



meantime, on January 20, 2022, and again on March 8, 2022, the Office of Enforcement extended the date of the investigational hearing. As of March 8, 2022, the hearing was scheduled to be conducted on April 5, 2022.

On March 14, 2022, Nexo Financial filed a petition to modify the Bureau’s CID.

## II. LEGAL DETERMINATION

Nexo Financial argues that the CID should be modified to exclude Nexo’s “Earn Interest Product” because (according to Nexo Financial) the Bureau lacks authority over that product. In addition, as a procedural matter, Nexo Financial argues that its petition is timely even though the petition was filed more than 20 days after service of the CID and Nexo Financial did not seek or obtain an extension to file the petition.

For each of the two independent reasons set forth below, the petition is denied.

### **1. The Bureau has the authority to investigate whether Nexo Financial or others associated with it may have violated federal consumer financial law.**

As the CID itself indicates, the Bureau issued it as part of an investigation that, as of December 1, 2021, sought to determine three related questions: (1) whether subject entities were engaged in conduct that is subject to federal consumer financial law (specifically, the Consumer Financial Protection Act and Regulation E, which implements the Electronic Fund Transfer Act); (2) whether those entities had violated the CFPB and Regulation E; and (3) whether a Bureau enforcement action would be in the public interest.

In its petition, Nexo Financial claims that the Bureau lacks the authority to investigate Nexo’s Earn Interest Product. To support that contention, Nexo Financial asserts that the Securities and Exchange Commission “made patently clear in the BlockFi Order<sup>2</sup> that it believes

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<sup>2</sup> See *In the Matter of BlockFi Lending LLC*, No. 3-20758 (SEC Feb. 14, 2022),

interest-bearing crypto lending products [like Nexo’s Earn Interest Product] are securities.” Pet. at 6. However, Nexo Financial does not contend that the SEC has determined that the Earn Interest Product is a security. Nor, for that matter, does Nexo Financial concede that the Earn Interest Product is, in fact, a security, or that Nexo’s offering of the Earn Interest Product required Nexo Financial or any other Nexo entity to register with the SEC (whether as a broker, dealer, investment company, or for any other reason). Indeed, Exhibit C to Nexo Financial’s petition reproduces an email that Nexo apparently sent its customers on February 8, 2022, which states, “[w]e have not filed or confidentially submitted a registration statement with the SEC for any interest-bearing products and there is no guarantee it would be declared effective.” In other words, Nexo Financial is trying to avoid answering any of the Bureau’s questions about the Earn Interest Product (on the theory that the product is a security subject to SEC oversight) while at the same time preserving the argument that the product is not a security subject to SEC oversight. This attempt to have it both ways dooms Nexo Financial’s petition from the start.<sup>3</sup>

To see why, it is important to recall that the recipient of a CID<sup>4</sup> cannot challenge an agency investigation by preemptively contesting the facts that the agency might find, at least where the investigation is not patently outside the agency’s authority. *FTC v. Ken Roberts Co.*, 276 F.3d 583, 584 (D.C. Cir. 2001) (“Unless it is patently clear that an agency lacks the

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<https://www.sec.gov/litigation/admin/2022/33-11029.pdf>.

<sup>3</sup> The Office of Enforcement engages in discussions with entities who receive CIDs, and those discussions assist the CFPB in further understanding entities’ business practices. As a practical matter, the Office of Enforcement may withdraw a CID if it learns that a relevant activity is outside the Bureau’s authority or if it uncovers some other reason that counsels against pursuing the investigation. Here, however, Nexo Financial has not demonstrated any basis to withdraw the CID issued to it.

<sup>4</sup> The courts “have treated CIDs as a form of administrative subpoena.” *See CFPB v. Accrediting Council for Indep. Colleges & Sch.*, 854 F.3d 683, 688 (D.C. Cir. 2017).

jurisdiction that it seeks to assert, an investigative subpoena will be enforced.”). The Supreme Court has “consistently reaffirmed” the principle that “courts should not refuse to enforce an administrative subpoena when confronted by a fact-based claim regarding coverage or compliance with the law.” *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1076 (9th Cir. 2001) (citing *United States v. Powell*, 379 U.S. 48, 57-58 (1964)); *CFPB v. Harbor Portfolio Advisors, LLC*, 2017 WL 631914, at \*3 (E.D. Mich. Feb. 16, 2017) (“Whether Respondents’ transactions *actually* involve ‘credit’ is not at issue, and it would be premature for the Court to decide that question at this stage.”).

Here, the unsettled facts related to the Earn Interest Product make it impossible to tell whether any of Nexo Financial’s conduct in connection with the Earn Interest Product might be subject to an exclusion from the Bureau’s authority under the CFPA or to an exemption to Regulation E.

First, take the CFPA. Under 12 U.S.C. § 5517(i)(1), “the Bureau shall have no authority to exercise any power to enforce [the CFPA] with respect to a person regulated by the Commission.” The phrase “person regulated by the Commission” is a defined term. *Id.* § 5481(21). It means, among other things, a person who is “a broker or dealer that is required to be registered under the Securities Exchange Act of 1934,” an investment company that is required to be registered under the Investment Company Act of 1940, and “any employee, agent, or contractor acting on behalf of, registered with, or providing services to” such a regulated person, “but only to the extent that [the regulated person], or the employee, agent, or contractor of such person, acts in a regulated capacity.” *Id.* § 5481(21)(A), (C), (L).

As noted above, Nexo Financial does not claim that it (or any other Nexo entity) was required to be registered under the Exchange Act, the Investment Company Act, or any of the

other enumerated securities law in § 5481(21)(A)-(K). Instead, it posits that the SEC likely believes that Nexo’s Earn Interest product is a security while studiously avoiding stating that Nexo Financial agrees with that assumed assessment or that Nexo Financial (or any other Nexo entity) was required to register with the SEC. At this point in the Bureau’s investigation, it is too early to tell whether Nexo Financial (or any other Nexo entity) was required to be registered with the SEC under any of the enumerated securities laws in § 5481(21)(A)-(K) and, if so, whether and to what extent Nexo Financial was acting in a regulated capacity with respect to the Earn Interest product.

Next, consider Regulation E, which generally applies to “electronic fund transfers.” Under 12 C.F.R. § 1005.3(c)(4), the term “electronic fund transfer” does not include “[a]ny transfer of funds the primary purpose of which is the purchase or sale of a security . . . , if the security . . . is . . . [r]egulated by the [SEC]” or “[p]urchased or sold through a broker-dealer regulated by the [SEC].” The Official Interpretations of Regulation E provide two examples of transfers to which this exemption does not apply: (1) transfers involving “[a] debit card or other access device that accesses a securities . . . account such as a money market mutual fund and that the consumer uses for purchasing goods or services or for obtaining cash” and (2) transfers involving “[p]ayment of interest or dividends into the consumer’s account (for example, from a brokerage firm or from a Federal Reserve Bank for government securities).” 12 C.F.R. pt. 1005, Supp. I, cmt. 3(c)(4)-3.

Here, of course, Nexo Financial is unwilling to concede that the Earn Interest Product is a security and does not assert that it (or any other Nexo entity) was a broker-dealer regulated by the SEC. As a result, it is too early to determine whether any of the fund transfers offered or provided by Nexo Financial in connection with the Earn Interest Product were subject to

Regulation E's exemption for securities transfers, let alone to conclude that every such transfer is exempt (as would be necessary to demonstrate that investigation of the Earn Interest Product is patently outside the Bureau's authority).

Accordingly, Nexo Financial's petition fails to demonstrate that the Bureau lacks authority to investigate its Earn Interest product or any other product. The petition is therefore denied.

**2. The petition is untimely because Nexo Financial filed it more than 20 days after service of the CID and without obtaining an extension.**

The CFPA and the Bureau's implementing regulations set forth a clear deadline for petitioning to modify or set aside a CID and a clear process for obtaining extensions of time. Nexo Financial ignored both. Its petition is therefore denied for the independent reason that it is untimely.

Under 12 U.S.C. § 5562(f) and 12 C.F.R. 1080.6, the deadline for responding to a CID is 20 calendar days from service of the CID or any time before the return date on the CID, whichever is earlier. Here, because the CID was served on December 1, 2021, and the return date was extended until April 5, 2022, the petition was due on December 21, 2021. By statute, this deadline can be extended "as may be prescribed in writing, subsequent to service, by any Bureau investigator named in the demand." 12 U.S.C. § 5562(f). The Bureau's rules further specify that "[t]he Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement are authorized to rule upon requests for extensions of time within which to file such petitions" and that "[r]equests for extensions of time are disfavored." 12 C.F.R. § 1080.6(e)(2). Nexo Financial did not seek an extension pursuant to these rules, yet did not file its petition until March 14, 2021, nearly three months after the deadline.

Nevertheless, Nexo Financial contends, at 5, that its petition was timely because the deadline was “effectively tolled” by its ongoing efforts to meet and confer with the Office of Enforcement. Accordingly, Nexo Financial contends that it had ten days from its last meet and confer to file the petition.<sup>5</sup> This theory is inconsistent with the statutory and regulatory provisions governing extensions, which specify that extensions are to be granted “in writing,” by an Assistant Enforcement Director or Deputy Assistant Enforcement Director, and that requests for extensions are “disfavored.” On Nexo Financial’s theory, extensions are implicitly provided by Enforcement staff any (and every) time the parties continue to meet and confer about a CID more than 10 days after the CID is received. This is not what the statute or the rules say. Nexo Financial’s petition is untimely and is denied on that independent ground.

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<sup>5</sup> Nexo Financial is wrong to suggest, at 5, that the “rules implicitly provide for 10 calendar days between the meet and confer process and the time to file a petition.” Indeed, the rules contemplate that in some cases (i.e., where the CID’s return date is less than 20 days from the service of the CID) there will be fewer than 10 days between the meet-and-confer deadline and the petition deadline.

### **III. CONCLUSION**

For the foregoing reasons, the petition to modify the CID is **DENIED**. Nexo Financial is directed to appear for oral testimony on December 19, 2022. Nexo Financial is welcome to engage in discussions with Bureau staff about another date for its appearance that may be acceptable to the Assistant Director or Deputy Assistant Director of the Office of Enforcement.

**IT IS SO ORDERED.**

Dated: November 22, 2022

*Rohit Chopra*

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Rohit Chopra  
Director