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CFPB Again Seeks Demise of Overdraft or NSF Fees, Part 1



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In January 2024, the Consumer Financial Protection Bureau ("CFPB") issued two proposed rules that, if implemented as written, would result in further whittling down overdraft or non-sufficient funds ("NSF") fees charged by financial institutions.

The first proposed rule, [announced by the CFPB on January 17, 2024](#), but not yet published in the Federal Register, would apply only to "very large financial institutions" (i.e., those institutions that have more than \$10B in assets) and is called "[Overdraft Lending: Very Large Financial Institutions](#)." The proposed rule would "update" what the CFPB characterizes as, "several non-statutory exceptions in Regulation Z to extend consumer credit protections that generally apply to other forms of consumer credit to certain overdraft credit" solutions offered by the financial institutions. Interestingly (and perhaps fatally?), the proposal is to remove these "non-statutory exceptions" to the Truth In Lending Act ("TILA") from its implementing regulation, Regulation Z, only for the very large financial institutions, but to retain those exceptions for all other financial institutions until the CFPB understands how the market responds to the rule. On the one hand, the CFPB is justifying these changes to Regulation Z that have been in place since the Federal Reserve first promulgated the regulation in 1969 as not being core to the intent of the TILA, but on the other hand, the CFPB is proposing to introduce a new "non-statutory exception" by applying the changes only to very large financial institutions.

Stay tuned for a part two on this Overdraft Lending proposed rule in the next *Cabinet News & Views* that walks through the proposed rule in more detail, but for now, here is a summary of the proposed changes. To assist with understanding the proposed rule, the CFPB published a [Fact Sheet](#), and a [Report](#) on the marketplace that endeavors to justify the reasons for the proposed rule.

Comments on the proposed rule are due to the CFPB on or by April 1, 2024.

- Courtesy overdraft protection can still be extended by covered financial institutions, but the only fees that may be charged for such protection is a “break-even” fee set by the financial institution or a “benchmark fee” that is set by the CFPB, based upon its understanding of market data, which the CFPB has predicted to be anywhere from \$3 to \$14, plus \$.50 per overdraft transaction. The CFPB is not allowed to fix prices for fees, but by offering the alternative methodology of a “break-even” fee and leaving the choice up to the financial institution, they appear to be trying to side-step that limitation on their authority.
- More formal overdraft protection could be offered to customers on an opt-in basis, and would constitute an overdraft line of credit, subject to Regulation Z protections and disclosures, which consumers could choose to repay as they wish (i.e., the line of credit could not require automatic payments). In this case, consumers would apply for the line of credit, have their credit report pulled and be underwritten for the line of credit just like consumers are evaluated and underwritten for other forms of credit. Of course, these lines of credit for overdraft used to be very popular with banks, but the prudential regulators in the 2000’s [found such lines of credit to pose safety and soundness concerns](#), primarily due to the amount of time consumers took to repay the lines of credit, and so most banks phased these lines of credit out.

The second proposed rule, [announced on January 24, 2024](#), is called the [Fees on Instantaneously Declined Transactions](#) rule and would apply to all “covered financial institutions” regardless of size, with the proposed definition meaning any “financial institution” that holds “accounts” as defined by Regulation E. The CFPB explains that while today most consumers are not charged a fee by their financial institution when the transaction is declined at the point of sale for non-sufficient funds, that result is generally because of consumer protections in place for debit card transactions. However, there have been numerous technology innovations that allow for instantaneous or near-instantaneous transactions to occur at the point of sale using other methods of payment, such as automated clearinghouse (“ACH”) transactions or even electronic check transactions, and, as the CFPB observes, “banks have previously increased fees when technology provided an opportunity.” Put another way, the reason that there are only debit card consumer protections against NSF fees was because of the speed of transactions debit cards provided, compared to other payment methods. But, now that transactions nearly as speedy can be conducted through payment methods other than debit cards, the CFPB is seeking to ensure that all such speedy transactions have the same consumer protections.

Comments are due on this proposed rule by or on March 24, 2024.
