

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part 1042

[Docket No. CFPB-2024-0003]

RIN 3170-AB16

Fees for Instantaneously Declined Transactions; Withdrawal of Proposed Rule

AGENCY: Consumer Financial Protection Bureau.

ACTION: Withdrawal of proposed rule.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) is withdrawing its proposed rule to prohibit banks and other financial institutions from charging certain nonsufficient funds (NSF) fees, such as those for declined debit card purchases, Automated Teller Machine (ATM) withdrawals, and some person-to-person payments. The CFPB will determine whether a more comprehensive approach to also prohibit NSF fees charged for additional types of transactions will better protect consumers from potentially unlawful fees.

DATES: The proposed rule published January 31, 2024, at 89 FR 6031 is withdrawn as of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: The docket for this withdrawn proposed rule is available at <https://www.regulations.gov/docket/CFPB-2024-0003>.

FOR FURTHER INFORMATION CONTACT: George Karithanom, Regulatory Implementation and Guidance Program Analyst, Office of Regulations, at 202-435-7700 or <https://reginquiries.consumerfinance.gov/>. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov.

SUPPLEMENTARY INFORMATION:

I. Summary

On January 31, 2024, the Consumer Financial Protection Bureau (CFPB) published in the *Federal Register* a notice of proposed rulemaking in which it proposed to prohibit covered

financial institutions from charging fees, such as nonsufficient funds fees, when consumers initiate payment transactions that are instantaneously declined. The proposed rule preliminarily determined that charging such fees would constitute an abusive practice under the Consumer Financial Protection Act's (CFPA) prohibition on unfair, deceptive, or abusive acts or practices. For the reasons stated below, the CFPB is exercising its discretion to withdraw the notice of proposed rulemaking and terminate this rulemaking proceeding.

II. Background

A. Market Background and Proposed Rule

When a consumer attempts a withdrawal, debit, payment, or transfer that exceeds the available funds in their depository account, a financial institution will sometimes decline the transaction and charge the consumer a fee, often called a nonsufficient funds (NSF) fee. Normally, these fees are only charged on check or Automated Clearing House (ACH) transactions that take days to clear, under the theory that a fee could deter consumers from intentionally attempting payments that will be declined in order to obtain a product or service from a merchant before the transaction is declined. Financial institutions have historically not charged NSF fees on ATM and debit transactions because declinations on these types of transactions are instant and effectively costless to the financial institution, and, because there is no chance that the transaction is successful for the consumer, there is no moral hazard to deter. However, financial institutions' fee practices have been rapidly changing in recent years, and some nonbank prepaid card providers have started charging NSF fees on instantly declined transactions despite the lack of a meaningful justification for the fee.

The proposal preliminarily concluded that it is an abusive practice to charge an NSF fee on a transaction that is instantaneously declined because such fees take unreasonable advantage of consumers' lack of understanding of the risks, costs, or conditions of their accounts at the time they are initiating covered transactions. In making this preliminary conclusion, the CFPB observed that, unlike the CFPA's unfairness prohibition, the statutory text for the abusive

conduct prohibition does not require any inquiry into reasonable avoidability. Although the CFPB preliminarily found that consumers' lack of understanding that they would be charged an NSF fee in the circumstances addressed in the proposal is generally reasonable, the proposal noted that the statutory text of the prohibition does not require a finding that the consumer's lack of understanding was reasonable to demonstrate abusive conduct.

The CFPB preliminarily determined that consumers charged NSF fees on covered transactions would lack understanding of the material risks, costs, or conditions of their account at the time they are initiating covered transactions. The proposed rule stated that the "costs" associated with a covered transaction that would result in an NSF fee would primarily be the amount of the fee itself. The proposal further stated that the amount of funds in the account and whether they are sufficient for a given transaction at the time the consumer is initiating that transaction are relevant "conditions" of the consumer's deposit account. At the time a consumer considers initiating a request to withdraw, debit, pay, or transfer funds from their account, the proposed rule explained, the relevant risks to the consumer would include the possibility the transaction will be declined and result in an NSF fee.

The CFPB preliminarily declined to characterize consumers' lack of understanding in the proposal as either "specific" or "general" because that binary framework—used in the 2020 partial rescission of the CFPB's 2017 rulemaking on Payday, Vehicle Title, and Certain High-Cost Installment Loans¹—is unhelpful for determining whether consumers understand the material risks, costs, or conditions of a consumer financial product or service, which is the statutory requirement. As discussed in the proposal, a consumer's lack of understanding can be based on one or the other, or a mixture of both, and each can inform one another. Indeed, a person's understanding of their personal risk may be intertwined with their understanding of the

¹ See 85 FR 44382, 44421 (July 22, 2020).

general risk to all consumers—if one knows that many are harmed, they are more likely to understand that they are likely to be harmed.

The CFPB preliminarily concluded in the proposed rule that the practice of charging NSF fees on covered transactions takes unreasonable advantage of consumers’ lack of understanding of the above-referenced material risks, costs, or conditions of their accounts when they initiate those transactions. The CFPB explained that a determination of unreasonable advantage-taking involves an evaluation of the facts and circumstances that may affect the nature of the advantage and the question of whether the advantage-taking was unreasonable under the circumstances.² The proposal also stated that such an evaluation does not require an inquiry into whether the advantage-taking is typical or not—that even a relatively small advantage may be abusive if it is unreasonable, and that one may rely on qualitative assessment rather than an investigative accounting of costs and benefits to determine whether a covered financial institution takes an unreasonable advantage.³

B. Statutory History

Congress passed the prohibition on abusive conduct after the 2007-2008 financial crisis, recognizing that the unfairness and deception prohibitions were insufficient to prevent predatory mortgage lending.⁴ The statutory authority to regulate abusive conduct was explicitly added as a new standard of fair dealing, and Congress crafted the prohibition as separate and distinct from unfairness and deception.⁵

² See *Statement of Policy Regarding Prohibition on Abusive Acts or Practices* (Abusive Policy Statement), 88 FR 21883, 21886 (Apr. 12, 2023). Cf., e.g., *Swift & Co. v. Wallace*, 105 F.2d 848, 854-55 (7th Cir. 1939) (“‘[U]nreasonable’ is not a word of fixed content and whether preferences or advantages are unreasonable must be determined by an evaluation of all cognizable factors which determine the scope and nature of the preference or advantage.”).

³ Abusive Policy Statement, 88 FR 21883 at 21886.

⁴ See generally 2023 Abusive Policy Statement (in discussing background and legislative history regarding CFPB’s authority to address abusive conduct, stating “. . . Congress concluded that the manner in which agencies had enforced the prohibitions on unfair and deceptive acts or practices was too limited to be effective at preventing the financial crisis, and once again amended existing law to better meet new challenges).

⁵ As the 2023 Abusive Policy Statement noted, in 2007, then-FDIC Chairwoman Sheila Bair explained in congressional testimony that unfairness “can be a restrictive legal standard” and proposed that Congress consider “adding the term ‘abusive,’” which she noted existed in the Home Ownership and Equity Protection Act, and which

The prohibition, section 1031(b) of the CFPA provides the CFPB with the authority to “prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.”⁶ CFPA section 1031(b) further provides that rules under section 1031 may include requirements for the purpose of preventing such acts or practices.⁷

Under CFPA section 1031(d), the CFPB “shall have no authority . . . to declare an act or practice abusive in connection with the provision of a consumer financial product or service” unless the act or practice meets at least one of several enumerated conditions.⁸ CFPA section 1031(d)(2) provides, in pertinent part, that an act or practice is abusive when it takes unreasonable advantage of a consumer’s lack of understanding of the material risks, costs, or conditions of the product or service.

Comments Received

The CFPB received nearly 8,000 comments on the proposed rule. Commenters supported and opposed the proposed rule on various grounds. A coalition of consumer advocacy groups and a number of think tanks, individuals, financial institutions, financial institution employees, and State and local governmental agencies supported the proposed rule. Some comments supporting the rule stated that: NSF fees (including those not covered by the proposal) have a particular impact on financially vulnerable populations; the proposal would simply codify the existing practice of most financial institution that do not charge NSF fees for instantaneously

“is a more flexible standard to address some of the practices that make us all uncomfortable.” *Improving Federal Consumer Protection in Financial Services: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. 40 (2007) (statement of Hon. Sheila C. Bair, Chairman of the Federal Deposit Insurance Corporation), <https://www.govinfo.gov/content/pkg/CHRG-110hhrg37556/html/CHRG-110hhrg37556.htm>; An act or practice need fall into only one of the enumerated conditions under CFPA section 1031(d) to be abusive, but an act or practice could satisfy more than one of those conditions.⁵

⁶ CFPA section 1031(b), 124 Stat. 2005-2006 (12 U.S.C. 5531(b)).

⁷ *Id.*

⁸ 12 U.S.C. 5531(d). For a more detailed discussion of the CFPB’s authority under the abusive conduct prohibition, see Abusive Policy Statement, 88 FR 21883.

declined transactions; the proposal correctly described the CFPB’s statutory abusive conduct authority; and the proposal properly applied that authority to prohibit NSF fees for covered transactions. A number of commenters supporting the proposal asserted that the discussion of lack of understanding in the proposal was consistent with that of the 2023 Abusive Policy Statement, agreed that the abusive conduct prohibition was a separate and distinct statutory tool from unfairness and deception and asserted that the insertion of a reasonable person standard in the lack of understanding prong of the abusive conduct prohibition would be statutorily inappropriate.

A number of the supportive comments stated that the proposed rule would help to protect consumers from abusive conduct, but cited evidence of current harm to consumers from NSF fees beyond the scope of the proposed rule, such as the impact on consumers of NSF fees for check, ACH and recurring debit fee transactions. One commenter stated that 87% of Americans surveyed believe that NSF fees of *any* kind—including fees not covered by the proposed rule—are unfair. Others reasoned that financial institutions generally should not profit from consumer misfortune. One commenter highlighted the impact of NSF fees charged for recurring debit transactions, especially for those on fixed incomes. Similarly, several other commenters inquired as to whether the proposed abusive conduct analysis of the rule, focused as it was on NSF fees for instantaneously declined transactions, might not also apply to NSF fees for other transactions not covered by the rule, including check and ACH transactions.

A number of trade groups, financial institutions (including banks, credit unions, and non-depositories), employees of financial institutions, individuals, a group of law students, and others opposed the proposed rule. Their comments challenged provisions such as: the scope of the rule; the background analysis of the CFPB’s statutory abusive conduct authority; the application of that authority to NSF fees for covered transactions; the lack of prevalence of NSF fees covered by the rule; the preventive nature of the rule; the alleged potential impact to innovation in the

industry; and the alleged potential cost of the rule, even to the institutions that do not charge NSF fees covered by the rule.

Although the CFPB is not finalizing the proposed rule, it affirms its interpretation of the CFPA with respect to its authority as discussed in the 2023 Policy Statement and disagrees with the comments that argued against it. As a general matter, the CFPB received comments about the agency's reading of its abusive authority and the application to instantaneous NSF fees. Commenters discussed the CFPB's reading of the abusive standard, but those comments raised mostly policy-based concerns and did not seriously grapple with the CFPB's interpretation of the statutory language. For example, commenters did not give a plausible, much less superior, alternative textual readings of the abusive standard that justified imputing the "reasonable consumer" test for unfair practices to the statutory lack of understanding standard. Commenters did not suggest that lack of understanding of "costs" or "conditions" require, as a textual matter, an assessment of probabilities or likelihood or magnitude of harm. And commenters did not raise specific counter-arguments supporting the notion that the CFPB should, statutorily, only pursue regulations under its abusive authority if consumers lack understanding of "general" risk, as opposed to when consumers lack understanding of individual risks, costs, or conditions.

Commenters did suggest that the CFPB's reading of the statute as prohibiting practices distinct from those prohibited by the unfairness and deception standards would have broad policy consequences. However, Congress has already spoken on these issues of policy; the legislative history and statutory text make clear that Congress intended the existence of an additional and distinct standard prohibiting abusive practices. Furthermore, the CFPB does not agree that law-abiding companies have to be allowed to take unreasonable advantage of consumer's lack of understanding in order to operate in a fair market economy. While consumers may not be expected to understand every element of a financial transaction, law-abiding companies do not take unreasonable advantage of a lack of understanding to profit unreasonably. For that reason, the CFPB continues to operate with an understanding of the abusive conduct standard consistent

with the 2023 Abusive Policy Statement as well as the clarifications with respect to the payday rule discussed in the proposal.

III. Withdrawal of the Proposed Rule

The proposed rule would have applied the analysis summarized above in section II.A. only to NSF fees charged for transactions that were instantaneously or nearly instantaneously declined. The stated purpose for this limited-scope proposal was that because technological advances might eventually make instantaneous payments ubiquitous, it was important to proactively set regulations to protect consumers from abusive practices that could emerge.

However, as explained above, a number of comments highlighted that NSF fees for transactions not covered by the rule could also be abusive, such as fees for recurring Automated Clearing House (ACH) transactions. These fees are much more common under current market conditions than fees on instantaneous payments. Some comments suggested that the proposed abusive conduct analysis be extended to transactions not covered by the proposed rule.

In light of the comments received and upon further consideration, the CFPB has reason to believe that practices involving the charging of NSF fees on other types of transactions may also be abusive for reasons similar to those discussed in the proposal. However, the prevalence, nature, and extent of harms from these non-instantaneous NSF fees were outside of the scope of the proposal and were not the focus of the proposed rule's evidence or analysis. Accordingly, the CFPB has determined that it would be a prudent use of its rulemaking and market monitoring resources to withdraw this rulemaking and to consider whether consumers similarly lack understanding of other NSF fees to determine whether a broader rulemaking would be appropriate.

IV. Applicable Date

The notice of proposed rulemaking published in the *Federal Register* at 89 FR 6031 on January 31, 2024, is withdrawn as of [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

Authority and Issuance

For the reasons set forth above, the CFPB uses its discretion to withdraw the proposed rule on NSF fees for instantaneously declined transactions published in the *Federal Register* on January 31, 2024.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.