



## MEMORANDUM

**Date:** July 15, 2022

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**To:** Shayne Picard

**From:** Joseph B. Evans  
Daley Epstein  
Jennifer Levengood

**Re:** \$XDC

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### *Preliminary Statement*

The following memorandum analyzes regulatory risk associated with the XinFin XDC blockchain (the “Protocol” or the “XDC Network”) token (\$XDC) (hereinafter “\$XDC”). The analysis herein is based solely upon the information provided by XDC Foundation (the “Foundation”), the publicly available information about \$XDC that we have reviewed, and regulatory guidance and court decisions that are public as of the date of this memorandum. This memorandum analyzes regulatory risk related to U.S. federal securities laws and regulations (the “Securities Laws”) only and does not analyze any other U.S. regulatory regimes or foreign laws. The views of the Securities and Exchange Commission (“SEC”) as to the applicability of the Securities Laws to cryptocurrency have evolved over time, and it is possible that a particular SEC enforcement attorney, or the SEC itself, could disagree with this analysis. The applicability of the Securities Laws to cryptocurrency has been changing rapidly, and the SEC has become increasingly aggressive in pursuing enforcement actions. This analysis has been prepared for the Foundation only. No third party is permitted to rely on this analysis. If the Foundation shares this memorandum with any third party, the Foundation runs the risk of waiving the attorney-client privilege and the attorney work product doctrine.

As set forth below, there are several arguments supporting the notion that \$XDC is not a “security” under the Securities Laws. These arguments considerably reduce regulatory risk under the Securities Laws.

\$XDC is used on dozens of third-party applications primarily as a settlement mechanism and a means of payment for various fees. These are “consumptive” uses of \$XDC that significantly reduce the risk that the SEC would consider \$XDC to be a security.

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A review of marketing materials for \$XDC reveals that the Foundation has generally promoted \$XDC’s “consumptive uses.” Unlike the marketing materials for many other competing cryptocurrencies which focus on price speculation, the marketing materials for \$XDC is focused on its “consumptive” uses. The \$XDC marketing material is a factor that reduces regulatory risk under the Securities Laws.

\$XDC and the Protocol also appear to be governed by a series of community run “master nodes.” The fact that master nodes contribute to the governance of the Protocol is a factor weighing strongly in favor of the notion that the Protocol is “decentralized.” If the Protocol is “decentralized,” \$XDC would not be a security. However, cutting against the “decentralized” argument is the fact that \$XDC was initially launched by XinFin FinTech Pte. Ltd. In 2021, XinFin provided a grant for the establishment of the independent XDC Foundation which continues to disseminate marketing materials.

We understand that neither the SEC nor any other regulator has ever accused XinFin FinTech or the Foundation of violating the Securities Laws. While it is difficult to anticipate how any particular SEC enforcement attorney may react to \$XDC, there are generally strong arguments in favor of the determination that \$XDC is not a security.

### ***Background***

\$XDC was launched in April 2017.<sup>1</sup> \$XDC and the Protocol were created for the stated purpose of “leverage[ing] the power of cryptographic tokens . . . interconnect[ing] an ecosystem of applications via a unique blockchain infrastructure that allows fast, frictionless and secure payment, and ensur[ing] reliable storage of value.”<sup>2</sup> \$XDC is the native cryptocurrency on the Protocol which can be used for real-time payment and settlement. We also understand that \$XDC is made to act as a settlement mechanism for dApps, or third-party applications, built on the Protocol.<sup>3</sup>

\$XDC has primarily been marketed as a “utility token” that is used to pay for goods, services, and settlements on the Protocol.<sup>4</sup> \$XDC is currently being used to power networks and act as a settlement mechanism to pay transaction fees and purchase goods and services on various third-party applications. The various uses and applications are described herein.

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<sup>1</sup> COINBASE, XINFIN, <https://www.coinbase.com/price/xinfin>.

<sup>2</sup> See XinFin Network Whitepaper.

<sup>3</sup> <https://xinfin.org/XDC>.

<sup>4</sup> <https://xinfin.org/XDC-utility>.

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Currently, \$XDC trades on a number of cryptocurrency exchanges that permit trading in the United States, including: BitMart, KuCoin, MercatoX, Stex, WBF, Bittrue, BitTrex, XT.com, Bequant, BKex and Coinex.<sup>5</sup> While \$XDC is traded on many cryptocurrency exchanges that offer \$XDC to U.S. customers, we understand neither XinFin FinTech nor the Foundation have ever received any formal or informal inquiry from the SEC.

### ***Regulatory Framework***

When determining whether digital assets are securities subject to the Securities Laws, the SEC and federal courts have applied the “investment contract” analysis first articulated by the U.S. Supreme Court in *SEC v. Howey*, 328 U.S. 293 (1946) (the “*Howey test*”). The *Howey test* is a four-part test for determining when a particular arrangement constitutes an “investment contract,” and, therefore, a security. Under the *Howey test*, four elements must be met for an asset to be considered a security:

1. An investment of money;
2. In a common enterprise;
3. With an expectation of profits; and
4. Derived solely from the efforts of others.

The SEC’s Strategic Hub for Innovation and Financial Technology (“*FinHub*”) also published the “[Framework for ‘Investment Contract’ Analysis of Digital Assets](#)” (the “*Framework*”). The Framework is not a rule, regulation, or formal statement of the SEC. Further, the SEC (at the Commission level) has neither approved nor disapproved of its content. The Framework provides a long list of non-determinative factors to consider when evaluating a cryptocurrency under *Howey*. The factors in the Framework are neither intended to be exhaustive nor is any single factor intended to be determinative. The SEC also acknowledges in the Framework that “a digital asset previously sold as a security” could be “reevaluated at the time of later offers or sales.”<sup>6</sup>

Since issuing the Framework, the SEC’s Division of Enforcement has brought enforcement actions against high-profile cryptocurrency companies in the United States. In these actions, the SEC argued that certain cryptocurrencies and associated fundraising efforts constituted the unregistered sale of securities. The SEC’s most high-profile cases have been against Telegram Group Inc., Kik Interactive Inc., Ripple Labs Inc., and BitConnect. *See SEC v. Telegram Group Inc.*, 448 F. Supp. 3d 352 (S.D.N.Y. 2019); *SEC v. Kik Interactive Inc.*, 492 F. Supp. 3d 169 (S.D.N.Y. 2019); *SEC v. Ripple Labs Inc. et al.*, No. 20-cv-10832,

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<sup>5</sup> A list of exchanges, including some which are not accessible from within the U.S., on which \$XDC is traded is available at <https://coinmarketcap.com/currencies/xinfin/markets/>. Note that exchanges are free to list and exchange \$XDC without consent from XinFin FinTech, XDC Foundation, or any other entity.

<sup>6</sup> U.S. Securities and Exchange Commission, Framework for “Investment Contract” Analysis of Digital Assets (Apr. 3, 2019), <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets>.

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ECF No. 4 (S.D.N.Y. Dec. 22, 2020); *SEC v. BitConnect et al.*, 21-cv-07349, ECF No. 1 (S.D.N.Y. Sept. 1, 2021).

Additionally, recent comments from SEC Chairman Gary Gensler suggest the SEC intends to pursue enforcement actions concerning cryptocurrency more aggressively.<sup>7</sup> Chairman Gensler has not specified which cryptocurrencies constitute a “security,” but has stated that some cryptocurrencies fit into the SEC’s jurisdiction.<sup>8</sup> It has also been recently reported that the SEC is hiring additional SEC enforcement attorneys and other staff to focus on the cryptocurrency industry.<sup>9</sup>

***Analysis***

While it is likely the SEC would argue the first element of the *Howey* test – an “investment of money” – has been satisfied, many arguments exist which support the notion that \$XDC does not satisfy the other three elements. Although there is some regulatory risk in offering \$XDC to U.S. customers, there are strong arguments in favor of \$XDC not being considered a security. This is primarily because \$XDC exhibits many “consumptive” uses and there is a cottage industry of service providers and other applications which require users to possess and spend \$XDC to participate. Another factor weighing in favor of the determination that \$XDC is not a security is the significant involvement of masternodes and standby nodes in governing the Protocol.

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<sup>7</sup> In February 2022, the SEC charged BlockFi Lending, LLC with, among other violations, failing to register its crypto lending product as a security. See Press Release, U.S. Securities and Exchange Commission, *BlockFi Agrees to Pay \$100 Million in Penalties and Pursue Registration of its Crypto Lending Product* (Feb. 14, 2022), <https://www.sec.gov/news/press-release/2022-26>. While the recent BlockFi charges pertained to a lending product, as opposed to a cryptocurrency such as \$XDC, it suggests the SEC may be becoming more aggressive.

<sup>8</sup> See, e.g., U.S. Securities and Exchange Commission, *Chair Gary Gensler’s Remarks before the Aspen Security Forum* (Aug. 3, 2021), <https://www.sec.gov/news/public-statement/gensler-aspen-security-forum-2021-08-03> (“I believe we have a crypto market now where many tokens may be unregistered securities, without required disclosures or market oversight.”); WALL ST. J., *SEC Chairman on New Regulations on Cryptocurrencies and Climate Risk* (Dec. 12, 2021), [https://www.wsj.com/articles/sec-chairman-on-regulations-on-cryptocurrency-and-climate-risk-11639165931?mod=itp\\_wsj&ypr=yahoo](https://www.wsj.com/articles/sec-chairman-on-regulations-on-cryptocurrency-and-climate-risk-11639165931?mod=itp_wsj&ypr=yahoo) (“With regard to these digital currencies, if you’re still raising money from the public, that still comes under the securities laws.”)

<sup>9</sup> U.S. Securities and Exchange Commission, *SEC Nearly Doubles Size of Enforcement’s Crypto Assets and Cyber Unit*, Press Release No. 2022-78 (May 3, 2022), <https://www.sec.gov/news/press-release/2022-78>.

## **1. Investment of Money**

This first factor is likely satisfied as \$XDC is purchased for fiat and cryptocurrency. The SEC has repeatedly taken the position that, when cryptocurrencies are purchased and sold for fiat and other cryptocurrencies, the “investment of money” prong is satisfied. There is a high likelihood that the “investment of money” prong is satisfied for \$XDC.

## **2. Common Enterprise**

Certain U.S. courts have determined that a “common enterprise” exists where there is both “horizontal” and “vertical” commonality. *See Revak v. SEC Realty Corp.*, 18 F.3d 81, 87 (2d Cir. 1994) (discussing horizontal commonality as “the tying of each individual investor’s fortunes to the fortunes of the other investors by the pooling of assets, usually combined with the pro-rata distribution of profits” and two variants of vertical commonality, which focus “on the relationship between the promoter and the body of investors”); *see e.g., Kik*, 492 F. Supp. 3d at 179 (citing *Balestra v. ATBCoin LLC*, 380 F. Supp. 3d 340, 354 (S.D.N.Y. 2019)); *Mautner v. Alvin H. Glick Irrevocable Grantor Tr.*, No. 19-cv-2742, 2019 WL 6311520, at \*7 (S.D.N.Y. Nov. 25, 2019) (finding that an offering was not a “security” where the agreement “afforded members significant control”). Though the SEC generally considers cryptocurrencies satisfy “commonality,”<sup>10</sup> this is not necessarily the case for every cryptocurrency. If a cryptocurrency is controlled by a “decentralized” community, “commonality” does not exist. As the Court held in *Telegram*, “[i]n the abstract, an investment of money in a cryptocurrency utilized by members of a decentralized community connected via blockchain technology, which itself is administered by this community of users *rather than by a common enterprise*, is not likely to be deemed a security under [Howey].” *Telegram*, 448 F. Supp. 3d at 358 (emphasis added). The SEC “does not contend that Bitcoins transferred on the Bitcoin blockchain are securities,” in part because there is no common enterprise. *Id.*

\$XDC, like most cryptocurrencies, is likely to satisfy horizontal commonality. This is because the value of \$XDC is tied together by price, *i.e.*, as the price of \$XDC rises and falls, it affects all holders of \$XDC equally.<sup>11</sup>

The best argument against commonality for \$XDC is that the Protocol is operated by independent third parties who operate “masternodes.”<sup>12</sup> As XinFin has described, the Protocol is decentralized because “node operators who choose to participate in the validation process of all transactions can do so by staking 10 million \$XDC that are locked in a smart contract.” \$XDC holders who deposit 10 million \$XDC can

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<sup>10</sup> Framework, *supra* n. 7, at Section II(B) (“Based on [the SEC’s] experiences to date, investments in digital assets have constituted investments in a common enterprise because the fortunes of digital asset purchasers have been linked to each other or to the success of the promoter’s efforts.”).

<sup>11</sup> Framework, *supra* n. 7.

<sup>12</sup> XinFin Network Whitepaper.

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register to run a “masternode” or a backup node.<sup>13</sup> There are currently 108 masternodes and 130 backup nodes. In exchange for operating a masternode or backup node, and staking the required 10 million \$XDC, operators become “trusted users,” *i.e.*, key participants who help maintain the Protocol and participate in governance.<sup>14</sup> Thus, \$XDC appears to be partially decentralized to mostly decentralized<sup>15</sup> due to the use of community-run masternodes and backup nodes. Therefore, there is a strong argument there is no vertical commonality, which suggests the “common enterprise” prong may not be satisfied.

However, the SEC may argue that \$XDC satisfies the “common enterprise” prong. Furthermore, the value of \$XDC may be tied to the ability of the Foundation to promote the token and establish third-party relationships. If a significant majority of masternodes and backup nodes were owned or controlled by founders or other insiders of XinFin FinTech or the Foundation, the SEC could take the position that the decision-making is not “decentralized” and “vertical commonality” is satisfied. The SEC could also argue XinFin FinTech or the Foundation to be the driving force behind adoption and promotion of the token based on social media posts.<sup>16</sup>

While there are arguments on both sides, the Protocol appears to have decentralized much of the on- and off-chain governance through masternodes and backup nodes. *See, e.g., Mautner v. Alvin H. Glick Irrevocable Grantor Tr.*, No. 19-cv-2742, 2019 WL 6311520, at \*7 (S.D.N.Y. Nov. 25, 2019) (finding that an offering was not a “security” where the agreement “afforded members significant control”). It also appears that the Protocol’s decentralized governance is more mature than other protocols that claim they are “decentralized.” There is a relatively low regulatory risk that the “common enterprise” prong will be met with respect to \$XDC.

### **3. Expectation of Profits**

The SEC has indicated that the “expectation of profits” prong is not met if purchasers buy a cryptocurrency for the purposes of “consumption.” The Framework provides a number of “characteristics of use or consumption” including: (1) whether “it is possible to pay for goods or services with the digital asset without first having to convert it to another digital asset or real currency;” (2) whether “potential purchasers have the ability to use the network and use (or have used) the digital asset for its intended functionality;” and (3) “if it is characterized as a virtual currency, the digital asset actually operates as a

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> XinFin FinTech Pte. Ltd. brought the first three masternodes online when it initiated the network and still maintains those three masternodes which, together, account for less than 3% of the current masternodes and less than 2% of the total nodes.

<sup>16</sup> *See* <https://www.xdc.org/> (“XDC Foundation supports the growth, development and adoption of the XDC Network. We collaborate with an informed and active community of developers, world trade experts, and content creators.”)

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store of value that can be saved, retrieved, and exchanged for something of value at a later time.” See Framework II(C)(3).

There is a strong argument that \$XDC is purchased for consumptive purposes because it is used for payment and settlement mechanisms on the various third-party applications described below. The use of \$XDC to pay for services on third party applications supports the argument that \$XDC is being purchased to “consume” and not for the “expectation of profits,” *i.e.*, speculating that the price of \$XDC will increase in value.<sup>17</sup> \$XDC operates as the reserve cryptocurrency for many third-party apps running on the XDC Network. Furthermore, \$XDC is required in order to use the XDC Network, because it is the “protocol token.”<sup>18</sup> These factors strongly suggest that \$XDC is not a security because it is immediately available for its intended non-speculative “consumptive” use.

\$XDC is consumed on many platforms, including Comtech Gold, XDCNFT, SuperBullsNFT, Impel, XDSea, Plugin, LedgerMail, XSwap, Metabloqs, EuroStasis, USNota, GlobianceDEX, GBEX, BlocksScan, StorX, XcelTrip, Traval, MyContract, TradeFinex, DCB Bank Ltd., Kramaa, Land Registry, inFactor, Blockdegree, Airnetz, and TurantPay.<sup>19</sup> \$XDC is primarily used as a form of payment or “settlement mechanism” on these platforms. For example, \$XDC is “consumed” or “spent” as follows: on Impel to participate in financial messaging services, in the XDCNFT application to purchase NFTs and pay related fees, in the XDSea application to purchase NFTs, to purchase travel on XcelTrip, to run the protocol on XSwap, to pay for the creation of tokens on MyContract, and for payment for life saving medical evacuation and air ambulance on Airnet.

To our knowledge, the Foundation does not have control over any Layer 2 projects’ operations or success. Because the viability of these projects, although operated on the XDC Network, appear to be driven by the efforts of third parties, this is a factor weighing in favor of the notion that there is no “common enterprise.”

\$XDC may also be utilized for staking to participate in the Protocol’s validator network. The Protocol uses a delegated proof of stake. To control a masternode, a participant must stake 10,000,000 \$XDC. \$XDC’s use as a governance token is a consumptive use because it promotes the purpose of the decentralized nature of the blockchain which reduces the likelihood of meeting the “expectation of profits” prong. However, those who control masternodes earn a yield, which suggests that an expectation of profit may exist with respect to running masternodes. The SEC and the courts have not yet indicated how “staking” governance offerings will be treated under the “expectation of profits” prong.

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<sup>17</sup> See Framework, *supra* n. 10, at Section II(C)(3) (listing “characteristics of use or consumption” including, for example, whether “it is possible to pay for goods or services with the digital asset without first having to convert it to another digital asset or real currency”).

<sup>18</sup> *Id.*

<sup>19</sup> <https://xinfin.org/XDC-utility>.



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The promotional materials from XDC Foundation—and specifically, the Twitter account (@XinFin\_Official)—appear to be promoting consumptive and functional uses of \$XDC and the Protocol. Unlike most cryptocurrency-related social media promotion, the @XinFin\_Official Twitter account rarely discusses profit potential and instead emphasizes \$XDC’s functionality. For example, a January 18, 2022 retweet from @Travalacom showcases the use of \$XDC to pay for booking “hotels, flights, & activities around the world.”<sup>20</sup> Similarly, a May 3, 2022 retweet from @flrfinance showcases \$XDC’s use in Panama and El Salvador as a form of official currency alongside of Bitcoin.<sup>21</sup> Notably, the whitepaper discusses the business application of the token and its use for various types of financial platforms.<sup>22</sup> The lack of promotion as an “investment” supports the argument that \$XDC is being purchased for a “consumptive” purpose and not for the “expectation of profit.” See No-Action Letter, Turnkey Jet, Inc. (Apr. 2, 2019) (finding that, among other factors, the Turnkey Tokens were not securities because they were “marketed in a manner that emphasizes the functionality of the Token, and not the potential for the increase in the market value of the Token.”). The social media and marketing of \$XDC weighs strongly in favor of \$XDC not meeting the “expectation of profits” prong.<sup>23</sup>

However, while \$XDC would have a “consumptive use” argument, the SEC would likely argue \$XDC is being purchased “with an expectation of profits.” The SEC could argue that \$XDC is not solely, or truly “consumable” because it is traded on several cryptocurrency exchanges. The SEC would likely compare the total volume of transactions of \$XDC on cryptocurrency exchanges with the volume of \$XDC transactions used to pay fees on the XDC Network and as a payment mechanism for the third-party platforms.

The SEC could point to some third-party promotional videos indicating that \$XDC as a “financial monster” that will “reach 3000+ USD per coin.”<sup>24</sup> This may indicate that the public sentiment towards \$XDC is profit-focused, rather than consumptive-focused. \$XDC’s statements that they intend to list \$XDC on more and larger marketplaces<sup>25</sup>—which would presumably generate greater returns for investors—also negates arguments that the coin is purely “consumptive”. See Framework Section II.C

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<sup>20</sup> <https://twitter.com/travalacom/status/1483468894987714561>.

<sup>21</sup> <https://twitter.com/flrfinance/status/1521587685294546947>.

<sup>22</sup> <https://xinfin.org/docs/whitepaper-business.pdf>.

<sup>23</sup> See *In the Matter of Carrier EQ, Inc. d.b.a. “Airfox,”* Securities Act Release No. 10575 (finding the whitepaper, blog posts, online videos and correspondence with virtual currency exchanges made by the company to be factors that weigh on the determination of whether the unregistered sale of securities has taken place); see also *In the Matter of Paragon Coin, Inc.,* Securities Act Release No. 10574 (finding social media posts and the whitepaper to be factors that weight on the determination of whether the unregistered sale of securities has taken place).

<sup>24</sup> <https://www.youtube.com/watch?v=xjGYBGYbxrs>.

<sup>25</sup> <https://xinfin.org/xdc>.



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(“A purchaser may expect to realize a return through participating in distributions or through other methods of realizing appreciation on the asset, such as selling at a gain in a secondary market.”).

The SEC would also likely argue that even though \$XDC can be used for consumptive purposes, it is unlike stablecoins or other tokens that do not fluctuate in price. *See Telegram*, 448 F. Supp. 3d at 371-75. As a result, the SEC may argue that purchasers of \$XDC are buying \$XDC with the hope that the price will increase and generate high resale value—*i.e.*, with an expectation of profit. *See id.*

To determine whether there is an “expectation of profits,” the SEC applies an “economic reality” test. *See Telegram*, 448 F. Supp. 3d at 365 (“In the analysis of purported investment contracts, form should be disregarded for substance and the emphasis should be on economic reality.”) (internal quotation omitted); *Kik*, 492 F. Supp. 3d at 179-180. The economic reality test reviews how a cryptocurrency is actually used in commerce, notwithstanding any proposed or advertised uses. For example, if most \$XDC purchases are made for payment on third-party applications, this would support the view that \$XDC has a “consumable” use and is not a security. On the other hand, if most \$XDC purchases are made by investors for speculation in the hope that they would profit from a sale of \$XDC, the “expectation of profits” prong would likely be met.

While there are some facts and arguments in favor of the “expectation of profit” prong being satisfied, this factor is likely not met for \$XDC due to the significant “consumptive” uses of \$XDC and the well-developed Protocol. There are more well developed “consumptive” uses of \$XDC than many other competing cryptocurrencies. Given the maturity of the Protocol and the active and varied “consumptive” uses for \$XDC, there is a relatively low regulatory risk that the “expectation of profits” prong is satisfied.

#### **4. Derived Solely from Efforts of Others**

The “derived solely from the efforts of others” prong is closely related to the “common enterprise” prong. *Telegram*, 448 F. Supp. 3d at 375 (noting that the relevant inquiry asks “whether the reasonable expectation of profits [were] derived from the entrepreneurial or managerial efforts of others”) (internal quotation omitted).<sup>26</sup> Whether this prong will be met depends, in large part, on the involvement of third parties in off- and on-chain governance. Without a strong showing of decentralization, the SEC may argue that the success of \$XDC is tied to the managerial efforts of XinFin FinTech or XDC Foundation, given that it has been created, managed, and promoted by those entities.<sup>27</sup>

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<sup>26</sup> *See also* Framework, *supra* n. 10, at Section II(C) (“A purchaser may expect to realize a return through participating in distributions or through other methods of realizing appreciation on the asset, such as selling at a gain in a secondary market. When a promoter, sponsor, or other third party . . . provides essential managerial efforts that affect the success of the enterprise, and investors reasonably expect to derive profit from those efforts, then this prong of the test is met.”).

<sup>27</sup> Framework, *supra* n. 10, at Section II(C) (noting that a digital asset is likely to rely on the “efforts of others” is if “[t]here are essential tasks or responsibilities performed and expected to be performed by [a

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XinFin claims the Protocol is decentralized because it is designed to “operate[] with randomized consensus between . . . approx. 500+ masternodes.”<sup>28</sup> Those who control backup nodes also participate in off- and on-chain governance and make critical decisions for the Protocol. These factors weigh in favor of the argument that the Protocol is decentralized.

The SEC has noted that a cryptocurrency may decentralize over time, stating that “a digital asset transaction may no longer represent a security offering [i]f the network on which the token or coin is to function is sufficiently decentralized – where purchasers would no longer reasonably expect a person or group to carry out essential managerial or entrepreneurial efforts ... As a network becomes truly decentralized, the ability to identify an issuer or promoter to make the requisite disclosures becomes difficult, and less meaningful.”<sup>29</sup> As more \$XDC holders participate in operating masternodes and backup nodes, the Protocol will continue to decentralize. For this reason, it is likely that the regulatory risk under the Securities Laws will continue to decrease over time.

As described above, independent third parties manage masternodes and make decisions separate and apart from the decisions of the Foundation or XinFin FinTech. Masternode operators control each node and have independent voting rights. Though many masternode operators opt to not vote on certain technical updates, the voting process works to decentralize any decisions made on and about the Protocol and makes it less likely that profits from \$XDC are derived from the efforts of “others”; rather, it is the community itself making decisions for the Protocol.

However, though XinFin FinTech’s Twitter account (@XinFin\_Official) is helpful to the argument that the token is for a consumptive purpose, the Twitter account constantly markets the token and its success in being utilized on various third-party platforms. The SEC could argue that the Foundation’s involvement in marketing and promoting \$XDC and the Protocol weighs in favor of the “derived solely from the efforts of others” prong.

Thus, there are strong arguments for and against the “efforts of others” prongs. While the Foundation is still involved in marketing, the Protocol is significantly more decentralized than many of its competing protocols. There is a relatively low regulatory risk that the “efforts of others” prong is satisfied for \$XDC.

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promoter, sponsor, or other third party], rather than an unaffiliated, dispersed community of network users (commonly known as a ‘decentralized’ network).”).

<sup>28</sup> <https://www.xinfin.org/governance-member>.

<sup>29</sup> See SEC, Digital Asset Transactions: When Howey Met Gary (Plastic) June 14, 2018.

***Conclusion***

There are several factors supporting the conclusion that \$XDC is not a security. There are significant “consumptive” uses for \$XDC and most decision-making on the Protocol is governed by community-run masternodes and backup nodes. The SEC could argue that certain of the *Howey* prongs are met due to the continued promotion and involvement of the Foundation. However, the regulatory risk of \$XDC under the Securities Laws is relatively low as compared to other competing cryptocurrencies and protocols.

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