



## NSF Fees

### Cite

CFPB, Notice of Proposed Rulemaking, Fees for Instantaneously Declined Transactions

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Retail Banking, Marketing, Policy, Legal, Government Relations

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[https://files.consumerfinance.gov/f/documents/cfpb\\_fees-for-instantaneously-declined-transactions-nprm\\_2024-01.pdf](https://files.consumerfinance.gov/f/documents/cfpb_fees-for-instantaneously-declined-transactions-nprm_2024-01.pdf)

## Impact Assessment

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- The Bureau states that the proposal's impact is largely prospective, but it would in fact apply to NSF determinations that could result in fees related to FedNow and RTP transactions, a fact also expressly acknowledged in the NPR.
- As a result, Bureau cost and impact assessments could be quickly outdated.
- Prohibited NSF fees on check/ACH declinations would increase instant-payment risks.
- Rising transaction-account costs due to declinations could combine with those related to the agency's companion proposal to limit overdraft fees or impose costly compliance burdens that could accelerate the challenges facing lower-income households seeking free transaction accounts.

## Overview

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The CFPB has followed up a controversial proposal to set prices for larger-bank overdrafts exempt from certain consumer standards with a proposal to simply ban certain non-sufficient fund (NSF) fees when banks decide in real time to decline a consumer-payment request.<sup>1</sup> The Bureau readily acknowledges that banks in fact generally do not now charge NSF fees in these cases, but it fears they might and wishes to preemptively prohibit this as part of the Administration's campaign against "junk fees." Although the rule is aimed principally at electronic declinations, it would apply to check and ACH transactions as declination capability grows via instant-payment system adoption.

## Impact

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The proposal would ban NSF fees for covered transactions by considering them unfair, deceptive, and abusive acts or practices (UDAAP), a finding that

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<sup>1</sup> See **OVERDRAFT12**, *Financial Services Management*, January 23, 2024.

opens the bank or any of its third-party vendors or even advisers to significant legal and reputational risk.<sup>2</sup> This is a powerful threat even though the Bureau readily acknowledges that many banks have stopped charging NSF fees on electronic declinations and, even when they do, these are not for instantaneous ATM or point-of-sale transactions. However, the Bureau at the same time asserts that NSF fees for real-time requests are sometimes charged for ATM transactions outside a bank's network, for online transactions, or on prepaid accounts, but the scope of any such fees now and whether these are usually imposed by the larger banks covered by this proposal is not made clear. The proposal's overall presentation of NSF fee practices often relies on data dating back to 2014 or is based on NSF fees as a whole, not those that would be immediately covered. Based on its analysis, the NPR says that NSF fees charged by larger banks average \$32, but the proposal's impact assessment assumes only minimal, if any, NSF fees would be affected.

Further, the proposal's definitions (see below) cover checks and ACH transactions. The agency's conclusion that the rule would have principally prospective impact is premised on the assumption that check/ACH denials take "hours or days." This is increasingly untrue under current, private real-time payment systems and would be still less applicable once the FedNow system is fully operational. The proposal in fact says it is drafted to apply to checks if instantaneous denial is feasible, thus giving it more immediate impact than the agency seems to expect.

The agency also premises its proposal not only on the potential for abuse it perceives as technology advances, but also because it expects banks to review NSF practices if its overdraft proposal is adopted and fee revenue at larger banks comes under heightened pressure. It does not address the fact that most banks relying on overdraft-fee revenue are exempt from the overdraft proposal, making it unclear if the Bureau expects smaller banks not to expand declination fees because of continuing overdraft-fee revenue, but this seems unlikely.

Finally, the preamble to the rule discusses the agency's current UDAAP standard in considerable depth. It would appear to clarify how the agency determines abusive practice not only in this NSF context, but also more generally in areas such as the differences between a consumer's failure to understand product terms and conditions and "reasonable avoidability." It is unclear if these new statements in the final rule will be used more broadly by the agency and, if so, if they have legal effect. In the case of these NSF fees, the Bureau has preliminarily concluded that consumers would lack understanding of at least one aspect of their material risks at the point of attempting a transaction that is then declined, making this UDAAP. It rejects disclosures as a solution to this problem on grounds that ensuring effective announcements across many channels would be very difficult and consumers might not understand disclosures even if provided.

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## What's Next

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This NPR was released on January 24; comments are due by March 25. It is likely to face GOP opposition upon finalization prompting a Congressional Review Act proceeding to repeal it. Should this pass both the House and Senate,

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<sup>2</sup> See UDAP8, *Financial Services Management*, April 6, 2023.

it will be vetoed by the President. The outcome of the election will determine the fate of this rule – and that of most other recent CFPB actions – in 2025.

## Analysis

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The Bureau states that this proposal followed requisite consultation with other federal agencies as well as with State attorneys general, other officials, and relevant official trade associations.

### A. Scope

#### 1. Covered Transactions

Covered accounts would be checking, savings, or other asset accounts held by the financial institution that are not a wholesale accounts or otherwise exempted. Covered transactions from these accounts are those that permit instantaneous or near-instantaneous payments, withdrawals, or similar transactions that are immediately declined for insufficient funds. As a result and as acknowledged in the preamble, checks and ACH transactions would be covered by the rule if technology comes to permit rapid denial and NSF fees are charged.

#### 2. Covered Institutions

These would be all IDIs or credit unions.

### B. Request For Comment

Views are sought on:

- the extent of covered transactions, the extent to which it anticipates emerging technology and payment systems, and how likely these transactions are to be abusive; and
- additional data on NSF practices and the impact of this proposal.