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# CFPB Issues Proposal to Eliminate Fees on Instantaneously Declined Transactions

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On January 24, 2024, the Consumer Financial Protection Bureau (CFPB) **issued a notice of proposed rulemaking** that would prohibit financial institutions from charging fees on transactions that are declined instantaneously or near-instantaneously. The rule states that assessing a nonsufficient funds (NSF) fee in connection with such covered transactions would be considered an "abusive" practice under the Consumer Financial Protection Act's prohibition on unfair, deceptive, or abusive acts or practices, meaning that it takes advantage of consumers' lack of understanding of the material risks, costs, or conditions of a consumer financial product or service.

The proposal would apply to all instantaneously declined transactions, regardless of the transaction method. While many institutions have eliminated or reduced NSF fees for all transactions, the proposed rule would not apply to NSF fees charged on paper check or automated clearinghouse (ACH) transactions, as those denials are not instantaneous.

## CFPB's impetus for the rule

The CFPB suggests that declined transaction fees tend to disproportionately impact consumers with lower incomes and lower credit scores. Specifically, the CFPB explains in the supplemental information accompanying the proposed rule that "financially vulnerable" populations often lack the financial resources to build an adequate cushion in their accounts to avoid NSF fees. The CFPB believes that the rule would proactively combat abusive tactics by financial institutions that may try to take advantage of customers who do not understand the material risks, costs or conditions associated with their deposit accounts.

Furthermore, the CFPB states that declined transaction fees are not fees for a service provided to consumers, and profiting from transactions where the consumer receives no service in return raises concerns that a covered financial institution may be engaging in unreasonable advantage-taking by financial institutions. The CFPB referenced its market monitoring that found the median NSF fee charged by the largest financial institutions was approximately $32. However, the CFPB found that the service provided by the bank – the handling of an NSF account that does not have enough funds to settle an authorized debit card transaction between the time of authorization of that transaction and the settlement of that transaction – resulted in an $0.005 de minimis transaction cost for most financial institutions.

## Definitions and interplay with Regulation E

The CFPB suggests that to foster consistency with the existing regulatory framework, the proposed rule would incorporate several definitions from Regulation E, which implements the Electronic Fund Transfer Act.

### 'Account'

Under the proposed rule, an "account" has the same definition as in Regulation E. Pursuant to that definition, an account **would** include the following:

- A checking, savings, or other consumer asset account held by a financial institution (directly or indirectly), including certain club accounts, established primarily for personal, family or household purposes.
- A prepaid account, as defined in 12 CFR 1005.2(b)(3).

An account **would not** include, for example:

- An account held by a financial institution under a bona fide trust agreement.
- An occasional or incidental credit balance in a credit plan.
- Profit-sharing and pension accounts established under a bona fide trust agreement.
- Escrow accounts, such as those for payments of real estate taxes, insurance premiums, or completion of repairs or improvements.
- Accounts for purchasing US savings bonds.

The proposed definition covers a broad range of consumer account types to maximize the number of consumers protected from potentially abusive practices.

#### ‘Covered financial institution’

The proposed rule would provide that “covered financial institution” means a “financial institution” as defined in Regulation E, 12 CFR 1005.2(i). Applying that definition, a “covered financial institution” would mean a bank, savings association, credit union, or any other person that directly or indirectly holds an account belonging to a consumer, or that issues an access device and agrees with a consumer to provide electronic fund transfer services, including certain peer-to-peer payment companies. Adopting this definition also would incorporate related definitions and commentary, such as those for “access device” and “electronic funds transfer.”

#### ‘Covered transaction’

Under the proposal, a “covered transaction” is defined as an attempt by a consumer to withdraw, debit, pay or transfer funds from their account that is declined instantaneously or near-instantaneously by a covered financial institution due to insufficient funds. A declined transaction occurs instantaneously or near-instantaneously when the transaction is processed in real time with no significant perceptible delay to the consumer when attempting the transaction.

Under existing law, NSF fees currently may be charged on transactions that the financial institution declines within seconds after the payment request is initiated (e.g., debit card transactions), as well as on transactions that are rejected hours or days after the initial request to pay is made. The proposed rule would only apply to the former category of transactions, not to NSF fees on transactions that do not occur instantaneously – for example, the proposed rule would not impact NSF fees charged on ACH and check transactions, which may take several hours or a couple of days to settle. Transactions authorized in the first instance, even if they are later rejected or fail to settle due to insufficient funds, also would not be covered by the proposal.

## What’s next?

The proposal is part of the Biden administration’s broader efforts to combat so-called junk fees charged by financial institutions. The proposed rule comes only a week after the CFPB **issued a proposal to address discretionary overdraft services offered by large financial institutions**. Although the CFPB noted that in recent years most financial institutions have stopped charging NSF fees for instantaneously declined transactions, the CFPB’s proposal suggests an intent to proactively prevent NSF fees and abusive practices as new forms of technology and instant payments through digital applications become more widespread. Financial institutions that charge fees for instant payments should be mindful that the CFPB is focused on the charging of NSF fees and other fees as a potentially abusive practice.



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