



## Financial Services Management

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### “Surprise” Fee Restrictions

#### Cite

CFPB; Consumer Financial Protection Circular 2022-06, Unanticipated overdraft fee assessment practices; Bulletin 2022-06 – Unfair Returned Deposited Item Fee Assessment Practices

#### Recommended Distribution:

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#### Website:

[https://files.consumerfinance.gov/f/documents/cfpb\\_unanticipated-overdraft-fee-assessment-practices\\_circular\\_2022-10.pdf](https://files.consumerfinance.gov/f/documents/cfpb_unanticipated-overdraft-fee-assessment-practices_circular_2022-10.pdf)

### Impact Assessment

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- Banks will need immediately to terminate blanket fees for rejected deposits to avoid possible CFPB enforcement.
- Rejected-check fees remain acceptable if fees are charged for reasons over which the deposit account holder has knowledge or control.
- Many overdraft fees are not only subject to CFPB criticism, but now to express enforcement under sweeping agency UDAAP power.
- Banks still charging even some overdraft fees may need to review policy and accept reduced fee revenue.
- If the Bureau extends the reasoning in these orders, many deposit, payment, and lending fees could be sanctioned.

### Overview

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In conjunction with a Presidential speech and new White House initiative against “junk fees,” the CFPB has accelerated its own efforts in this arena with two new policy directives.<sup>1</sup> As with many other recent Bureau actions, the new circular and bulletin do not take the form of notice-and-comment rulemakings, but rather are directives with express enforcement implications unless or until the courts overturn them, the General Accounting Office intervenes to bar guidance outside the rulemaking process as it did years ago related to inter-agency leveraged-loan standards, or new law reconfigures the agency.<sup>2</sup> The most immediate implication of these edicts is a ban on blanket rejected deposit fees and further constraints on overdraft fees. However, the reasoning and rationale in these orders is likely to carry over to a pending agency rulemaking on

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<sup>1</sup> See **CONSUMER38**, *Financial Services Management*, February 1, 2022.

<sup>2</sup> See **LENDING5**, *Financial Services Management*, March 28, 2013.

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credit-card fees<sup>3</sup> and possible initiatives related to remittances and even debit- or credit-card interchange fees.<sup>4</sup>

## Impact

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These directives continue the CFPB’s practice of using its new examination standards related to unfair, deceptive, and abusive acts or practices (UDAAP) to subject activities or practices to severe sanctions even if the sanctioned fee or practice is found even by the Bureau to comply with applicable law or rule prior to these orders.<sup>5</sup> Although the practices sanctioned in these orders are found to be unfair, deceptive, and/or abusive, the agency’s rationale for constraining them depends at least as much on its finding that these fees undermine effective market competition. As a result, it is possible that the agency will extend its “junk-fee” campaign not only to the back-end fees captured here, but also to front-end or third-party fees that the agency may find adversely affect either consumers or the marketplace.

In these UDAAP determinations, the Bureau also finds that these fees are exorbitant in relation to bank risk. This standard could have sweeping implications across a wide array of loan products if the agency extends its sanctions to other loan products based on the relationship of fees or even interest rates to what it understands to be a lender’s actual risk.

Another key feature of the overdraft circular is the conclusion that, regardless of the extent to which they comply with rules, current disclosures are so opaque that consumers cannot be expected to understand when a charge is likely to be imposed. To the extent that the Bureau continues to rule that legally compliant disclosures are UDAAP, it will extend a policy on information asymmetry in a novel way that may well insulate consumers from fees regardless of the extent to which consumers could avoid fees by what some might consider a reasonable understanding of the products or providers they select.

The CFPB’s view of rejected-deposit fees is similarly expansive – even to the extent these are disclosed as required by law, the agency has deemed them unfair except in identified circumstances when consumer action (e.g., depositing unsigned checks) occur. The Bureau’s know-it-when-it-sees it approach to otherwise-legal fees significantly complicates the challenges of setting financial-institution policy and designing products that are otherwise compliant with all pertinent rules at the time a practice is set or fee charged.

## What’s Next

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The Bureau issued these standards on October 26. Neither has the force of rule, but the circular is designed to set enforcement policy not only for the agency, but also for other regulators with power over overdraft fees (e.g., the FRB). It is unlikely that

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<sup>3</sup> See **CREDITCARD35**, *Financial Services Management*, July 5, 2022.

<sup>4</sup> See **INTERCHANGE11**, *Financial Services Management*, October 11, 2022.

<sup>5</sup> See **CONSUMER39**, *Financial Services Management*, March 22, 2022.

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the banking agencies will follow the Bureau’s lead on this, preferring instead to judge compliance with current rules unless or until these are expressly revised. The bulletin has an express statement that, while it is not an administrative action, it sets policy that will govern CFPB enforcement. Although the CFPB orders banks to comply almost immediately (see below), the bulletin is effective when published in the *Federal Register*; the circular appears to be effective upon release.

## **Analysis**

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### **A. Overdrafts**

The Bureau here reasons that overdraft fees a consumer could not “reasonably anticipate” are likely to be UDAAP. These unanticipated fees – elsewhere called “surprise” fees – are found to occur in circumstances such as authorize-positive/settle-negative transactions and other instances in which bank policies are opaque to customers and they thus cannot avoid fees that are disproportionate to any actual credit risk, cause substantial harm, and otherwise meet UDAAP criteria. The public-benefit test notes that research suggests that changes to back-end fees such as overdrafts do not adversely affect front-end fees and, even if they were to do so, the pain of surprise back-end fees and competition benefits related to ending them outweigh any adverse result of higher front-end fees.

### **B. Deposit Fees**

This compliance bulletin addresses situations in which a check deposited into a consumer’s account may be rejected due to insufficient funds or other actions on the part of the payor. Since fees in these instances often have nothing to do with the accountholder’s behavior, the CFPB believes blanket policies imposing such fees are likely unfair because they are unavoidable and costly. As with the overdraft-fee rationale above, the analysis also concludes that ending these blanket back-end fees would not result in unduly harmful front-end costs.

Still, the bulletin makes it clear that banks may charge deposit-returned fees if the consumer could have noted a problem and thus not attempted the deposit (i.e., by noticing that a check is unsigned). In these cases, the depositor could have reasonably taken action to avoid the fee.