(e) The Administrative Judge shall determine the day, time, and place for the hearing and shall decide whether the hearing will be conducted via video teleconferencing. In the event the individual fails to appear at the time and place specified, without good cause shown, the record in the case shall be closed and returned to the Manager, who shall then make an initial determination regarding the eligibility of the individual for DOE access authorization in accordance with § 710.22(a)(3).

(f) At least 7 calendar days prior to the date scheduled for the hearing, the Administrative Judge shall convene a prehearing conference for the purpose of discussing stipulations and exhibits, identifying witnesses, and disposing of other appropriate matters. The conference may be conducted by telephone, video teleconference, or other means as directed by the Administrative Judge.

* * * * *

■ 16. Amend § 710.26 by:

■ a. Removing in paragraph (a) wherever it appears the words ''his/her'' and adding in their place the word ''their''; and

■ b. Revising paragraph (d).

The revision reads as follows:

§ 710.26 Conduct of hearings.

* * * * *

(d) DOE Counsel shall assist the Administrative Judge in establishing a complete administrative hearing record in the proceeding and bringing out a full and true disclosure of all facts, both favorable and unfavorable, having a bearing on the issues before the Administrative Judge. The individual shall be afforded the opportunity of presenting testimonial, documentary, and physical evidence, including testimony by the individual in the individual's own behalf. All witnesses shall be subject to cross-examination, if possible.

* * * * *

§ 710.27 [Amended]

■ 17. Amend § 710.27 paragraph (b), in the second sentence by removing the word ''handicapped'' and adding in its place, the word ''prejudiced''.

§ 710.28 [Amended]

■ 18. Amend § 710.28 in paragraph (a)(4) by removing the words ''his/her'' and adding in their place the word ''their''.

§ 710.29 [Amended]

■ 19. Amend § 710.29 paragraph (c), in the first sentence by removing the words ''his/her'' and adding in their place the word ''their''.

■ 20. Amend § 710.31 by revising paragraphs (b)(4), (5), and (6) to read as follows:

§ 710.31 Reconsideration of access eligibility.

* * * * *

(b) * * *

(4) If, pursuant to the provisions of paragraph (b)(2) of this section, the Manager determines the individual is eligible for access authorization, the Manager shall grant access authorization.

(5) If, pursuant to the provisions of paragraph (b)(2) of this section, the Manager determines the individual remains ineligible for access authorization, the Manager shall so notify the Director in writing. If the Director concurs, the Director shall notify the individual in writing. This decision is final and not subject to review or appeal. If the Director does not concur, the Director shall confer with the Manager on further actions.

(6) Determinations as to eligibility for access authorization pursuant to paragraphs (b)(4) or (5) of this section may be based solely upon the mitigation of derogatory information which was relied upon in a final decision to deny or to revoke access authorization. If, pursuant to the procedures set forth in paragraph (b)(2) of this section, previously unconsidered derogatory information is identified, a determination as to eligibility for access authorization must be subject to a new Administrative Review proceeding.

Appendix A to Part 710 [Removed]

■ 21. Appendix A to part 710 is removed.

[FR Doc. 2024–01874 Filed 1–30–24; 8:45 am]

BILLING CODE 6450–01–P

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part 1042

[Docket No. CFPB–2024–0003]

RIN 3170–AB16

Fees for Instantaneously Declined Transactions

AGENCY: Consumer Financial Protection Bureau.

ACTION: Proposed rule; request for public comment.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) is proposing to prohibit covered financial institutions from charging fees, such as nonsufficient funds fees, when consumers initiate payment transactions that are instantaneously declined. Charging such fees would constitute an abusive practice under the Consumer Financial Protection Act's prohibition on unfair, deceptive, or abusive acts or practices.

DATES: Comments must be received on or before March 25, 2024.

ADDRESSES: You may submit comments, identified by Docket No. CFPB–2024–0003 or RIN 3170–AB16, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. A brief summary of this document will be available at *https://www.regulations.gov/docket/CFPB-2024-0003.*
- *Email: 2024-NPRM-NSF@cfpb.gov.* Include Docket No. CFPB–2024–0003 or RIN 3170–AB16 in the subject line of the message.
- *Mail/Hand Delivery/Courier:* Comment Intake—2024 NPRM Fees for Instantaneously Declined Transactions, c/o Legal Division Docket Manager, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552.

Instructions: The CFPB encourages the early submission of comments. All submissions should include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. Commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to *https://www.regulations.gov.*

All submissions, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Submissions will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Pavitra Bacon, Joseph Devlin, Lawrence Lee, or Michael G. Silver, Senior Counsels, 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. Background

A. Rulemaking Goals

When a consumer's attempted withdrawal, debit, payment, or transfer transaction amount exceeds the available funds in their account, currently, a financial institution might decline the transaction and charge the consumer a fee, often called a nonsufficient funds (NSF) fee. NSF fees might be charged on transactions that the financial institution declines within seconds after the payment request is initiated, as well as on transactions that are rejected hours or days after the initial request to pay is made. As discussed below, many financial institutions in recent years have stopped charging NSF fees. To the extent they continue to be charged currently, however, NSF fees are almost always charged only on check or Automated Clearing House (ACH) transaction declinations, which do not occur instantaneously. In contrast, NSF fees are rarely charged on Automated Teller Machine (ATM) or point-of-sale (POS) debit transaction declinations, which do occur instantaneously. The CFPB is aware of limited instances where such fees might be charged on the latter set of transactions (for example, in connection with prepaid accounts and transactions declined at ATMs that are outside the depository institution's ATM network).[1] To a similarly limited extent, the CFPB has also observed such fees being charged in connection with other types of transactions (such as online transfer and in-person bank teller transactions).[2]

The CFPB is proposing to prohibit covered financial institutions from charging NSF fees on transactions that are declined instantaneously or near-instantaneously.[3] As technological advancements may eventually make instantaneous payments ubiquitous, the CFPB believes that is important to proactively set regulations to protect consumers from abusive practices.

B. High-Level Summary of the Proposed Rule

To prevent abusive practices related to NSF fees on instantaneously declined transactions, as detailed below in part IV (Discussion of Proposed Rule), the CFPB proposes to prohibit covered financial institutions from charging such fees. The CFPB preliminarily concludes that charging NSF fees in these circumstances would constitute an abusive practice under the Consumer Financial Protection Act's prohibition on unfair, deceptive, or abusive acts or practices. The proposal would prohibit financial institutions from engaging in this practice across all instantaneously declined transactions, regardless of transaction method (*e.g.,* debit card, ATM, person-to-person).

C. NSF Fees in the Market

Today, the combined costs of overdraft and NSF fees constitute a higher cost to consumers than the combined costs of periodic maintenance fees and ATM fees.[4] Although overdraft and NSF fees are distinct, many publications discuss them together,[5] and, in recent decades, a financial institution's NSF fee has typically been the same amount as any per-transaction overdraft fee it may charge.[6] The amount of an NSF fee is typically not pegged to the transaction's processing cost[7] or the transaction's amount;[8] institutions generally charge a fixed amount per declined transaction.[9] The CFPB's research found that in 2012, the median NSF fee among 33 large institutions sampled was $34.[10] While many institutions have opted to stop charging NSF fees within the last two years,[11] the CFPB recently found

[1] *See* Trevor Bakker et al., Consumer Fin. Prot. Bureau, *Data Point: Checking account overdraft,* at 20 tbl. 8 (July 2014), *https://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf* (CFPB 2014 Data Point).

[2] *Id.*

[3] As explained below, covered transactions would include transactions that are declined ''instantaneously'' or ''near-instantaneously.'' The discussion below describes the difference in terminology. For ease of reference, the proposal sometimes refers jointly to these two terms as ''instantaneously.''

[4] *See, e.g.,* Consumer Fin. Prot. Bureau, *Data Point: Overdraft/NSF Fee Reliance Since 2015—Evidence from Bank Call Reports,* at 2–3 (Dec. 2021), *https://files.consumerfinance.gov/f/documents/cfpb_overdraft-call_report_2021-12.pdf* (CFPB December 2021 Data Point); *see generally* Fed. Fin. Insts. Examination Council, *Central Data Repository's Public Data Distribution, https://cdr.ffiec.gov/public/ManageFacsimiles.aspx* (last visited Jan. 17, 2024).

[5] Generally, an overdraft fee is charged when a transaction (debit, payment, transfer, or withdrawal) that exceeds the consumer's account balance is paid (covered) by the accounting-holding financial institution. An NSF fee is charged when a transaction (debit, payment, transfer, or withdrawal) that would exceed the account balance if it were paid is instead returned *unpaid* by the account-holding financial institution. Despite this distinction, the CFPB believes that surveys, reports, and studies often group these two types of fees together. This is in part because banks with over $1 billion in assets report overdraft and NSF fees together within the ''consumer overdraft-related service charges'' category (*see* Fed. Fin. Insts. Examination Council, FFIEC 031 and 041, *Instructions for Preparation of Consolidated Reports of Condition and Income,* at RI 36, *https://www.ffiec.gov/pdf/FFIEC_forms/FFIEC031_FFIEC041_202303_i.pdf* (last updated Mar. 2023)). In addition, either of these fees can be charged when a consumer's available balance is insufficient to cover a transaction, and there is substantial overlap in the population of consumers who incur overdraft and NSF fees. *See* Consumer Fin. Prot. Bureau, *A Closer Look: Overdraft and the Impact of Opting-In* (Jan. 19, 2017), *https://files.consumerfinance.gov/f/documents/201701_cfpb_Overdraft-and-Impact-of-Opting-In.pdf* (CFPB Closer Look); Consumer Fin. Prot. Bureau, *Overdraft and NSF Practices at Very Large Financial Institutions* (Jan. 2024), *https://files.consumerfinance.gov/f/documents/cfpb_overdraft-nsf-practices-very-large-financial-institutions_2024-01.pdf* (Overdraft and NSF Report).

[6] *See,* Consumer Fin. Prot. Bureau, *CFPB Study of Overdraft Programs: A white paper of initial data findings,* at 11 n.f, 52 (June 2013), *https://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf* (CFPB White Paper).

[7] For example, the median cost of issuing a business check is $2.01–$4.00 and the cost to receive a business check is $1.01–$2.00. *See* Ass'n for Fin. Profs. (underwritten by Corpay), *2022 AFP Payments Cost Benchmarking Survey,* at 16 (Jan. 2022), *https://www.afponline.org/publications-data-tools/reports/survey-research-economic-data/Details/paymentscost* (available for download at *https://www.corpay.com/resources/whitepapers/2022-afp-payments-cost-benchmarking-survey/gated*). The CFPB expects that the costs for consumer checks to be within similar ranges. The median total processing cost across issuers for all types of debit card transactions was 11 cents per transaction in 2011 (*see* 76 FR 43394, 43397 (July 20, 2011)) and the average per-transaction authorization, clearing, and settlement costs, excluding issuer fraud losses, among issuers covered by the Board's debit card interchange fee rule was 3.9 cents in 2021 (Bd. of Governors of the Fed. Rsrv. Sys., *2021 Interchange Fee Revenue, Covered Issuer Costs, and Covered Issuer and Merchant Fraud Losses Related to Debit Card Transactions,* at 24 (Oct. 2023), *https://www.federalreserve.gov/paymentsystems/files/debitfees_costs_2021.pdf* (FRB 2021 Interchange)).

[8] The average value of a check payment in 2021 was $2,430. Bd. of Governors of the Fed. Rsrv. Sys., *The Federal Reserve Payments Study: 2022 Triennial Initial Data Release, https://www.federalreserve.gov/paymentsystems/fr-payments-study.htm* (last updated July 27, 2023) (FRB 2022 Payments Study). In 2022, the average value of a debit card transaction was $46.84. Bd. of Governors of the Fed. Rsrv. Sys., *Regulation II (Debit Card Interchange Fees and Routing)—Average Debit Card Interchange Fee by Payment Card Network, https://www.federalreserve.gov/paymentsystems/regii-average-interchange-fee.htm* (last updated Sept. 23, 2022) (FRB Regulation II).

[9] CFPB White Paper at 11.

[10] *Id.* at 52.

[11] *See* Consumer Fin. Prot. Bureau, *Data spotlight: Vast majority of NSF fees have been eliminated, saving consumers nearly $2 billion annually* (Oct. 11, 2023), *https://www.consumerfinance.gov/data-research/research-reports/vast-majority-of-nsf-fees-have-been-eliminated-saving-consumers-nearly-2-billion-annually/* (CFPB October 2023 Data Spotlight); Consumer Fin. Prot. Bureau, *Non-sufficient fund (NSF) fee practices of the 25 banks reporting the most overdraft/NSF revenue in 2021, https://files.consumerfinance.gov/f/documents/cfpb_nsf-fee-banks-chart_2023-05.jpg* (last visited Jan. 17, 2024). *See also* Meghan Greene et al., Fin. Health Network, *FinHealth Spend Report 2023: U.S. Household Spending on Financial Services Amid Historic Inflation and an Uncertain Economy,* at 5 (June 2023), *https://finhealthnetwork.org/wp-content/uploads/2023/06/FinHealth-Spend-Report-2023.pdf* (FinHealth Spend Report 2023) (documenting a continued decrease in spending on overdraft and NSF fees, from $10.6 billion in 2021 to $9.9 billion in 2022); Oz Shy & Joanna Stavins, *Who Is Paying All These Fees? An Empirical Analysis of Bank Account and Credit Card Fees,* at 6 (Fed. Rsrv. Bank of Bos., Working Paper No. 22–

through its market monitoring that, among institutions above $10 billion in assets still charging such fees, the median fee is $32.

1. NSF Fee Impacts on Certain Consumer Populations

Overdraft and NSF fees tend to be incurred by consumers with higher financial vulnerability (including those with lower incomes [12] and lower credit scores [13]). The CFPB has previously found that individuals with more overdraft and NSF fees in the prior year tend to have lower account balances and tend to be more credit-constrained than other consumers, as they have lower average credit scores, are less likely to possess a general-purpose credit card, have less available credit when they do have such cards, and more often possess thin credit files.[14] Researchers also found that only 4 percent of ''Financially Healthy'' [15] households with checking accounts reported paying an overdraft or NSF fee in 2022, compared with 46 percent of ''Financially Vulnerable'' [16] households.[17] According to a CFPB study, 9 percent of all accounts at the studied banks paid nearly 80 percent of combined overdraft and NSF fees.[18]

Beyond the impact of having insufficient funds, incurring NSF fees can negatively affect a consumer's overall perceptions of whether the banking system is fair, transparent, and competitive.[19] The Federal Deposit Insurance Corporation (FDIC) has found that among unbanked households in 2021, almost three in ten (29.2 percent) cited as a main reason for not having an account concerns related to fees or minimum balance requirements—''Bank account fees are too high,'' ''Bank account fees are too unpredictable,'' or ''Don't have enough money to meet minimum balance requirements.'' [20]

2. The Rise of Noncash Payments

When NSF fees are charged, they are almost always charged exclusively in connection with noncash payments (that is, ACH, cards, mobile application payments, and checks), the use of which has grown rapidly due in large part to technological and regulatory changes. In a recent study, the Federal Reserve Bank of San Francisco (FRBSF) found that generally, consumers are shifting away from cash and increasingly making card payments.[21] The FRBSF attributed this shift in large part to consumers making a greater share of purchases remotely when compared to before the COVID–19 pandemic [22] and to increased preference for card payments.[23] In addition, consumers are increasingly adopting newer noncash payment methods, such as those initiated through digital applications.[24] This shift away from cash by banks also coincided with certain regulatory developments—such as the enactment of the Check Clearing for the 21st Century Act (Check 21), a Federal law that took effect in 2004.[25] Check 21 provided that a properly prepared paper reproduction of an original check (a ''substitute check'') is the legal equivalent of an original paper check [26] and allowed banks to avoid the ''inefficient and costly'' [27] transportation of paper checks.

3. Government Regulation of Noncash Payments and NSF Fees

The rise in noncash payments also prompted regulatory interventions necessary to protect consumers. For example, in 2009, the Board of Governors of the Federal Reserve System (Board) amended Regulation E, which was subsequently recodified by the CFPB, to require financial institutions to obtain account holders' affirmative consent (*i.e.,* their ''opt-in'') for overdraft coverage of ATM and one-time (non-recurring) POS debit card transactions before the financial institution could charge a fee for paying such overdraft transactions (2009 Opt-in Rule).[28] Following implementation of that rule, the CFPB found that consumers who opted in pay significantly more fees than consumers who do not opt in (*i.e.,* opted-in consumers paid on average $22 per month in overdraft and NSF fees while non-opted-in consumers paid on average $3 per month).[29] The CFPB also found that if a consumer has not opted in, depository institutions typically will not authorize any ATM or one-time debit card transactions if there are insufficient funds at the time the transaction is attempted.[30] These institutions rarely charge an NSF fee when declining an ATM transaction or a debit card authorization inquiry at a merchant POS,[31] likely for two reasons. First, the cost of declining such transactions has always been trivial.[32]

18, 2022), *https://www.bostonfed.org/-/media/Documents/Workingpapers/PDF/2022/wp2218.pdf* (Boston Fed Working Paper) (finding that ''[a] 'bounced'-check fee—assessed when the amount on a check exceeds the account balance—was [ ] rare, with only 1.0 percent of all consumers having paid such a fee in 2021'').

[12] One study found that consumers making under $30,000 a year are nearly twice as likely to incur an overdraft fee as those making over $30,000 (20 percent vs. 10 percent). Pew Ctr. on the States, *Overdraft America: Confusion and Concerns about Bank Practices,* at 6 (May 2012), *https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2012/sciboverdraft20america1pdf.pdf* (Pew 2012 Survey). *See also* Boston Fed Working Paper at 6.

[13] *See, e.g.,* David Low et al., Consumer Fin. Prot. Bureau, *Data Point: Frequent Overdrafters,* at 16 tbl. 2 (Aug. 2017), *https://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_frequent-overdrafters.pdf* (CFPB 2017 Data Point).

[14] CFPB 2017 Data Point at 5; Boston Fed Working Paper at 6, 16 (finding that individuals with FICO scores of less than 600 were more likely to have paid NSF fees in 2021 (3.5 percent) than the average consumer; that individuals with scores above 800 were significantly less likely to have done so (0.1 percent); and that this disparity also applied to overdraft fees although to a starker extent (32.0 percent versus 2.3 percent)).

[15] FinHealth Spend Report 2023 at 12 (describing ''Financially Healthy'' individuals as ''able to manage their day-to-day expenses, absorb financial shocks, and progress toward meeting their long-term financial goals'').

[16] *Id.* (describing ''Financially Vulnerable'' individuals as ''struggling with almost all aspects of their financial lives'').

[17] FinHealth Spend Report 2023 at 7.

[18] CFPB 2017 Data Point at 13.

[19] Joe Valenti, *Overdraft fees can price people out of banking,* Consumer Fin. Prot. Bureau (Mar. 30, 2022), *https://www.consumerfinance.gov/about-us/blog/overdraft-fees-can-price-people-out-of-banking/.*

[20] Fed. Deposit Ins. Corp., *2021 FDIC National Survey of Unbanked and Underbanked Households,* at 2 (Oct. 2022), *https://www.fdic.gov/analysis/household-survey/2021report.pdf* (FDIC 2021 Survey).

[21] Emily Cubides & Shaun O'Brien, Fed. Rsrv. Bank of S.F., *2023 Findings from the Diary of Consumer Payment Choice,* at 4, 6 (May 2023), *https://www.frbsf.org/cash/wp-content/uploads/sites/7/2023-Findings-from-the-Diary-of-Consumer-Payment-Choice.pdf.*

[22] *Id.* at 7–8 (20 percent of purchases and person-to-person (P2P) payments were made remotely or online in 2020 and 2021 versus 13 percent of such payments in 2019).

[23] *Id.* at 8 (''Consumers prefer credit cards because of the perceived convenience, lower rates of cash acceptance, and the ease of record keeping as compared to cash.'').

[24] *See* Kevin Foster et al., *The 2021 Survey and Diary of Consumer Payment Choice: Summary Results,* at 7 (Sept. 2022), *https://www.atlantafed.org/-/media/documents/banking/consumer-payments/survey-diary-consumer-payment-choice/2021/sdcpc_2021_report.pdf* (finding that 66.4 percent of all consumers had adopted one or more payment applications in the previous 12 months—a share that was nearly 20 percent higher than five years earlier).

[25] Check Clearing for the 21st Century Act, Public Law. 108–100, 117 Stat. 1177 (2003).

[26] Fed. Fin. Insts. Examination Council, *Check Clearing for the 21st Century Act Foundation for Check 21 Compliance Training, https://www.ffiec.gov/exam/check21/check21foundationdoc.htm* (last visited Jan. 17, 2024).

[27] Bd. of Governors of the Fed. Rsrv. Sys., *Frequently Asked Questions about Check 21, https://www.federalreserve.gov/paymentsystems/regcc-faq-check21.htm* (last visited Jan. 17, 2024).

[28] *See* Regulation E, 12 CFR 1005.17(b)(2).

[29] CFPB Closer Look at 4.

[30] *Id.* at 2.

[31] *Id.* at 1; *see also* Pew 2012 Survey at 1.

[32] In 2010, card issuers reported that their median per-transaction cost of nonsufficient funds handling was one cent. 76 FR 43394, 43398 (July 20, 2011). Since then, the transacted weighted average cost of nonsufficient funds handling has fallen to $0.005. FRB 2021 Interchange at 39 tbl. 14A. Nonsufficient funds handling costs were described in the survey as ''[c]osts of handling of events in which an

Continued

Second, in its preamble to the 2009 Opt-In Rule, the Board wrote that such fees ''could raise significant fairness issues'' under the Federal Trade Commission (FTC) Act because ''the institution bears little, if any, risk or cost to decline authorization of an ATM or one-time debit card transaction.'' [33] The CFPB understands that many financial institutions interpret that language to suggest that charging NSF fees in these circumstances would violate the FTC Act's unfairness prohibition, and have oriented their practices to charge fees generally only when overdraft coverage is provided on ATM and one-time debit card transactions and to not charge fees when those transactions are declined.[34]

Another impactful change in the noncash market came in 2011 when the debit card interchange fee standard in Regulation II [35] first went into effect, capping the interchange fee that a larger debit card issuer may charge or receive.[36] In response to this rule, some financial institutions initially sought to replace the lost revenue with debit usage fees, but then quickly abandoned such efforts, largely due to public displeasure and pressure.[37]

More recently, there has been an effort across the Federal Government to eliminate fees that are not subject to the competitive processes to ensure fair pricing. In January 2022, the CFPB launched an initiative to reduce certain fees charged by banks and other companies under its jurisdiction.[38] Soon after, the CFPB issued a Request for Information (RFI) regarding anti-competitive fees in banking,[39] took action to constrain ''pay-to-pay'' fees,[40] and announced a proposed rulemaking on credit card late fees.[41] The CFPB also published several research reports on overdraft/NSF fees,[42] an analysis of fees on college banking products,[43] and a report on credit cards.[44] Most recently, the CFPB issued guidance to stop large banks from charging illegal fees for basic customer service [45] and proposed to supervise larger nonbank companies that offer services like digital wallets and payment applications.[46]

The CFPB's recent supervisory and enforcement activity has also focused, in part, on certain types of NSF fees. In its supervisory work, the CFPB has cited financial institutions for engaging in several problematic practices related to deposit account fees, including assessing certain types of NSF fees. For example, the CFPB previously found that some institutions engaged in unfair acts or practices by assessing multiple NSF fees for the same transaction.[47] The CFPB also took concurrent action with the Office of the Comptroller of the Currency (OCC) addressing this practice, among others.[48] Most recently, the CFPB discussed its supervisory findings related to the charging of multiple NSF fees for the same transaction and of returned deposit item fees.[49]

Other Federal agencies have also taken actions to address certain practices related to NSF fees.[50] In September 2023, the Board issued a supervisory statement noting it had cited NSF representment fees as unfair.[51] In April 2023, the OCC issued a bulletin that found, among other things, that the practice of assessing an additional NSF fee on a representment transaction was, in some instances, unfair and deceptive.[52] In August 2022, the FDIC issued supervisory guidance stating that practices involving the charging of multiple NSF fees arising

account 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.'' *Id.* at 28 n.25. Based on this description, the cost of handling events in which the debit card transaction was not authorized is likely even lower.

[33] *See* 74 FR 59033, 59041 (Nov. 17, 2009).

[34] Through its enforcement work, the CFPB recently found that one bank had violated the Consumer Financial Protection Act's prohibition on deceptive practices by, among other things, misleading deposit account holders into thinking that they would incur NSF fees on one-time debit card and ATM transactions if they chose not to exercise their rights to opt into overdraft coverage under Regulation E. *See* Atlantic Union Bank, File No. 2023–CFPB–0017, at 11 ¶ 26 (Dec. 7, 2023).

[35] This rule implemented the provisions of section 1075 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which amended the Electronic Fund Transfer Act (15 U.S.C. 1693 *et seq.*) by adding a new section 920 regarding interchange transaction fees and rules for payment card transactions.

[36] Bd. of Governors of the Fed. Rsrv. Sys., *2011 Interchange Fee Revenue, Covered Issuer Costs, and Covered Issuer and Merchant Fraud Losses Related to Debit Card Transactions,* at 2 (Mar. 5, 2013), *https://www.federalreserve.gov/paymentsystems/files/debitfees_costs_2011.pdf.* More recently, the Board requested comment on a proposal to lower the maximum interchange fee that a large debit card issuer can receive for a debit card transaction and to establish a regular process for updating the maximum amount every other year going forward. *See* 88 FR 78100 (Nov. 14, 2023).

[37] *See* FRB Regulation II; Rick Rothacker, *Under pressure, Bank of America drops $5 debit card fee* (Nov. 1, 2011), *https://www.reuters.com/article/us-bankofamerica-debit/under-pressure-bank-of-america-drops-5-debit-card-fee-idUSTRE7A04E120111101/;* Samantha Cornell, *BofA to Impose Debit Card Fee: Will Competitors and Consumers Stay on Board of Jump Ship?,* Fordham J. Corp. & Fin. L. (Oct. 31, 2011), *https://news.law.fordham.edu/jcfl/2011/10/31/bofa-to-impose-debit-card-feed-will-competitors-and-consumers-stay-on-board-of-jump-ship/;* Press Release, The Fin. Brand, *BofA's $5 Monthly Debit Fee: The Backlash, The Fallout and What It All Means* (Oct. 4, 2011), *https://thefinancialbrand.com/news/checking-accounts/bank-of-america-debit-card-fee-fallout-19989/.*

[38] Press Release, Consumer Fin. Prot. Bureau, *Consumer Financial Protection Bureau Launches Initiative to Save Americans Billions in Junk Fees* (Jan. 26, 2022), *https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-launches-initiative-to-save-americans-billions-in-junk-fees/.*

[39] 87 FR 5801 (Feb. 2, 2022).

[40] Press Release, Consumer Fin. Prot. Bureau, *CFPB Moves to Reduce Junk Fees Charged by Debt Collectors* (June 29, 2022), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-moves-to-reduce-junk-fees-charged-by-debt-collectors/.*

[41] 88 FR 18906 (Mar. 29, 2023).

[42] *See, e.g.,* CFPB December 2021 Data Point; CFPB October 2023 Data Spotlight; Consumer Fin. Prot. Bureau, *Data spotlight: Overdraft/NSF revenue down nearly 50% versus pre-pandemic levels* (May 24, 2023), *https://content.consumerfinance.gov/data-research/research-reports/data-spotlight-overdraft-nsf-revenue-in-q4-2022-down-nearly-50-versus-pre-pandemic-levels/full-report/. See also* Consumer Fin. Prot. Bureau, *Trends in overdraft/non-sufficient fund (NSF) fee revenue and practices, https://www.consumerfinance.gov/data-research/research-reports/trends-in-overdraftnon-sufficient-fund-nsf-fee-revenue-and-practices/* (last updated May 24, 2023) (CFPB Overdraft/NSF Trends).

[43] Consumer Fin. Prot. Bureau, *College Banking and Credit Card Agreements* (Oct. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_college-banking-report_2022.pdf.*

[44] Consumer Fin. Prot. Bureau, *The Consumer Credit Card Market,* at 52 (Sept. 2021), *https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf.*

[45] 88 FR 71279 (Oct. 16, 2023).

[46] 88 FR 80197 (Nov. 17, 2023).

[47] Consumer Fin. Prot. Bureau, *Supervisory Highlights: Junk Fees Special Edition, Issue 29, Winter 2023,* at 5–6 (Mar. 2023), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights-junk-fees-special-edition_2023-03.pdf.*

[48] Press Release, Consumer Fin. Prot. Bureau, *CFPB Takes Action Against Bank of America for Illegally Charging Junk Fees, Withholding Credit Card Rewards, and Opening Fake Accounts* (July 11, 2023), *https://www.consumerfinance.gov/about-us/newsroom/bank-of-america-for-illegally-charging-junk-fees-withholding-credit-card-rewards-opening-fake-accounts/.*

[49] Consumer Fin. Prot. Bureau, *Supervisory Highlights Junk Fees Update Special Edition, Issue 31, Fall 2023,* at 4–6, 10, 17 (Oct. 2023), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory_highlights_junk_fees-update-special-ed_2023-09.pdf.*

[50] As noted above, Federal agencies have also taken recent actions to address fees that are not subject to competitive processes. For example, in October 2023, the FTC issued a proposed rule that would prohibit businesses across the economy from charging hidden and misleading fees, require the full price up front, and provide for monetary penalties and consumer refunds when violated. Press Release, Fed. Fin. Insts. Examination Council, *FTC Proposes Rule to Ban Junk Fees* (Oct. 11, 2023), *https://www.ftc.gov/news-events/news/press-releases/2023/10/ftc-proposes-rule-ban-junk-fees.*

[51] *See* Bd. of Governors of the Fed. Rsrv. Sys., *Compliance Spotlight—Supervisory Observations on Representment Fees,* Consumer Compliance Outlook (Second Issue 2023), *https://www.consumercomplianceoutlook.org/2023/second-issue/compliance-spotlight/* (last visited Jan. 17, 2024).

[52] Off. of the Comptroller of the Currency, *OCC Bulletin 2023–12: Overdraft Protection Programs: Risk Management Practices* (Apr. 26, 2023), *https://www.occ.treas.gov/news-issuances/bulletins/2023/bulletin-2023-12.html.*

from the same unpaid transaction results in heightened unfairness and other risks.[53] In 2019, the National Credit Union Administration (NCUA) issued a rule prohibiting Federal credit unions from charging overdraft or NSF fees related to certain types of loan payments drawn against a borrower's account.[54]

The CFPB has observed recent significant reductions in NSF fees, at least in part due to these actions. The CFPB has found that banks' overdraft/NSF fee revenue declined significantly compared to pre-pandemic levels (predominantly due to changes in bank policies),[55] and nearly two-thirds (65 percent) of banks with over $10 billion in assets have eliminated NSF fees, representing an estimated 97 percent of annual NSF fee revenue earned by those institutions.[56] However, 80 percent of credit unions with over $10 billion in assets still charge NSF fees.[57]

II. Stakeholder Outreach and Consultation

The CFPB has engaged in outreach and research related to overdraft and NSF fees since soon after the CFPB's inception. In 2012, the CFPB initiated a broad inquiry into overdraft programs for consumer checking accounts.[58] This inquiry included issuance of an RFI on the impacts of overdraft-related fees, including NSF fees, on consumers[59] and collection and analysis of overdraft-related data from several large banks over $10 billion in assets that provided a significant portion of all U.S. consumer checking accounts.[60] The CFPB published analyses of these data in a series of reports from 2013–2017, which examined institution-level policies and data, as well as account- and transaction-level data.[61] These studies assessed, among other things, overdraft and NSF fee size, incidence, and related account closure; overdraft-related policies and practices across institutions; the distribution of overdraft and NSF fee incurrence across accounts; and the characteristics of account holders across distributions of overdraft frequency. The CFPB also collected anonymized institution-level information from several core processors, which provide operations and accounting systems to financial institutions. This data collection informed the CFPB's 2021 report assessing overdraft and NSF policies and practices among a large sample of financial institutions using core processors.[62]

In 2021, the CFPB examined financial institutions' reliance on overdraft/NSF fees from 2015 to 2019, finding that it was persistent.[63] Since then, the CFPB has continued tracking overdraft and NSF trends in the marketplace[64] and evaluating some banks' key overdraft-related metrics through the CFPB's supervision work.[65] From April 2023 to August 2023, the CFPB reviewed the publicly available overdraft and NSF practices of financial institutions with assets over $10 billion.[66] In addition, the CFPB has recently collected information from several financial institutions under the CFPB's supervision regarding their overdraft-related practices.[67]

In 2022, CFPB issued an RFI regarding fees that are not subject to competitive processes that ensure fair pricing, which received over 80,000 comments.[68] Overdraft-related fees were by far the most common issue raised in the comments. Many consumers expressed concerns that the fees were charged for reasons that were unclear, disproportionate compared to the incidents resulting in the fees, and difficult or impossible to avoid. Consumers also reported that they were being charged fees that they believed were excessive, they appeared surprised by the fees, and they evidenced confusion about whether they were being charged an overdraft or NSF fee.

Through market monitoring engagement with credit union and State bank associations, the CFPB has received feedback pertaining to NSF and overdraft practices. Some banks and credit unions stated that many consumers place value on the short-term liquidity provided by overdraft services, while other institutions claimed that these types of fees are important for funding other services and programs offered to customers, such as financial literacy programs. Federal and State depository trade associations also have critiqued the characterization of their members' fees as so-called ''junk fees'' and urged the CFPB to study consumer preferences before taking further action.

The CFPB also gathers information on NSF and other bank fees from its Consumer Complaint Database. Consumers who submit complaints sometimes do not appear to understand the difference between NSF and overdraft fees. The complaints strongly suggest that consumers are often confused about why they were charged NSF fees when they declined overdraft protection and some consumers complain that their bank's transaction posting order led to fees that should not have been charged. Consumers also expressed frustration at not being able to track their account balance accurately. For example, consumer complainants frequently express the belief that deposited funds would be available, but an extended hold placed on the deposit led to overdraft or NSF fees.[69]

As discussed in connection with section 1022(b)(2) of the Consumer Financial Protection Act (CFPA) below, the CFPB's outreach included consultation with other Federal consumer protection and prudential regulators. The CFPB has provided other regulators with information about the proposal, and received feedback that has assisted the CFPB in preparing this proposal. The CFPB's outreach also included State Attorneys General, Tribal

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[53] Fed. Deposit Ins. Corp., FIL–40–2022, *Supervisory Guidance on Multiple Re-Presentment NSF Fees* (Aug. 2023), *https://www.fdic.gov/news/financial-institution-letters/2022/fil22040.html.*

[54] 84 FR 51942 (Oct. 1, 2019).

[55] *See* Consumer Fin. Prot. Bureau, *Data Spotlight: Banks' overdraft/NSF fee revenue declines significantly compared to pre-pandemic levels* (Feb. 7, 2023), *https://www.consumerfinance.gov/data-research/research-reports/banks-overdraft-nsf-fee-revenue-declines-significantly-compared-to-pre-pandemic-levels/.*

[56] *See* CFPB October 2023 Data Spotlight.

[57] *Id.*

[58] Press Release, Consumer Fin. Prot. Bureau, *CFPB Launches Inquiry into Overdraft Practices* (Feb. 22, 2012), *https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-launches-inquiry-into-overdraft-practices/.*

[59] 77 FR 12031 (Feb. 28, 2012). The RFI specifically defined overdraft fees to include, among other things, fees for returned checks, which the RFI termed NSF fees. *See id.* at 12033 (''[W]e use the terms 'overdraft' and 'overdraft fee' broadly to refer to practices followed and fees charged when a consumer initiates a transaction for which there are insufficient funds in the consumer's checking account. Specifically, the term overdraft fee includes fees charged for a returned check (*e.g.,* an NSF fee), fees charged when an overdraft item is paid (*i.e.,* an overdraft coverage fee), and fees charged if an overdraft is not repaid within a specified period of time.'').

[60] *See* CFPB White Paper at 8; CFPB 2014 Data Point at 6–7.

[61] *See* CFPB White Paper; CFPB 2014 Data Point; CFPB 2017 Data Point.

[62] Nicole Kelly & Éva Nagypál, Ph.D., Consumer Fin. Prot. Bureau, *Data Point: Checking Account Overdraft at Financial Institutions Served by Core Processors* (Dec. 2021), *https://files.consumerfinance.gov/f/documents/cfpb_overdraft-core-processors_report_2021-12.pdf.*

[63] *Id.*

[64] *See* CFPB Overdraft/NSF Trends (reflecting data and analysis published periodically from Dec. 1, 2021 to present).

[65] Patrick Gibson & Lisa Rosenthal, *Measuring the impact of financial institution overdraft programs on consumers,* Consumer Fin. Prot. Bureau (June 16, 2022), *https://www.consumerfinance.gov/about-us/blog/measuring-the-impact-of-financial-institution-overdraft-programs-on-consumers/.*

[66] *See* CFPB October 2023 Data Spotlight.

[67] *See generally* Overdraft and NSF Report.

[68] 87 FR 5801 (Feb. 2, 2022).

[69] *See, e.g.,* Consumer Fin. Prot. Bureau, Consumer Complaint 3745300, *https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/3745300.*

Attorneys General, State financial regulators, and organizations representing the officials charged with enforcing applicable Federal, State, and local laws.

III. Legal Authority

Consumer Financial Protection Act Section 1031

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.'' [70] CFPA section 1031(b) further provides that rules under section 1031 may include requirements for the purpose of preventing such acts or practices.[71]

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.[72] 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.

Congress intended the statutory phrase ''abusive acts or practices'' to encompass conduct by covered persons that is beyond what would be prohibited as unfair or deceptive acts or practices.[73] Unlike unfairness, but similar to deception, a finding of abusive conduct requires no showing of substantial injury to establish liability. Rather, it is focused on conduct that Congress presumed to be harmful or distortionary to the proper functioning of the market. 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 condition.[74]

Consumer Financial Protection Act Section 1022(b)(1)

Section 1022(b)(1) of the CFPA provides that the CFPB's Director ''may prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the CFPB to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.'' [75] The term ''Federal consumer financial law'' includes rules prescribed under title X of the CFPA, which include rules prescribed under section 1031.[76]

Section 1022(b)(2) of the CFPA prescribes certain standards for rulemaking that the CFPB must follow in exercising its authority under CFPA section 1022(b)(1).[77] See part VI for a discussion of the CFPB's standards for rulemaking under CFPA section 1022(b)(2).

IV. Discussion of the Proposed Rule

Definitions (§ 1042.2)

2(a) Account

Proposed § 1042.2(a) provides that ''account'' has the same meaning as the term in Regulation E, 12 CFR 1005.2(b). Pursuant to that definition, an account would include the following: (1) 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,[78] and (2) a prepaid account, as defined in 12 CFR 1005.2(b)(3).[79] An account would not include, for example: (1) an account held by a financial institution under a bona fide trust agreement; [80] (2) an occasional or incidental credit balance in a credit plan; [81] (3) profit-sharing and pension accounts established under a bona fide trust agreement; [82] (4) escrow accounts such as for payments of real estate taxes, insurance premiums, or completion of repairs or improvements; [83] or (5) accounts for purchasing U.S. savings bonds.[84]

The CFPB preliminarily concludes that referencing this existing definition of account for purposes of this proposal would help to foster consistency with Regulation E and would provide a familiar regulatory definition that has already been successfully implemented by many covered financial institutions. This definition would also capture a broad range of consumer account types to maximize the number of consumers protected from the preliminarily identified abusive practice. The CFPB seeks comment on its proposed approach to this definition.

2(b) Covered Financial Institution

Proposed § 1042.2(b) provides 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. A covered financial institution would not include a motor vehicle dealer, as defined in CFPA section 1029(f)(2), that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.[85] Adopting this definition would also incorporate related definitions and commentary, such as those for ''access device'' [86] and ''electronic funds transfer.'' [87]

The CFPB preliminarily concludes that referencing this existing definition of account for purposes of this proposal would help to foster consistency with Regulation E and would provide a familiar regulatory definition that has already been successfully implemented by many covered financial institutions. This definition would also capture a broad range of financial institutions to ensure an equal playing field. The CFPB seeks comment on its proposed approach to this definition.

2(c) Covered Transaction

Proposed § 1042.2(c) provides that ''covered transaction'' means an attempt by a consumer to withdraw, debit, pay,

[70] CFPA section 1031(b), 124 Stat. 2005–2006 (12 U.S.C. 5531(b)).

[71] *Id.*

[72] 12 U.S.C. 5531(d). For a more detailed discussion of the CFPB's authority under the abusive conduct prohibition, *see Statement of Policy Regarding Prohibition on Abusive Acts or Practices,* 88 FR 21883 (Apr. 12, 2023) (Abusive Policy Statement).

[73] *See, e.g.,* S. Rept. No. 111–176, at 172 (2010) (''Current law prohibits unfair or deceptive acts or practices. The addition of 'abusive' will ensure that the [CFPB] is empowered to cover practices where providers unreasonably take advantage of consumers.''); Public Law 111–203 pmbl. (listing, in the preamble to the CFPA, one of the purposes of the CFPA as ''protect[ing] consumers from abusive financial services practices'').

[74] The conduct that underlies an abusive conduct determination may also be found to be unfair or deceptive, depending on the circumstances.

[75] 12 U.S.C. 5512(b)(1).

[76] 12 U.S.C. 5481(14).

[77] 12 U.S.C. 5512(b)(2).

[78] 12 CFR 1005.2(b)(1).

[79] 12 CFR 1005.2(b)(3).

[80] 12 CFR 1005.2(b)(2).

[81] 12 CFR 1005.2(b)(1).

[82] *See* Comment 2(b)(2)–2; Comment 2(b)–2.i.

[83] Comment 2(b)–2.ii.

[84] Comment 2(b)–2.iii; for a general discussion of the ''account'' definition, *see* Consumer Fin. Prot. Bureau, *Interagency Consumer Laws and Regulations—Electronic Fund Transfer Act,* at 5 (Mar. 2019), *https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual_efta-exam-procedures-incl-remittances_2019-03.pdf.*

[85] 12 CFR 1005.2(i); 12 U.S.C. 5519; Public Law 111–203, 124 Stat. 1376, 2005 (2010).

[86] 12 CFR 1005.2(a).

[87] 12 CFR 1005.2(g), 1005.3.

or transfer funds from their account that is declined instantaneously or near-instantaneously by a covered financial institution due to insufficient funds. A declination occurs instantaneously or near-instantaneously when the transaction is processed in real time and there is no significant perceptible delay to the consumer when attempting the transaction. While consumers may attempt to withdraw, debit, pay, or transfer funds from their account in a variety of different ways, including by check, ACH, person-to-person (P2P) transaction, or debit card, this proposed definition would only cover transactions that are instantaneously or near-instantaneously declined due to insufficient funds. Transactions declined or rejected due to insufficient funds hours or days after the consumer's attempt would not be covered by the proposal. 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.

Based on this proposed definition, checks and ACH transactions would not be covered, assuming these payment mechanisms do not evolve in such a way that they are able to be declined instantaneously or near-instantaneously. Generally, a check is physically accepted by the merchant or payee, without payment authorization or guarantee, and is deposited in its bank and sent through the check clearing process to the payor's bank.[88] Checks usually clear within one or two business days.[89] Similarly, ACH transactions generally are not processed in real time—they are typically processed in batches several times a day when the applicable ACH operator (the Federal Reserve Bank or the Electronic Payments Network) is open for business.[90]

Based on this proposed definition, one-time debit card transactions that are not pre-authorized, ATM transactions, and certain P2P transactions would be covered by the proposal, assuming these payment mechanisms continue to be declined instantaneously or near-instantaneously. ATM and one-time debit card transactions that are subject to the requirements of Regulation E's opt-in requirements[91] are authorized instantaneously or near-instantaneously, and in the event of insufficient funds, are declined instantaneously or near-instantaneously.[92] Some debit card transactions are not authorized in real time—for example, decoupled debit card transactions are typically processed as ACH debits,[93] and most recurring debit card transactions are authorized in advance. Some P2P transactions are authorized in real time and may be declined instantaneously or near-instantaneously, whereas others are processed as ACH debits.[94] The applicability of the proposal to P2P transactions may also depend in part on whether the P2P provider offers a stored value account for funds or links to a deposit account, and on the evolution of P2P transaction mechanisms more generally.[95]

The CFPB solicits comment on the proposed definition of covered transaction, including whether: (1) the timing component is sufficiently clear to determine coverage; (2) the proposed definition appropriately accounts for emerging payment networks and technology innovations; and (3) the proposed definition captures the scope of relevant transactions where potential abusive practices are occurring in the market or are at risk of occurring in the future.

2(d) Insufficient Funds

Proposed § 1042.2(d) provides that ''insufficient funds'' refers to the status of an account that does not have enough money to cover a withdrawal, debit, payment, or transfer transaction. The CFPB preliminarily concludes that including this definition would streamline the rule by avoiding circular definitions. The CFPB seeks comment on its proposed approach to this definition.

2(e) Nonsufficient Funds Fee or NSF Fee

Proposed § 1042.2(e) provides that ''nonsufficient funds fee or NSF fee'' means a charge that is assessed by a covered financial institution for declining an attempt by a consumer to withdraw, debit, pay, or transfer funds from their account due to insufficient funds. This proposed definition also would clarify that the name used by the financial institution for a fee is not determinative of whether it is considered a ''nonsufficient funds fee.''

Unlike overdraft fees, which can also be charged in the event of insufficient funds, NSF fees as defined herein are only charged after a declined transaction. As a result, such fees may sometimes be referred to as ''declination'' fees or ''bounced check'' fees. The CFPB has also observed such fees labeled as, for example, ''returned item fees,''[96] ''returned payment fees,'' ''uncollected funds fees,'' ''overdraft—unpaid fees,'' and ''shortage of funds

[88] 76 FR 43394, 43400 (July 20, 2011).

[89] Off. of the Comptroller of the Currency, *I deposited a check. When will my funds be available/released from the hold?, HelpWithMyBank.gov, https://www.helpwithmybank.gov/help-topics/bank-accounts/funds-availability/funds-availability-check.html* (last visited Jan. 17, 2024).

[90] Nacha, *The ABCs of ACH, https://www.nacha.org/content/abcs-ach* (last visited Jan. 17, 2024).

[91] *See* 12 CFR 1005.17(b).

[92] This instantaneous (or near-instantaneous) authorization or declination occurs with debit card transactions that are ''single message'' (where the authorization request and the settlement request are sent in the same transmission at the same time) as well as ''dual message'' (where the first transmission requests authorization and the second transmission requests settlement)—in both cases, the authorization request is processed in real time.

[93] 76 FR 43394, 43408 (July 20, 2011).

[94] When a P2P transaction is processed as an ACH debit, the funds are often made immediately available to the recipient, but the sender may not instantly see the funds withdrawn from their linked account, as the sender's account-holding institution may take several days to settle the payment. In contrast, when a P2P transaction is processed as a credit card or debit card transaction, the funds are often made immediately available to the recipient and the sender may instantly see the funds withdrawn from their linked account, as the sender's account-holding institution authorizes and settles the transaction instantaneously or near-instantaneously.

[95] While some P2P providers merely facilitate transactions between linked deposit accounts, others allow users to hold funds within their P2P provider account. These providers automatically place funds received into the stored value account, and the consumer can transfer the funds into a linked deposit account or send the funds in a future P2P transaction. Attempts to send funds to another person from a stored value account may be declined instantaneously or near-instantaneously. In contrast, transfers from a stored value account to a linked deposit account that does not involve a debit card are typically ACH transactions taking between one and three business days, although some providers may offer an instantaneous or near-instantaneous transfer on those transactions (often for a fee). *See* Kate Rooney, *PayPal users can now transfer funds instantly to their bank accounts,* CNBC (Mar. 12, 2019), *https://www.cnbc.com/2019/03/12/venmo-users-can-now-transfer-funds-instantly-to-their-bank-accounts.html.* P2P transactions are continuing to increase in speed due to technology and payment network infrastructure advances, including, recently, the launch of the FedNow Service. *See* U.S. Dep't of Treas., *The Future of Money and Payments,* at 30–31 (Sept. 2022), *https://home.treasury.gov/system/files/136/Future-of-Money-and-Payments.pdf;* Fed Rsrv. Bank Servs., *Instant payments could help financial institutions capture a piece of the P2P pie,* FRBservices.org, *https://www.frbservices.org/financial-services/fednow/instant-payments-education/instant-payments-could-help-fi-capture-p2p.html.*

[96] ''Returned item'' NSF fees are charged to the consumer's account when dishonoring or returning checks or other items that are drawn on the consumer's account due to insufficient funds. These fees are distinct from ''returned deposited item fees'' that are imposed when items deposited by the consumer are returned due to insufficient funds in the *check originator's* account. *See* 12 CFR 1030.11(a)(1); Comment 11(a)(1)–2. This proposal does not address whether returned deposited item fees are an abusive practice. The CFPB's ''Bulletin 2022–06: Unfair Returned Deposited Item Fee Assessment Practices'' addressed potential unfairness concerns with returned deposited item fees. *See* 87 FR 66940 (Nov. 7, 2022).

fees.'' This proposed definition broadly includes the types of fees that, if charged, would in substance constitute an abusive practice, regardless of how the fees are labeled. The CFPB seeks comment on its proposed approach to this definition. The CFPB also solicits comments on its examples of fee labels.

Abusive Conduct/Lack of Understanding (§§ 1042.2 and 1042.3)

The CFPB's preliminary findings regarding covered financial institutions' abusive charging of NSF fees in connection with covered transactions are discussed below. The CFPB is making these preliminary findings based on the evidence discussed in the abusive conduct analysis below and in the section-by-section analysis and Background discussion above.

Under CFPA section 1031(d)(2)(A), the CFPB may declare an act or practice to be abusive in connection with the provision of a consumer financial product or service if the act or practice takes unreasonable advantage of a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service.[97] The CFPB is preliminarily determining that charging an NSF fee in connection with a covered transaction would take unreasonable advantage of consumers' lack understanding of the material risks, costs, or conditions associated with their deposit accounts, and thus would be abusive.

The CFPB understands, based on its market monitoring, that currently covered financial institutions rarely charge NSF fees on covered transactions.[98] The CFPB is proposing this rule primarily as a preventive measure.[99] Financial institutions have ongoing incentives to generate revenue, and NSF fees may become increasingly appealing as a revenue source in the absence of this proposal. For example, if the recently released Overdraft Proposed Rule [100] is finalized and curbs overdraft fee revenue, institutions might have an incentive to impose new fees. This proposal, if finalized, would prevent the imposition of NSF fees in various contexts where they might foreseeably arise, such as declines of ATM, debit card, and P2P transactions.[101] Thus, the CFPB is proposing to preempt imposition of new fees that would harm consumers in the future.

The CFPB considered whether a disclosure remedy to the preliminarily identified abusive practice would be sufficient, and has preliminarily determined that although such a remedy might reduce the incidence of the abusive conduct, it would not eliminate it and would likely be too costly or not feasible in many or most situations. Theoretically, a financial institution could present a disclosure when the transaction is attempted, explaining that the transaction would be declined and a fee would be charged. However, the CFPB is skeptical that such a disclosure would be feasible because the financial institution is often not the party operating the point-of-sale terminal, ATM machine, or P2P application interface. If it were feasible, it would likely be costly to present individual disclosures for each such transaction and implement such disclosures across many different payment channels and consumer interfaces. And a disclosure of that nature would not eliminate the incidence of the abusive practice because there would still be consumers who may not understand even a well-crafted disclosure.[102]

The CFPB seeks comment on whether the practices identified in this proposal are broad enough to address the potential consumer harms and if the description of the preliminarily identified abusive practice should be revised in any way, and requests any relevant additional data that should be considered.

Approaches to Abusive Conduct Prohibition in Prior CFPB Rulemakings

Before describing the reasoning behind the CFPB's preliminary conclusion that it would be an abusive practice for covered financial institutions to charge NSF fees on covered transactions, the CFPB first discusses the approach taken to assess abusive practices in prior rulemakings. Under CFPA section 1031(d)(2)(A), an act or practice can be abusive if covered parties take unreasonable advantage of the ''lack of understanding on the part of consumers of the material costs, risks, or conditions of the product or service.'' The CFPB's 2017 rulemaking on Payday, Vehicle Title, and Certain High-Cost Installment Loans (2017 rule) stated that consumers lack understanding in the context of obtaining certain types of small-dollar loans ''if they fail to understand either their personal likelihood of being exposed to the risks of the product or service in question or the severity of the kinds of costs and harms that may occur.'' [103] This conclusion was part of the 2017 rule's larger set of findings that a lender's failure to determine whether a consumer had the ability to repay a covered loan was abusive and unfair. In a separate 2020 rulemaking, the CFPB rescinded certain provisions of the 2017 rule's UDAAP findings as well as the 2017 rule's mandatory underwriting provisions (2020 rule).[104]

In explaining the rationales for rescission, the 2020 rule's preamble included certain statements about the abusive conduct prohibition. However, these rationales were specific to and inextricably intertwined with the evidentiary record and financial products at issue in the 2017 rule. Accordingly, the 2020 rule's discussion of the abusive conduct prohibition was

[97] 12 U.S.C. 5531(d)(2)(A).

[98] The CFPB and other regulators have taken action in other ways to address harms from NSF fees that are prevalent in today's market. Some of those actions are described elsewhere in this proposal's preamble. Along those lines, the CFPB notes that the CFPB's proposal addressing overdraft fees (Overdraft Proposed Rule), which was released recently, would amend Regulation Z such that, going forward, § 1026.52(b) would apply to open-end covered overdraft credit that can be accessed by a hybrid debit-credit card. In doing so, the Overdraft Proposed Rule would prohibit any fee imposed with respect to most potentially overdrawing transactions that a card issuer declines to authorize, including certain declined debit card transactions and declined ACH transactions. Thus, the Overdraft Proposed Rule, if finalized, would prohibit certain NSF fees charged in today's market under the CFPB's TILA authority, but it generally would not prohibit the NSF fees that this proposal, if finalized, would prohibit.

[99] *See* 12 U.S.C. 5511(b) (CFPB's statutory objective under the CFPA of ''ensuring that . . . consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination''). *See also Nasdaq Stock Mkt. LLC* v. *SEC,* 38 F.4th 1126 (D.C. Cir. 2022) (''[A]n agency has the latitude to 'adopt prophylactic rules to prevent potential problems before they arise'—that is, '[a]n agency need not suffer the flood before building the levee.' '') (quoting *Stilwell* v. *Off. of Thrift Supervision,* 569 F.3d 514, 519 (D.C. Cir. 2009)).

[100] *See* Consumer Fin. Prot. Bureau, *Overdraft Lending: Very Large Financial Institutions, Proposed Rule* (released Jan. 17, 2024), *https://files.consumerfinance.gov/f/documents/cfpb_overdraft-credit-very-large-financial-institutions_proposed-rule_2024-01.pdf.*

[101] As described in the Background discussion above, P2P transaction platforms are a fast-growing segment of the market, and this trend is only expected to accelerate over the next few years, so the CFPB proposes to forestall the imposition of such fees in that market segment.

[102] If covered financial institutions began assessing NSF fees on covered transactions in the future, it is theoretically possible for consumer understanding of the financial institutions' practices to improve due to other factors. For example, some consumers who do not anticipate an initial NSF fee may be less surprised after incurring multiple NSF fees. However, as with a disclosure, such improved understanding would only reduce, and not eliminate, the incidence of the abusive practice. Such a development also would likely only improve understanding of financial institutions' practices, not understanding of the consumer's account balance at the time the covered transaction is initiated (see discussion below regarding ''risks, costs, or conditions'').

[103] 85 FR 44382, 44421 (July 22, 2020) (internal quotations omitted) (citing 82 FR 54472, 54617 (Nov. 17, 2017)).

[104] *Id.* at 44382.

likewise limited and did not address facts and circumstances other than those at issue in the 2020 rule (which, again, was inextricably linked to the 2017 rule's evidentiary record and product coverage).[105] The 2020 rule does not, for example, address factual situations where a lender exploits an information asymmetry between a lender and a consumer about the level of risk posed to the consumer by the product or service.[106]

Thus, as a general matter, the preamble in the 2020 rule does not constrain the CFPB's authority to enforce, supervise, or regulate under the full scope of the CFPA's abusive conduct prohibition in other rules or in individual supervisory or enforcement matters. As the 2020 rule's preamble itself explained, the 2020 rule ''addresses the legal and evidentiary bases for particular rule provisions identified in [the 2020] rule. It does not prevent the [CFPB] from exercising tool choices, such as appropriate exercise of supervision and enforcement tools, consistent with the [CFPA] and other applicable laws and regulations.'' [107] The 2020 rule also explained that it ''does not prevent the [CFPB] from exercising its judgment in light of factual, legal, and policy factors in particular circumstances as to whether an act or practice meets the standards for abusiveness under section 1031 of the [CFPA].'' [108]

Nevertheless, out of an abundance of caution and to correct any possible misimpressions that the 2020 rule's preamble set forth interpretive limits on the CFPB's authority under the abusive conduct prohibition that the agency must follow in other contexts, the CFPB hereby proposes to clarify the interpretation of the abusive conduct prohibition in the context of the 2020 rule, consistent with the analysis below. The CFPB also requests comment on whether there are other aspects of the 2020 rule's discussion of the abusive and unfair conduct prohibitions that warrant clarification.

Conflation of lack-of-understanding and reasonable-avoidability standards. The 2020 rule stated that the 2017 rule's lack-of-understanding standard was ''problematic'' and ''too broad,'' [109] and instead ''should be treated as similar'' to the reasonable-avoidability element of unfairness.[110] The 2020 rule stated that, for purposes of unfairness, consumers could reasonably avoid injury if they ''have an understanding . . . sufficient for them to anticipate [the] harms and understand the necessity of taking reasonable steps to prevent resulting injury.'' [111] It used a nearly identical approach to lack of understanding, stating that consumers have a sufficient understanding under section 1031(d)(2)(A) if their understanding is ''sufficient . . . to anticipate [the] harm and understand the necessity of taking reasonable steps to prevent resulting injury.'' [112]

These preamble statements reflect an overly narrow application of the statutory text for lack of understanding. With respect to the abusive conduct prohibition generally, it is worth noting that, unlike the CFPA's unfairness provision, the statutory text for the abusive conduct prohibition does not require any inquiry into reasonable avoidability.[113] Although the CFPB preliminarily finds that consumers' lack of understanding that they would be charged an NSF fee for covered transactions is generally reasonable, as discussed below, the statute does not require that the lack of understanding was reasonable to demonstrate abusive conduct.[114] The 2020 rule also did not specify why, in spite of the differences between the standards, it was ''appropriate'' to treat reasonable avoidability and lack of understanding as ''similar but distinct.'' [115]

Conflating the two standards in this manner contravenes the context and purpose of the abusive conduct prohibition and the statutory text. Congress passed the prohibition after the 2008 mortgage crisis, recognizing that the unfairness and deception prohibitions were insufficient to prevent predatory mortgage lending.[116] The abusive conduct prohibition was explicitly added as a new standard of fair dealing, and clearly was not intended to simply mirror unfairness.[117] Moreover, although a consumer's lack of understanding might, depending on the facts, contribute to a consumer being unable to reasonably avoid substantial injury, nothing in CFPA section 1031(d)(2)(A)'s text supports interpreting the provision to track the reasonable-avoidability standard. Rather, under the statute the inquiry is whether the consumers at issue lack understanding of the risks, costs, or conditions of a product or service and

[105] For example, both the ''Legal'' and ''Reconsidering the Evidence'' subsections of the 2020 rule's lack-of-understanding analysis rely heavily on the conclusion that a study of payday borrowers' ability to predict future time in debt by Professor Ronald Mann was insufficient to underpin the 2017 rule's lack-of-understanding findings. *See id.* at 44422 (describing how ''[a]lthough the [2017 rule] concluded that a significant population of consumers do not understand the material risks and costs of covered loans, the [2017 rule] extrapolated or inferred this conclusion from the [CFPB]'s interpretation of limited data from the Mann study . . . [t]he limited data from the Mann study does not address whether consumers lack understanding of the material costs, risks, or conditions of covered loans''), and *id.* at 44423 (stating, in reiterating the language from the proposed rule preceding the 2020 rule (2019 proposal), that ''the Mann study was not sufficiently robust and reliable in light of'' the 2017 rule's anticipated impacts on the market and how the Mann study was the ''linchpin'' of the 2017 rule's lack-of-understanding finding).

[106] As the Abusive Policy Statement described, certain ''gaps in understanding'' between a consumer and an entity can ''create circumstances where transactions are exploitative.'' *See* Abusive Policy Statement at 21886–87.

[107] 85 FR 44382, 44415 n.286 (July 22, 2020).

[108] *Id.*

[109] *Id.*

[110] 85 FR 44382, 44422 (July 22, 2020).

[111] *Id.* at 44394.

[112] *Id.* at 44422.

[113] *Compare* 12 U.S.C. 5531(c)(1)(A), *with* 12 U.S.C. 5531(d)(2)(A).

[114] Section 1031(d)(2)(A) refers to ''lack of understanding'' without a qualifier, whereas other UDAAP authority provisions in section 1031 expressly include a reasonableness qualifier. *Compare* 12 U.S.C. 5531(d)(2)(A), *with* 12 U.S.C. 5531(d)(2)(C) (making reference to ''reasonable'' reliance''), *and* 12 U.S.C. 5531(c)(1)(A) (for purposes of the unfairness test, substantial injury must not be ''reasonably'' avoidable). *See also DHS* v. *MacLean,* 574 U.S. 383, 392 (2015) (describing how ''Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another'' and the ''interpretive canon that Congress acts intentionally when it omits language included elsewhere applies with particular force'' where the phrases being compared are in close proximity).

[115] 85 FR 44382, 44422–23 (July 22, 2020). The 2020 rule merely repeated the 2019 proposal's language that ''unlike the elements of unfairness . . . the elements of [the abusive conduct prohibition] do not have a long history or governing precedents. Rather, the CFPA marked the first time that Congress defined 'abusive acts or practices' as generally unlawful in the consumer financial services sphere.'' *Id.* at 44421–22. The 2020 rule then stated that, ''[f]or the same reasons that . . . there was an insufficient basis to support the 2017 [rule's] finding that substantial injury from the identified practice was not reasonably avoidable . . . there is an insufficient basis to conclude that consumers lack understanding of the material risks, costs or conditions.'' *Id.* at 44422.

[116] *See generally* Abusive Policy Statement (discussing background and legislative history regarding CFPB's authority to address abusive conduct); *see also* 86 FR 14808, 14809 (Mar. 19, 2021) (in rescinding an earlier policy statement issued by the CFPB in 2020 on the abusive conduct prohibition, CFPB reasoned, in part, that ''[d]eclining to apply the full scope of the statutory standard pursuant to the policy has a negative effect on the [CFPB's] ability to achieve its statutory objective of protecting consumers from abusive practices'').

[117] As the 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 ''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.*

whether the company took unreasonable advantage of that lack of understanding—not whether, as noted above, the lack of understanding was reasonable.[118] Lastly, the 2020 rule itself in various passages acknowledged these textual differences and recognized how they lead to different contours of authority, which undermines the 2020 rule's attempt to tether the two standards.[119] Accordingly, the CFPB proposes to clarify that lack of understanding under CFPA section 1031(d)(2)(A) is not synonymous with reasonable avoidability under the unfairness standard.

Magnitude and likelihood of risk of harm. The 2020 rule stated that consumers have ''sufficient understanding'' of the material costs, risks, or conditions of small-dollar loans if they understand ''the magnitude and likelihood of risk of harm associated with the [product or service], as well as the necessity of taking reasonable steps to prevent resulting injury.'' [120] ''Magnitude and likelihood of risk of harm'' is a reasonable articulation of the standard for understanding certain ''risks'' that implicate prediction of future outcomes, especially in relation to loan underwriting. However, that is not the full scope of the potential risks under CFPA section 1031(d)(2)(A). As the CFPB's Statement of Policy Regarding Prohibition on Abusive Acts or Practices (Abusive Policy Statement) noted, the risks of which a consumer lacks understanding ''encompass a wide range of potential consumer harms.'' [121]

The CFPB proposes to clarify that the 2020 rule's focus on ''magnitude'' and ''likelihood'' of risk of harm was an application of what it means under the statute to understand ''risks,'' not necessarily ''costs'' or ''conditions.'' The statutory references to ''costs'' and ''conditions'' are textually disjunctive and can be conceptually distinct from ''risks'' and from each other. Where consumers lack understanding of the relevant costs or conditions, the notion of ''likelihood and magnitude of harm'' may have no bearing on the lack-of-understanding analysis. For example, it is enough to show that a company takes unreasonable advantage of the fact that consumers do not know a fee (''cost'') will be charged in a particular circumstance, even if consumers have some understanding of the ''risk'' that a fee might sometimes be charged. See below for a discussion of what risks, costs, and conditions mean in the particular context of this proposal.

Specific vs. general understanding. The 2020 rule took issue with the conclusion in the 2017 rule that consumers in the small-dollar lending market lack understanding or cannot reasonably avoid harm under the unfairness standard if they do not have a ''specific understanding of their personal risks such that they can accurately predict how long they will be in debt after taking out'' a covered loan.[122] The 2020 rule stated, rather, that ''consumers need not have a specific understanding of their individualized likelihood and magnitude of harm such that they could accurately predict how long they would be in debt after taking out'' a payday loan and that the appropriate analysis was whether consumers ''have an understanding of the likelihood and magnitude of risks of harm associated with payday loans sufficient for them to anticipate those harms.'' [123] According to the 2020 rule, this means that ''consumers need only understand that a significant portion of payday borrowers experience difficulty repaying,'' which the 2020 rule described as a ''generalized'' or ''general'' understanding.[124] The 2020 rule applied this distinction between ''specific'' and ''general'' consumer understanding both to the lack-of-understanding element of the abusive conduct prohibition, and to the reasonable-avoidability element of unfairness. Because the 2020 rule linked the unfair and abusive conduct prohibitions, the following discussion applies to the interpretation of both prohibitions.

The CFPB preliminarily declines to characterize consumers' lack of understanding in this proposal as either ''specific'' or ''general'' because that binary framework 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. 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 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.

Furthermore, to the extent that the 2020 rule could be misconstrued to suggest that analysis of the abusive conduct prohibition *requires* an inquiry into a consumer's so-called general understanding of risk, the CFPB is clarifying that is a misimpression for the reasons described below. Consumers' understanding of risk, and specifically, their anticipation of harm can be informed by a variety of factors, including personal circumstances. As noted above, those factors sometimes include general perception of risk in the market: if one knows that many are harmed or that the magnitude of harm is high, they are more likely to understand that they are likely to be harmed. But, in many circumstances, consumers would not have an accurate general understanding of risk in the market because, for example, either (1) they cannot observe harm to other consumers, or (2) even if they could, they would have no way of knowing whether those consumers are similarly situated to them. For example, in the deposit market, consumers cannot observe the frequency with which similarly situated consumers incur NSF fees. A consumer's understanding of the

[118] The Abusive Policy Statement noted that although establishing that a reasonable consumer would lack understanding of the material risks, costs, or conditions of a product or service is not a prerequisite to establishing liability under CFPA section 1031(d)(2)(A), government enforcers or supervisory agencies may rely on the fact that a reasonable consumer would lack such understanding to establish that consumers did not have such understanding. *See* Abusive Policy Statement at 21887 n.55.

[119] For example, as noted above the 2020 rule acknowledged that the reasonable-avoidability and lack-of-understanding standards were ''similar but distinct.'' 85 FR 44382, 44423 (July 22, 2020). It also acknowledged that the reasonable-avoidability standard ''has a 'means to avoid' requirement that is absent from the abusiveness standard,'' and ''abusiveness could prohibit some conduct that unfairness would permit.'' *Id.* And it stated that ''[t]he [CFPB] believes that Congress intended for the statutory phrase 'abusive acts or practices' to encompass conduct by covered persons that is beyond what would be prohibited as unfair or deceptive . . . although such conduct could overlap and thus satisfy the elements for more than one of the standards.'' *Id.* at 44416.

[120] *Id.* at 44422. The 2020 rule went on to explain that ''sufficient understanding'' as applied in the context of the 2017 rule meant that consumers need only ''understand that a significant portion of payday borrowers experience difficulty repaying and that if such borrowers do not make other reasonable arrangements they may either end up in extended loan sequences, default, or struggle to pay other bills after repaying their payday loan.'' *Id.* at 44395. The 2020 rule elaborated that, ''if consumers understand that a significant portion of payday borrowers experience adverse outcomes, they grasp the likelihood of risk,'' and that if consumers ''understand the potential outcomes arising from difficulty repaying, they appreciate the magnitude of those risks.'' *Id.*

[121] *See* Abusive Policy Statement at 21887.

[122] 85 FR 44382, 44422 (July 22, 2020). *See also id.* at 44390 (in context of the reasonable-avoidability analysis, which the 2020 rule relied on for the lack-of-understanding analysis, describing the 2017 rule as requiring that consumers have a ''*specific* understanding of their *individualized* risk, as determined by their ability to accurately predict how long they would be in debt after taking out a covered short-term or longer-term balloon-payment loan'').

[123] 85 FR 44382, 44390–91 (July 22, 2020).

[124] *Id.* at 44391.

experience of their peers or general risk in the market may sometimes not accurately inform their understanding of the likelihood of incurring NSF fees generally or in connection with a particular transaction.[125] A consumer's lack of awareness of general risk in the market also may not mean that the consumer necessarily lacks understanding of the risk of using a product or service.

A consumer's general understanding of risk may not always be the sole relevant inquiry for purposes of ascertaining consumer understanding of risk of the likelihood or magnitude of harm. As stated earlier, a consumer's lack of understanding can be based on specific understanding or general understanding, or a mixture of both, and each can inform one another. Congress enacted the abusive conduct prohibition largely in response to the circumstances leading up to the 2008 financial crisis, where consumers may have *generally* understood the possibility of loan default and its consequences but lacked understanding of the specific, *individualized* risks set-up-to-fail mortgages posed to themselves.

Regarding unfairness, long-existing precedent in part frames the reasonable-avoidability analysis through the lens of a consumer's understanding of their own circumstances. For example, the D.C. Circuit described the reasonable-avoidability analysis in the FTC's Credit Practices Rule, in part, in the following manner: ''Since consumers do not expect to default, the invocation of particular credit remedies seems remote and speculative at the time of contracting and thus is not a material element in the consumer's decision. Instead, consumers quite reasonably focus their attention on the more immediate terms such as interest rates and payments.'' [126] This discussion of the conditions relevant to how consumers comprehend contract terms relates to consumers' understanding of their own risk of default. Similarly, in addressing an FTC action against a website operator that allowed users to create unverified checks drawn from unauthorized accounts, the Ninth Circuit discussed individual consumer circumstances that were relevant to the reasonable-avoidability analysis, including how it is ''likely that some consumers never noticed the unauthorized withdrawals.'' [127] While this precedent relates to the prohibition on unfair rather than abusive conduct, the long history and precedent regarding the standards of fair dealing in part inform how the CFPB interprets the abusive conduct prohibition.

Material Risks, Costs or Conditions of the Product or Service

As stated above and explained more fully below, the CFPB has 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. As explained in the preamble discussing proposed § 1042.2(c), a covered transaction means a request 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. The CFPB considers the account that is associated with a covered transaction to be a ''product or service,'' under CFPA section 1031(d)(2)(A).[128]

In view of CFPA section 1031(d)(2)(A)'s disjunctive formulation of ''material risks, costs, or conditions,'' an act or practice is abusive if it takes unreasonable advantage of the consumer's lack of understanding of at least one material risk, cost, or condition. In the circumstances addressed by this proposal, a lack of understanding of all three elements would be present for at least some consumers, and consumers would generally lack understanding of at least one element, as explained in the next subsection.[129]

As used in section 1031(d)(2)(A), ''risks'' is an expansive term.[130] At the time a consumer considers initiating a request to withdraw, debit, pay, or transfer funds from their account, the relevant risks to the consumer would include the possibility the transaction will be declined and result in an NSF fee. Furthermore, once a consumer actually initiates a covered transaction, it is certain that the transaction will be instantaneously declined and they will be charged a fee; therefore, the likelihood of harm at that time is 100 percent. This is because no chance occurrence, consumer choice, or other intervening event can happen between the transaction's initiation and the instantaneous decline that could change the harmful outcome (*i.e.,* the assessment of the fee). In other words, for covered transactions that are initiated, the risk of harm is a certainty. Therefore, a consumer who initiates such a transaction believing the transaction nevertheless might go through would lack understanding of the likelihood of harm. Given the tangible and negative consequences of both a transaction decline and the imposition of a fee, the CFPB interprets this risk, if and when present, to be material.

The ''costs'' associated with a covered transaction that would result in an NSF fee would primarily be the amount of the fee itself.[131] NSF fees that are charged in today's market are usually approximately $32 and typically are assessed on a per-transaction basis.[132] Even if NSF fees assessed on covered transactions were significantly lower than $32, they would still be material because they would be non-trivial to the consumer and would be paid without any service being received. The personal magnitude of this cost might be exacerbated by the fact that it could occur when the consumer's bank

[125] In theory, financial institutions could provide these types of disclosures at deposit account opening or before consumers initiate a transaction. However, account opening disclosures of this sort would likely have limited salience because at that moment in time, consumers are not focused on the possibility that they will incur a funds insufficiency in the future and on the consequences of doing so. *See Am. Fin. Servs. Ass'n* v. *FTC,* 767 F.2d 957, 978 (D.C. Cir. 1985) (*AFSA*). Moreover, as discussed above, providing a disclosure prior to the transaction might reduce the incidence of abusive conduct but would not eliminate it, and would likely be too costly or infeasible in most instances.

[126] *AFSA,* 767 F.2d at 978.

[127] *FTC* v. *Neovi, Inc.,* 604 F.3d 1150, 1158 (9th Cir. 2010) (internal citation omitted).

[128] *See* 12 U.S.C. 5531(d)(2)(A).

[129] As the Abusive Policy Statement explains, ''The inquiry under section 1031(d)(2)(A) is whether some consumers in question have a lack of understanding, not all consumers or even most consumers.'' Abusive Policy Statement at 21888. Because the CFPB does not believe that any consumer would knowingly incur a fee for no service, the lack of understanding would be general in regard to NSF fees charged for covered transactions, though the specific elements that are not understood—risks, costs, or conditions—may differ from consumer to consumer.

[130] As noted in the Abusive Policy Statement, risks can encompass a wide range of potential consumer harms. *See id.* at 21887. Merriam-Webster Dictionary Online defines ''risk'' as the ''possibility of loss or injury.'' *See Risk, Merriam-Webster.com* Dictionary, *https://www.merriam-webster.com/dictionary/risk* (last visited Jan. 17, 2024).

[131] As the CFPB explained in the Abusive Policy Statement, ''costs'' can include any monetary charge to a person as well as non-monetary costs such as lost time, loss of use, or reputational harm. *See* Abusive Policy Statement at 21886; *see also, e.g., Fort Knox Nat'l Co.,* File No. 2015–CFPB–0008, at 8 (Apr. 20, 2015) (entities took unreasonable advantage of consumers' lack of understanding by charging fees that they ''did not adequately disclose''); Consumer Fin. Prot. Bureau, *Supervisory Highlights, Issue 28, Fall 2022,* at 22 (Nov. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-28_2022-11.pdf* (CFPB Fall 2022 Highlights) (mortgage servicers took unreasonable advantage of consumers' lack of understanding when they profited from insufficiently disclosed phone-payment fees that were materially greater than the cost of other payment options).

[132] As discussed in part I (Background discussion), the CFPB recently found that the median fee among institutions above $10 billion in assets that still charge the fee is $32.

account would be empty or close to empty.

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.[133] Given how the conditions of the account would relate to the financial institution's imposition of NSF fees (whether, when, and how much), the CFPB would interpret these conditions as material.

The following subsection explains more fully the CFPB's preliminary finding that a consumer would lack understanding of the material risks, costs, or conditions of the account if a covered transaction were to take place.

Lack of Understanding on the Part of the Consumer

As the CFPB's Abusive Policy Statement explains, the prohibition in CFPA section 1031(d)(2)(A) turns on a consumer's lack of understanding, regardless of how that lack of understanding arose.[134] Although consumers' lack of understanding that they will be charged an NSF fee in the circumstances addressed in this proposal is generally reasonable, the statutory text of the prohibition does not require a finding that the consumer's lack of understanding was reasonable to demonstrate abusive conduct.[135] In addition, as the Abusive Policy Statement notes, the statutory text does not require that the covered financial institution caused the person's lack of understanding through untruthful statements or other actions or omissions.[136]

The CFPB preliminarily finds that a consumer who would be charged an NSF fee on a covered transaction would lack understanding of their account's material risks, costs or conditions at the time they initiated that transaction. Drawing on its experience and expertise regarding consumer behavior, the CFPB believes that if a transaction entails material risks or costs and consumers derive minimal or no benefit from the transaction, it is generally reasonable to conclude that consumers who nonetheless went ahead with the transaction did not understand the material risks, costs or the conditions giving rise to those risks or costs.[137] In this instance, such a transaction would provide no benefit to consumers, but consumers would incur a material cost or risk. Consequently, consumers would be paying something or taking a risk but receiving nothing in return. Therefore, the CFPB preliminarily concludes that consumers initiating covered transactions that incur NSF fees would generally lack awareness of their available account balance or other information about the material risks, costs, or conditions regarding their account. Indeed, if a consumer knew at the time of initiating a specific payment, debit, transfer, or withdrawal that they did not have enough funds to cover the transaction and an NSF fee would be charged, that consumer would likely either use a different payment method that would not result in such a fee or would postpone or forgo the transaction.

As explained further below, the CFPB also preliminarily concludes that there are a variety of specific reasons why consumers generally, or certain consumers individually, would lack understanding of the material risks, costs, or conditions when initiating a covered transaction. First, consumers' usage of deposit accounts has changed due to the advent and increased importance of debit cards during the past several decades.[138] The rise in debit card usage for small transactions resulted in increased transaction activity on the account for consumers' individual purchases.[139] These more frequent transactions might make it harder for some consumers to track their available funds. Although most consumers can now see a version of their account balance electronically through a mobile application, older consumers are far less likely to access their accounts through mobile apps,[140] and approximately 15 percent of Americans do not own a smartphone.[141] Even if consumers can access their account balance, the number displayed

[133] The Abusive Policy Statement explains that ''[g]aps in understanding with respect to 'conditions' include any circumstance, context, or attribute of a product or service, whether express or implicit. For example, 'conditions' could include the length of time it would take a person to realize the benefits of a financial product or service, the relationship between the entity and the consumer's creditors, the fact a debt is not legally enforceable, or the processes that determine when fees will be assessed.'' *See* Abusive Policy Statement at 21887.

[134] *See id.*

[135] As noted above in the discussion of the CFPB's approach to the abusive conduct prohibition in prior rulemakings, CFPA section 1031(d)(2)(A) refers to ''lack of understanding'' without a qualifier, whereas other UDAAP authority provisions in CFPA section 1031 expressly include a reasonableness qualifier.

[136] *See* Abusive Policy Statement at 21887 (''While acts or omissions by an entity can be relevant in determining whether people lack understanding, the prohibition in section 1031(d)(2)(A) does not require that the entity caused the person's lack of understanding through untruthful statements or other actions or omissions. Under the text of section 1031(d)(2)(A), the consumer's lack of understanding, regardless of how it arose, is sufficient.'').

[137] *See id.* at 21888.

[138] From cashiers physically imprinting card details on paper to internet-connected swipe terminals, the way consumers pay for goods and services has evolved significantly over the last half-century, and in turn, computing and telecommunication technologies have enabled the use of modern payment cards by consumers. In 1970, 16 percent of American families had a credit card; by 1983, that figure increased to 43 percent. By 2020, 72 percent of Americans had a credit card and 83 percent of Americans had a debit card. *See* Consumer Fin. Prot. Bureau, *Issue Spotlight: Big Tech's Role in Contactless Payments: Analysis of Mobile Device Operating Systems and Tap-to-Pay Practices* (Sept. 7, 2023), *https://www.consumerfinance.gov/data-research/research-reports/big-techs-role-in-contactless-payments-analysis-of-mobile-device-operating-systems-and-tap-to-pay-practices/full-report/.* The 2020 Survey of Consumer Payment Choice states: ''In a typical month in 2020, consumers on average made 23 debit card payments (33 percent of all payments), 18 credit or charge payments (27 percent), and 14 cash payments (21 percent). Consumers made three check payments per month on average in 2020, and eight [non-debit card] payments directly from a bank account . . . Checks were 4 percent of all payments, and electronic payments were 11 percent.'' Kevin Foster et al., Fed. Rsrv. Bank of Atlanta, *The 2020 Survey of Consumer Payment Choice: Summary Results,* at 15 (2021), *https://www.atlantafed.org/-/media/documents/banking/consumer-payments/survey-of-consumer-payment-choice/2020/2020-survey-of-consumer-payment-choice.pdf* (internal citation omitted). *While all types of card payments have increased,* it is the increased usage of debit cards that primarily affects consumer deposit accounts because credit or charge card payments do not directly or instantaneously debit these accounts.

[139] *See id. See also* Bd. of Governors of the Fed. Rsrv. Sys., *The 2013 Federal Reserve Payments Study Recent and Long-Term Trends in the United States: 2000–2012 (2012 Summary Report and Initial Data Release),* at 9 ex. 2 (July 2014), *https://www.frbservices.org/assets/news/research/2013-fed-res-paymt-study-summary-rpt.pdf* (showing the average debit card transaction ranged from $37 to $40 from 2003–2012, while the average check transaction ranged from $1,103 to $1,410), *https://www.frbservices.org/binaries/content/assets/crsocms/news/research/2013-fed-res-paymt-study-summary-rpt.pdf;* Bd. of Governors of the Fed. Rsrv. Sys., *Trends in the Use of Payment Instruments in the United States,* Fed. Rsrv. Bull., at 183–4, 187 tbl. 3, 196–97 (Spring 2005), *https://www.federalreserve.gov/pubs/bulletin/2005/spring05_payment.pdf (discussing and demonstrating the growth in debit card payments, which accounted for more than half the growth in electronic payments over the review period);* Maria LaMagna, *Debit Cards Gaining on Cash for Smallest Purchases,* MarketWatch (Mar. 23, 2016), *https://www.marketwatch.com/story/more-people-are-using-debit-cards-to-buy-a-pack-of-gum-2016-03-23* (describing industry analyst's take that, ''[A]s more locations accept credit and debit cards, more consumers are viewing plastic as a more convenient option than refilling their wallets with cash from an ATM''). *See generally* Bd. of Governors of the Fed. Rsrv. Sys., *Federal Reserve Payments Study (FRPS): Previous Studies, https://www.federalreserve.gov/paymentsystems/frps_previous.htm* (last updated Apr. 21, 2023) (The Federal Reserve Payments Studies from 2004 to 2013 (Exhibit 1 in each study) show that from 2000 to 2012, annual debit card transactions increased from 8.3 billion to 47 billion, while annual check transactions decreased from 41.9 billion to billion to 18.3 billion.).

[140] *FDIC 2021 Survey* at 26.

[141] Pew Rsrch. Ctr., *Mobile Fact Sheet* (Apr. 7, 2021), *https://www.pewresearch.org/internet/fact-sheet/mobile/.*

may not reflect what is available when the transaction takes place.[142] Furthermore, some consumers with smartphones might forgo checking their balance before initiating a covered transaction for a variety of reasons, including the rapidity of these transactions (see below) and discomfort with pulling up account information in a public location or using public Wi-Fi. And while ATM users can check their balance on the screen, some consumers may want to avoid incurring a fee to do so (particularly at an out-of-network ATM).

Second, certain account features and settlement practices that are unknown, complex, or counterintuitive make it challenging for consumers to understand whether they have the funds available for a transaction at a given time, or how that transaction would be handled. These complications make it difficult for consumers to understand the material risks, costs, or conditions when initiating a covered transaction. One example would be when a consumer has opted into overdraft coverage on ATM or one-time debit card transactions and expects the financial institution to pay a transaction into overdraft, but the institution instead denies overdraft coverage and charges an NSF fee, possibly because the consumer unknowingly exceeded the overdraft coverage limit that the financial institution had set for that particular customer.[143] An analysis of supervisory data on NSF practices at eight very large financial institutions suggests that 84.3 percent of NSF fees were assessed on accounts with overdraft coverage in 2022.[144] Other examples that could cause a lack of understanding of the material risks, costs or conditions of a consumer's account would be if the consumer were unaware of whether scheduled transactions, checks, or other non-instantaneous withdrawals had settled, or whether or not recent deposits had become fully available.[145]

Third, some consumers would not understand that it is even possible to overdraw their accounts with ATM or debit cards, or with a P2P transaction—in contrast to other payment methods such as checks and ACH transactions. As the Board explained in the 2009 Opt-in Rule, ''many consumers may not be aware that they are able to overdraft at an ATM or [point of sale]'' and ''[d]ebit cards have been promoted as budgeting tools, and a means for consumers to pay for goods and services without incurring additional debt.'' [146] Even following implementation of the 2009 Opt-in Rule, consumers have experienced confusion about whether their cards could overdraw their accounts.[147] Furthermore, consumers who did not elect to opt into overdraft coverage on ATM and one-time debit card transactions may be especially likely to lack understanding in this context, since they may believe that it is not possible to incur a fee (whether called an overdraft or an NSF fee) on these covered transactions.

Fourth, for many covered transactions under this proposal, the decision-making environment and rapidity of the consumer's required choices at the merchant POS, ATM, or online may contribute to consumers' lack of understanding of the material costs, risks, or conditions of these transactions, particularly in conjunction with the reasons discussed above. Although, as noted above, many consumers can now check their account balances on a smartphone, when a consumer purchases a good or service at a merchant POS terminal, makes an online purchase, or uses an ATM, the transaction typically occurs very rapidly and the consumer may not have time (or may perceive that they do not have time) to check the account balance, which may itself be a moving target if there are transactions that have not settled (see earlier discussion). Moreover, the burden of checking a balance immediately prior to a purchase is likely to be higher for economically vulnerable consumers, who are less likely to have internet or smartphone access to their depository accounts. This increased expected burden of getting information on an account balance, which may sometimes entail a fee when a vulnerable consumer has limited access to a bank branch with an in-network ATM, would make information acquisition about balances less likely and could make covered transactions more likely.[148]

The decision-making environment and rapidity of the consumer's choices may also contribute to consumers' lack of understanding of the material costs, risks, or conditions of many P2P covered transactions. Per the 2021 FDIC Survey, consumer households use nonbank online payment services to send or receive money (58.2 percent), make purchases in person (30.4 percent), and make purchases online (63.9 percent).[149] When a consumer purchases a good or service in person using a debit card, makes an online purchase, or sends money to a friend, the transaction occurs very rapidly and misremembering their account balance is possible. Although the speed and convenience can generally be viewed as positive features of such transactions for consumers, the CFPB preliminarily believes that these features, in conjunction with other issues, may make it more challenging for consumers to understand those transactions' material costs, risks, or conditions.

Unreasonable Advantage-Taking

Under CFPA section 1031(d)(2)(A), a practice is abusive if it takes unreasonable advantage of consumers'

[142] *See, e.g.,* Lauren Debter, *Why You Can't Trust Your Online Bank Account Balance in the Smartphone Era,* Forbes (July 13, 2016), *https://www.forbes.com/sites/laurengensler/2016/07/13/online-bank-account-balance-overdraft-fees* (Debter 2016).

[143] Financial institutions typically assign each account an overdraft coverage limit, which represents the maximum amount of overdraft coverage the financial institution is willing to extend on the account. Once an account reaches its overdraft coverage limit, the financial institution will no longer pay items into overdraft, but will return those items unpaid. Financial institutions often do not communicate overdraft coverage limits to consumers. *See* CFPB White Paper at 48–52.

[144] Overdraft and NSF Report at 16, 17 tbl. 6.

[145] *See, e.g.,* Debter 2016.

[146] 74 FR 59033, 59038 (Nov. 17, 2009).

[147] Pew Charitable Tr., *Overdrawn: Persistent Confusion and Concern about Bank Overdraft Practices,* at 5 (June 2014), *https://www.pewtrusts.org/-/media/assets/2014/06/26/safe_checking_overdraft_survey_report.pdf* (describing how more than half of those who incurred a debit card overdraft penalty fee do not believe that they opted in to overdraft coverage).

[148] *See generally* Press Release, Consumer Fin. Prot. Bureau, *CFPB Releases Reports on Banking Access and Consumer Finance in Southern States* (June 21, 2023), *https://www.consumerfinance.gov/about-us/newsroom/cfpb-releases-reports-on-banking-access-and-consumer-finance-in-southern-states/* (describing the CFPB's work on the Rural South); Fed. Rsrv. Bank of St. Louis, *Banking Deserts Become a Concern as Branches Dry Up* (July 25, 2017), *https://www.stlouisfed.org/publications/regional-economist/second-quarter-2017/banking-deserts-become-a-concern-as-branches-dry-up* (''The closing of thousands of bank branches in the aftermath of the 2007–09 recession has served to intensify societal concerns about access to financial services among low[-]income and minority populations . . . .''); Donald P. Morgan et al., *Banking Deserts, Branch Closings, and Soft Information,* Liberty St. Econ. (Mar. 7, 2016), *https://libertystreeteconomics.newyorkfed.org/2016/03/banking-deserts-branch-closings-and-soft-information/* (''U.S. banks have shuttered nearly 5,000 branches since the financial crisis, raising concerns that more low-income and minority neighborhoods may be devolving into 'banking deserts' with inadequate, or no, mainstream financial services.''); Hoai-Luu Q. Nguyen, *Are Credit Markets Still Local? Evidence from Bank Branch Closings,* 11(1) Am. Econ. J.: Econ. Pol'y 1 (2019), *https://www.aeaweb.org/articles?id=10.1257/app.20170543* (showing that distance to bank branches affects credit access for small businesses); Jung Sakong & Alexander K. Zentefis, *Bank Access Across America,* Fed. Rsrv. Bank of Chi. (Feb. 15, 2022), *https://www.chicagofed.org/publications/working-papers/2023/2023-15* (showing how distance to a bank branch affects bank branch use and banking access).

[149] *FDIC 2021 Survey* at 34 tbl. 6.6.

lack of understanding of the material risks, costs, or conditions of a consumer financial product or service. The CFPB preliminarily concludes 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.[150]

A determination of unreasonable advantage-taking, as the Abusive Policy Statement explains, 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.[151] The Abusive Policy Statement also explains 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.[152]

There is a point at which a covered financial institution's conduct in leveraging its superior information becomes unreasonable advantage-taking and thus is abusive. A number of analytical methods, including but not limited to those described in the Abusive Policy Statement, can be used to evaluate unreasonable advantage-taking.[153] The identified practice in this proposal preliminarily constitutes unreasonable advantage-taking under multiple of those analytical methods.

First, NSF fees are not fees for a service. Profiting from transactions where the consumer receives no service in return raises threshold concerns that a covered financial institution may be engaging in unreasonable advantage-taking. If a covered financial institution were to assess an NSF fee on a covered transaction, the practice would impose a cost (approximately $32 based on current NSF fees) with no benefit to the consumer, while at the same time imposing only an apparently de minimis cost on the covered financial institution ($0.005 at most, according to a 2021 Board survey)[154] that presumably could easily be recovered via fees collected on successful transactions. As noted above, charging an NSF fee in connection with a covered transaction would result in the consumer paying something for receiving nothing. This effectively turns the fee into a penalty fee. The CFPB notes that a consumer may already suffer disruption in the first instance by the decline of the covered transaction itself, whether through non-receipt of an expected good or service, embarrassment, or other adverse consequences. The NSF fee would compound that disruption by imposing a material cost.

Although the data noted above indicates that the cost to covered financial institutions of declining covered transactions appears to be de minimis, the CFPB requests submission of further data on these costs, as well as comment on the possibility of limiting the determination of unreasonable advantage-taking and the corresponding prohibition to allow for cost recovery.

Second, covered financial institutions would have no reason for imposing such fees other than reaping a windfall, because they could simply refuse to authorize the transaction instantaneously, which, as discussed above, would impose negligible cost on them.[155] The CFPB notes that in consumer litigation about banks' charging of fees on debit card transactions prior to the 2009 Opt-in Rule, one court held, for purposes of opining on a motion to dismiss, that charging such fees was an unconscionable practice under State law in part because the banks' ability to make an instantaneous decision about whether to process or decline a debit card transaction means there is less risk to the banks of the account having insufficient funds to cover the transaction.[156]

Third, covered financial institutions that charge NSF fees on covered transactions would be benefiting from negative consumer outcomes that result from one of the enumerated factors identified in CFPA section 1031(d)(2),[157] *i.e.,* a consumer's lack of understanding. As the Abusive Policy Statement explains, Congress, partly in response to the financial crisis, prohibited certain abusive business models and other acts or practices that—contrary to standard consumer finance relationships where the company benefits from consumer success—misalign incentives and generate benefit for a company when people are harmed.[158] The CFPB generally considers it unreasonable for a financial institution to benefit from, or be indifferent to, negative consumer outcomes resulting from a consumer's lack of understanding.[159]

Finally, in assessing whether the practice at issue here involves unreasonable advantage-taking, a relevant factor is the vulnerability of many of the consumers who would incur such NSF fees if they were imposed.[160] Although consumers of all

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[150] The CFPB notes that the fee charged in this situation would involve unreasonable advantage-taking no matter what specific situation creates the lack of understanding that is taken advantage of and whether it relates to lack of understanding of a material cost, risk, or condition or more than one of those factors.

[151] *See* Abusive Policy Statement at 21886. *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.'').

[152] Abusive Policy Statement at 21886.

[153] *See id.*

[154] *See* footnote 32.

[155] As the CFPB explained in the Abusive Policy Statement, "One may also assess whether entities are obtaining an unreasonable advantage by considering whether they are reaping more benefits as a consequence of the statutorily identified circumstances, or whether the benefit to the entity would have existed if the circumstance did not exist," meaning that, "[i]n other words, entities should not get a windfall due to" one or more of the enumerated conditions under CFPA section 1031(d)(2). *See* Abusive Policy Statement at 21886. *See also JPay, LLC,* File No. 2021–CFPB–0006 (Oct. 19, 2021) (consent order describing an abusive practice where a firm leveraged an exclusive contract to charge fees on prepaid cards used to provide money to individuals being released from prison or jail and where the prepaid cards replaced the feeless option of receiving such money as cash or by check that previously had been offered by prisons and jails); CFPB Fall 2022 Highlights at 22 (describing how mortgage servicers took unreasonable advantage of consumers' lack of understanding when they profited from insufficiently disclosed phone-payment fees that were materially greater than the cost of other payment options).

[156] *See In re Checking Acct. Overdraft Litig.,* 694 F. Supp. 2d 1302, 1320–21 (S.D. Fla. 2010).

[157] As the Abusive Policy Statement noted, "Congress prohibited certain . . . acts or practices that—contrary to many consumer finance relationships where the company benefits from consumer success—generate benefit for a company when people are harmed." Abusive Policy Statement at 21886.

[158] As the CFPB's Abusive Policy Statement explained, "The financial crisis was set in motion by a set of avoidable interlocking forces—but at its core were mortgage lenders profiting (by immediately selling on the secondary market) on loans that set people up to fail because they could not repay." *See* Abusive Policy Statement at 21884; *see also* S. Rep. No. 111–176, at 11 (2010), *https://www.congress.gov/congressional-report/111th-congress/senate-report/176/1* ("Th[e] financial crisis was precipitated by the proliferation of poorly underwritten mortgages with abusive terms, followed by a broad fall in housing prices as those mortgages went into default and led to increasing foreclosures.").

[159] *See* Abusive Policy Statement at 21886.

[160] *See* 85 FR 44382, 44420 (July 22, 2020) ("As a preliminary matter, the [CFPB] declines to use this rulemaking to articulate general standards addressing whether the conduct of lenders or other financial services providers take unreasonable advantage of consumers. Instead, the [CFPB] will articulate and apply such standards, including the 2017 [rule's] four-factor analysis, to the extent necessary to decide the specific issue in this rulemaking, namely, whether lenders take

income levels overdraw their checking accounts,[161] more affluent consumers are more likely to be able to maintain a cushion to help avoid doing so. As research shows, less well-off, more economically vulnerable consumers are more likely to be struggling to meet their regular expenses.[162] For these vulnerable consumers, maintaining such a cushion often is not possible.[163] As a result, NSF fees function as a penalty imposed on these consumers *because* they do not have enough money in their account, whether that deficiency is due to chronic income shortfalls, timing mismatches regarding inflows and outflows over which they have no control, or other reasons.[164] The harm inflicted on economically vulnerable consumers from such fees, if they were to be charged, would likely be greater than that which more affluent consumers would suffer. Because much of the windfall from charging NSF fees on covered transactions would be gained from vulnerable consumers in exchange for providing no benefit to them, a covered financial institution would be taking unreasonable advantage of such consumers in doing so. As with consumers in general, the profit accrued from imposing NSF fees in this circumstance would be derived directly from vulnerable consumers' lack of understanding. This practice would constitute unreasonable advantage-taking because covered financial institutions are profiting directly from consumer hardship rather than from providing useful services to avoid or alleviate it.

V. Proposed Effective Date

The CFPB is proposing that this rule have an effective date of 30 days after publication of a final rule in the **Federal Register**. The CFPB is proposing this expedited effective date because the practice that would be prohibited based on the CFPB's preliminary abusive conduct determination is not thought to be prevalent today, and therefore any burdens associated with implementation of this proposal, if finalized, should be minimal. However, since the CFPB understands that a limited number of providers may currently charge fees that would be subject to the prohibition, the CFPB seeks comment on whether the proposed effective date should be modified to provide additional time for implementation.

VI. CFPA Section 1022(b) Analysis

A. Overview

In developing the proposed rule, the CFPB has considered the proposed rule's potential benefits, costs, and impacts in accordance with section 1022(b)(2)(A) of the CFPA. The CFPB requests comment on the preliminary analysis presented below and submissions of additional data that could inform the CFPB's analysis of the benefits, costs, and impacts. In developing the proposed rule, the CFPB has consulted with the appropriate prudential regulators and other Federal agencies, including regarding the consistency of the proposed rule with any prudential, market, or systemic objectives administered by those agencies, in accordance with section 1022(b)(2)(B) of the CFPA.

B. Goals of the Proposed Rule

The CFPB is proposing this rule because of its preliminary determination that consumers would lack understanding of the material risks, costs, or conditions of a covered financial institution's charging of an NSF fee in connection with a covered transaction. In general, if consumers lack understanding of the material risks, costs, or conditions of a particular transaction, their choices may be suboptimal from an economic perspective.

C. Data Limitations and Quantification of Benefits, Costs, and Impacts

The discussion below relies on information that the CFPB has obtained from industry and publicly available sources, including reports published by the CFPB. These sources form the basis for the CFPB's consideration of the likely impacts of the proposed rule. The CFPB provides estimates, to the extent possible, of the potential benefits and costs to consumers and covered persons of this proposal given available data.

The specific data sources that inform this discussion and the CFPB's existing analysis include public call report data, internal data provided by financial institutions through supervisory information requests, and research published by the CFPB. In addition, the existing academic literature as well as policy work conducted by State regulators, and by the Board were considered.

There remain important data limitations that preclude a more exhaustive determination of the proposed rule's benefits, costs, and impacts. Foremost among them is that the existing data sources and evidence available to the CFPB generally do not separately identify whether NSF transactions or NSF fees were incurred on requests by consumers to withdraw, debit, pay, or transfer funds from their checking, savings, or consumer asset account where the transaction is declined instantaneously or near-instantaneously by the financial institution (henceforth, covered transactions). In part, this reflects the CFPB's understanding of the current prevalence of the practice; based on its market monitoring activities the CFPB believes that covered financial institutions rarely charge NSF fees on covered transactions.

Relatedly, quantifying the benefits, costs, and impacts of the proposed rule requires quantifying future consumer and covered financial institution behavior both with and without the proposed changes, and the CFPB is not aware of available data that could be used to generate reliable predictions about such future behavior. In particular, there is considerable uncertainty around the future frequency with which financial institutions would charge NSF fees on covered transactions in the absence of the proposed rule. This includes uncertainty about how many, and which financial institutions would begin charging NSF fees on covered transactions as well as at what rate and fee amount these fees would be assessed. To reflect this uncertainty, the CFPB considers a range of ways in which market practices might evolve in the absence of the proposed rule when calculating the costs, benefits, and impacts of the proposed rule.

The data, prior research, and existing policy work available to the CFPB or with which the CFPB is familiar provide an important basis for understanding

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unreasonable advantage of consumers if the lenders make covered loans without determining whether borrowers have the ability to repay them.'').

[161] CFPB 2017 Data Point at 25 tbl. 3 (showing that consumers with high balances may also be heavy overdrafters).

[162] *See, e.g.,* Bd. of Governors of the Fed. Rsrv. Sys., *Economic Well-Being of U.S. Households in 2022,* at 29 (May 2023), *https://www.federalreserve.gov/publications/files/2022-report-economic-well-being-us-households-202305.pdf.*

[163] *See* Rob Levy & Joshua Sledge, *Complex Portrait: An Examination of Small-Dollar Credit Consumers,* Ctr. for Fin. Servs. Innovation (2012), *https://s3.amazonaws.com/cfsi-innovation-files/wp-content/uploads/2017/01/31163518/A-Complex-Portrait-An-Examination-of-Small-Dollar-Credit-Consumers.pdf* (discussing how financial shortfalls may be due to mismatched timing between income and expenses, misaligned cash flows, income volatility, unexpected expenses or income shocks, or expenses that simply exceed income, and noting that 32 percent of users of small-dollar credit products reported misaligned cash flow as the precipitating factor for their borrowing, while 30 percent reported chronic income shortfalls).

[164] Through its supervisory work, the CFPB has learned that at seven very large financial institutions in 2022 consumer accounts with an average balance below $500 had more than 20 times as many NSF transactions and more than 11 times as many NSF fees as consumer accounts with an average balance above $1,500. Overdraft and NSF Report at 17 tbl. 6.

the potential effects of the proposed rule, albeit without being sufficient to completely quantify the potential effects of the proposal for consumers and covered persons. The deficits in existing data and evidence are due primarily to the proposed rule addressing practices not thought to currently be prevalent in consumer financial markets, to existing data not enabling the identification of covered transactions, to difficulty predicting the evolution of the market, and to the lack of existing evidence on the magnitude or direction of potential behavioral responses by consumers and covered persons to policies like the proposed rule. While the CFPB acknowledges these data limitations, the analysis below provides quantitative estimates where possible alongside qualitative discussions of the proposed rule's benefits, costs, and impacts. General economic principles and the CFPB's expertise, together with the available data, allow the CFPB to provide insight into these benefits, costs, and impacts. The CFPB requests additional data or studies that could help quantify the benefits and costs to consumers and covered persons of the proposed rule including information related to the current or likely future incidence of NSF fees on covered transactions.

D. Baseline for Analysis

In evaluating the proposal's benefits, costs, and impacts, the CFPB considers the impacts of the proposed rule against a baseline in which the proposed rule does not become effective. The baseline the CFPB considers corresponds to current law, wherein NSF fees are not explicitly prohibited for covered transactions. Based on its market monitoring activities, the CFPB understands that covered financial institutions rarely charge NSF fees on covered transactions; however, the CFPB is uncertain about the extent to which such fees are currently charged and the CFPB believes there is a risk that such fees may be charged to a greater degree in the future. The CFPB recognizes that financial institutions have incentives to generate new revenue; assessing NSF fees on covered transactions is one potential source of new revenue. Additionally, if the Overdraft Proposed Rule is finalized and reduces overdraft fee revenue for covered financial institutions, it may lead some institutions to consider imposing new fees. Increasing the prevalence of NSF fees on covered transactions could be one way that covered financial institutions respond, while market forces could lead even non-covered financial institutions to begin charging NSF fees on covered transactions.

Accordingly, for the baseline, the CFPB considers potential NSF market practices that range from financial institutions rarely charging NSF fees on covered transactions to a scenario where some financial institutions charge NSF fees on covered transactions. The CFPB believes that, absent the proposed rule, it is unlikely that NSF fees on covered transactions would be assessed at a rate greater than the rate at which they are currently charged on non-covered transactions.[165] To estimate the share of total NSF transactions [166] that would be covered, the CFPB uses data from the Federal Reserve Payments Study (FRPS) [167] to calculate the percent of total non-cash payments that were non-prepaid debit card payments in 2021: 44.7 percent. As further discussed below, this is informative of an upper bound on how large the impact of the proposed rule might be.[168]

For costs, benefits, and impacts, the CFPB estimates annual values and, absent any evidence to suggest that the values would change over time, the CFPB assumes that the annual values persist indefinitely.

The CFPB requests comment on the approach to evaluating the proposal's benefits, costs, and impacts and, specifically, on the assumptions implicit in providing estimates that correspond to a range of future NSF market practices.

E. Potential Benefits and Costs to Consumers and Covered Persons

1. Potential Benefits and Costs to Consumers

The proposal to prohibit NSF fees on covered transactions would directly benefit consumers who would have been assessed NSF fees on covered transactions by reducing the amount that they pay in NSF fees. In addition to the direct benefits from the absence of NSF fees, a prohibition on NSF fees could have several indirect impacts on consumers who would otherwise have been charged NSF fees. First, for consumers with account balances low enough that an NSF fee brings their balance below zero or farther below zero, NSF fees may lead consumers to have their account closed or to have their account information furnished to a checking account reporting company, which could make getting access to a new depository account more difficult in the future. By prohibiting NSF fees, the proposed rule should reduce (to zero) the likelihood of these indirect impacts of NSF transactions. Second, without the ability to assess NSF fees on transactions that consumers undertake without sufficient funds, financial institutions may opt to allow additional transactions to go through and charge overdraft fees instead. By allowing accounts to go into overdraft this implies more consumers will receive the item(s) they were attempting to purchase, though they may be assessed an overdraft fee. A third possibility is that a prohibition on NSF fees could reduce expected revenue for the consumer segments most likely to incur NSF fees and result in financial institutions being less willing to open depository accounts for those consumers.[169]

As discussed further below, the extent of any of these benefits depends on the extent to which NSF fees would be charged on covered transactions under the baseline. To the extent NSF fees would be charged, the direct effects of the proposed rule should benefit consumers by reducing the amount they pay in NSF fees. Similarly, the first above-mentioned indirect effect—a decreased likelihood of depository account closure and having negative information furnished to a checking account reporting company—should increase consumer welfare. Consumer welfare could increase or decrease from having more transactions go through and being assessed an overdraft fee instead of an NSF fee; whether consumers benefit will depend on the

[165] *See* part I (Background discussion) for a discussion of NSF fees assessed on non-covered transactions.

[166] Throughout this section, ''NSF transactions'' refer to requests by consumers to withdraw, debit, pay, or transfer funds from their checking, savings, or consumer asset account for an amount greater than the available funds in the account and where the transaction is declined by the financial institution.

[167] *See* FRB 2022 Payments Study.

[168] The FRPS data are not informative about the possibility of NSF fees being assessed on person-to-person (P2P) transactions, as P2P transactions are not included in the FRPS data. Whether their inclusion would increase or decrease the estimate of the share total non-cash payments that are covered transactions will depend on whether the ratio of covered to non-covered transactions is higher or lower for P2P transactions than it is for the non-P2P non-cash payments included in the FRPS data. However, the CFPB notes that because P2P transactions currently make up a relatively small share of non-cash payments, their inclusion is unlikely to affect this estimate by much.

[169] An additional possibility is that, to the extent financial institutions would have charged NSF fees on covered transactions under the baseline, those financial institutions could respond to the proposed rule by attempting to offset lost NSF revenue through changes in other account fees or prices. Any increases in these fees would decrease the benefit of the proposed rule for some consumers, with the net change in fee incidence (the decrease in NSF fee incidence and the increase in offsetting fee incidence) determining whether consumers benefit from the proposed rule.

relative size of NSF and overdraft fees as well as how much consumers value the goods or services they were attempting to purchase. Consumer welfare could also decrease if the inability to assess and collect NSF fees makes financial institutions less willing to offer depository accounts to certain consumers.

Direct Effects

As discussed above, the proposed rule will directly benefit consumers to the extent that NSF fees would have been charged on covered transactions, which are estimated to represent 44.7 percent of checking account transactions based on 2021 FRPS data. The CFPB understands that it is currently uncommon for financial institutions to charge NSF fees on covered transactions, but the CFPB does not have reliable data on how frequent the practice might be either now or in the future.

Recent CFPB analysis of Call Report data suggests that even after sharp declines in the number of banks with over $1 billion in assets charging NSF fees, consumers will be paying roughly $250 million annually in NSF fees to banks with more than $1 billion in assets.[170] The CFPB estimates that an additional $73 million in annual NSF fees is being paid to banks with less than $1 billion in assets and to credit unions, for a total of $323 million in annual NSF fees.[171]

Of this total, the CFPB's understanding is that the large majority was paid on non-covered transactions and therefore would be unaffected by the proposed rule, and the CFPB does not have definitive evidence with which to forecast the revenue that might be generated by covered transactions in the future under the baseline. As a starting point to arrive at a range of possible future NSF fee practices for covered transactions, the CFPB begins from our current annual estimate of all NSF fee revenue: $323 million. As a likely lower bound for potential future NSF fee market practices, the CFPB considers the scenario where NSF fees are rarely charged on covered transactions. This would suggest that the $323 million in current annual NSF fee revenue corresponds to $0 in future NSF fee revenue from covered transactions. As a more probable range of potential future NSF fee market practices for covered transactions, if projected annual NSF fee revenue for covered transactions were to correspond to between 5 and 20 percent of current annual NSF fee revenue, it would suggest between $16.2 million and $64.6 million in annual NSF revenue from covered transactions. The proposed rule would therefore indicate a direct benefit to consumers of between $16.2 million and $64.6 million in reduced NSF fees.

The CFPB seeks comment on the extent to which NSF fees are currently charged on covered transactions and the extent to which they might be charged on covered transactions in the future.

Indirect Effects

To the extent covered financial institutions would have charged NSF fees on covered transactions under the baseline, the proposed rule would benefit consumers by reducing to zero the probability that an NSF fee on a covered transaction would bring their account balance below zero and cause their account to be closed or their information to be furnished to a checking account reporting company. The indirect benefits to consumers from these reductions would increase consumer welfare for the consumers that would have experienced these events in the absence of the proposed rule.

The extent of these indirect benefits depends on the prevalence and amount of NSF fees charged on covered transactions under the baseline. At NSF fee market practices between the lower and upper bound projections, the proposed rule would generate indirect benefits to consumers through the same changes, though these benefits would be proportionally smaller in size than under the upper bound projection.

If the prohibition on NSF fees induces some financial institutions to allow additional transactions that they would have declined to go into overdraft, it could also benefit consumers relative to the baseline in instances where a consumer had a transaction declined, and they were assessed an NSF fee of the same amount as the overdraft fee. If the potential NSF fee is less than the potential overdraft fee, whether consumers benefit will depend on the consumers' valuation of the goods they were purchasing or attempting to purchase net of the price of the good(s). Whether this benefit is as large as the benefit the consumer receives if their transaction is declined but they are not assessed an NSF fee will depend on the consumer's valuations and the relative size of the NSF and overdraft fees. These indirect benefits would accrue to consumers only under NSF fee market practice projections that predict a positive number of NSF fees on covered transactions.

Behavioral Effects

To the extent covered financial institutions would have charged NSF fees on covered transactions under the baseline, the proposed rule could generate changes in the behaviors of consumers or covered persons. One possibility is that a prohibition on NSF fees could make consumers less willing to exert effort to get information on their account balance prior to making purchases and therefore could increase

[170] *See* CFPB October 2023 Data Spotlight. The CFPB arrived at this estimate by analyzing NSF fee practices of banks with over $10 billion in assets as of March 31, 2023, and the 75 banks that collected the most overdraft/NSF fee revenue in 2021 (some of which are under $10 billion in total assets). For each of these institutions, NSF revenue based on FFIEC Call Report data is calculated by taking 18.9 percent of reported overdraft/NSF fee revenue (except in cases where the bank did not have an overdraft program). Institutions that no longer charge NSF fees account for 86 percent of the total estimated NSF fee revenue of all banks over $1 billion in total assets. The remaining 14 percent of estimated 2021 NSF fee revenue is equal to approximately $250 million.

[171] Call Report data do not include information on overdraft or NSF fee revenue for credit unions or for banks with $1 billion or less in assets. To account for this, the CFPB uses data collected from core processors for the number of accounts by asset size and the overdraft/NSF revenue per account, and from 2014 call report data for the distribution of institutions by asset size, and then assumes that overdraft/NSF revenue at small institutions saw the same growth from 2014 to 2019 as large banks, to arrive at a 2019 estimate. These extrapolations suggest that banks with over $1 billion in total assets comprise 77.4 percent of marketwide overdraft/NSF revenue. *See* CFPB 2021 Data Point at 7. For the annual projection, the CFPB assumes that banks with assets over $1 billion represent the same relative portion of total marketwide overdraft/NSF revenue as they did in 2019. The CFPB then multiplies the annual NSF fee revenue projection by 1/0.774 to arrive at an estimate of NSF fee revenue from all financial institutions of $323 million. The CFPB also explored using the share of consumer deposits at banks with assets over $1 billion based on FFIEC and NCUA call report data from the fourth quarter of 2022 to extrapolate projected annual NSF revenue for banks with assets over $1 billion to arrive at a projected marketwide estimate for annual NSF revenue. For credit unions, the CFPB sums all possible shares and deposits for consumers. For Banks and Thrifts, the CFPB sums noninterest-bearing and interest-bearing deposits of individuals, partnerships, and corporations held in domestic offices (total deposits). The CFPB additionally sums the value of deposits of any type intended primarily for individuals for personal, household, or family use as reported only by Banks and Thrifts with more than $1 billion in total assets (consumer deposits). The CFPB then calculates the median share of total deposits that are represented by consumer deposits at banks and thrifts with between $1 billion and $10 billion in total assets (0.41). The CFPB multiplies the total deposit amount for Banks and Thrifts with less than $1 billion in total assets by this share, to arrive at an estimate of consumer deposits for each bank or thrift in the fourth quarter of 2022. The CFPB sums consumer deposits or imputed consumer deposits across all financial institutions regardless of size and calculate the ratio of consumer deposits held by banks and thrifts with more than $1 billion in total assets to total consumer deposits: 0.75. If the CFPB were to use this extrapolation factor to arrive at a marketwide estimate, it would multiply the annual NSF fee revenue estimate by 1/0.75 to arrive at a similar estimate of NSF fee revenue from all financial institutions of $333 million.

the likelihood of NSF transactions for some consumers. However, the CFPB can find little evidence to support the existence of a deterrent effect of NSF fees on the prevalence of NSF transactions. Based on data on NSF fees on transactions of all types from seven of the eight financial institutions that submitted data, after controlling for month-specific and financial institution-specific differences in the number of NSF transactions, the number of NSF transactions financial institutions report after decreasing or eliminating NSF fees decreased, on average, for the five financial institutions that made a change during the reporting period. This is consistent with the costs of avoiding NSF fees being sufficiently high for consumers at risk of NSF transactions that a change in NSF fee size does not result in a meaningfully different amount of optimal effort put towards avoiding these fees,[172] or with consumers not being aware of the possibility or size of NSF fees. The CFPB caveats that the NSF fees and transactions observed in the data are likely to have occurred primarily on non-covered transactions and it is possible that the relationship between NSF transactions and NSF fee sizes could be different if we were able to estimate it using only information on covered transactions and fees. Similarly, data that cover a longer period after a reduction in NSF fees would allow for the consideration of medium- and long-term deterrent effects of NSF fees. The data available to the CFPB only permit the consideration of effects that are observable less than twelve months after an NSF fee reduction. Nevertheless, the CFPB seeks comment on the potential deterrent effect of NSF fees on NSF transactions, including data and information that could help inform our understanding of this relationship.

Another possibility is that a prohibition on NSF fees could reduce expected revenue for the consumer segments most likely to incur NSF fees on covered transactions under NSF fee market practice projections above the lower bound, and result in financial institutions being less willing to open depository accounts for those consumers. This would decrease the benefits to the consumer segments that lose access to depository accounts that they would have had under the baseline and those NSF fee market projections.

Last, financial institutions could respond to the proposed rule by offsetting the NSF fee revenue that they would earn under projections above the lower bound with changes in other account fees or prices. These increases in other account fees or prices would decrease the benefits to consumers from the proposed rule.[173] Consumers with accounts that are assessed a greater value of new fees than they would have been assessed in NSF fees will benefit less from the proposed rule.

Distribution of Consumer Impacts

NSF transactions and fees are more likely for consumers with limited resources. Information from the eight financial institutions that responded to the CFPB's supervisory information request suggest that NSF transactions occurred 20 times as often on consumer accounts with low average daily balances (below $500) as for consumer accounts with high average daily balances (above $1,500).[174] NSF fees are 11 times as likely to be assessed on low-balance consumer accounts as on high-balance consumer accounts.

2. Potential Benefits and Costs to Covered Persons

For covered persons, the costs and benefits are, in general, the opposite of the benefits or costs to their customers, as detailed above, and net of offsetting changes. Any decrease in fees paid by consumers will result in an equally sized decrease in revenue for covered persons. Any increase in fees paid by consumers due to offsetting fees assessed by covered financial institutions will result in an equally sized increase in revenue for covered persons.

Additional potential costs to covered persons are the legal and personnel costs of reviewing current policies and pricing strategies to determine whether existing policies are compliant and whether to re-optimize behavior after considering the proposed rule. Given that the CFPB understands that NSF fees today are rarely charged on covered transactions, any such costs should be small, as current policies are generally consistent with the proposed rule's requirements. Some of these costs might be incurred by covered financial institutions due to the Overdraft Proposed Rule, regardless of whether the proposed rule takes effect.

As was the case above for consumers, for the baseline at the lower bound projection for NSF fee market practices, the proposed rule would generate few benefits, costs, or impacts for covered persons.

At levels above the lower bound projection, the proposed rule will have distinct benefits, costs, and impacts on covered persons, depending on whether financial institutions charge NSF fees on covered transactions.

Based on a CFPB analysis of publicly available Call Report data and publicly available information regarding banks' NSF practices, a majority of NSF fees have been eliminated among banks with at least $1 billion in total assets.[175] The CFPB report estimates that nearly three-fourths of the 75 banks with the highest combined NSF and overdraft revenue in 2021 have since stopped charging NSF fees. A similar analysis of NSF fee practices among banks with over $10 billion in assets estimates that two-thirds of those institutions have eliminated NSF fees. These findings suggest that a growing share of covered persons no longer charge NSF fees of any kind. These differences in NSF fee policies across covered persons could persist for covered transactions in the baseline. That is, some covered persons are likely to be charging NSF fees on covered transactions while other covered persons will not be charging NSF fees on covered transactions. To the extent that this behavior follows similar patterns as the currently observed decisions to charge NSF fees on non-covered transactions, the analysis suggests that smaller financial institutions may be less likely to not charge NSF fees on covered transactions than larger financial institutions. However, it is also possible that the

[172] In the context of acquiring information about account balances, this could be the case if consumers incur certain fees for checking balances at ATMs, if ATMs or financial institution branches are sufficiently far from where consumers live, or consumers lack access to their financial accounts online or through mobile applications.

[173] To gauge the size of potential fees that financial institutions would need to assess to fully replace the hypothetical revenue they lose from the proposed prohibition on NSF fees at the upper bound projection for future NSF fee market practices, the CFPB used the data from the eight financial institutions included in the most recent Supervisory Information Request. The CFPB calculated the NSF fee revenue per account that each financial institution reported in 2022, divided this amount by 12 and multiplied by the estimated ratio of covered to non-covered transactions from the 2021 FRPS data to get a monthly account fee that financial institutions would need to assess to replace the revenue they would hypothetically lose under the proposed rule. On average across the 31 checking products in the data, this monthly account fee would need to be $0.20 per account to replace the lost revenue from hypothetical NSF fees on covered transactions at the upper bound projection for NSF fee market practices. Consumers would then benefit less from the proposed rule if they were required to pay additional monthly account fees (or other similar fees). We caution that this is likely to overstate the monthly fee size needed to replace NSF fee revenue because of the five financial institutions that eliminated NSF fees during 2022 that collected a positive amount of NSF fee revenue in 2022. As these financial institutions have already stopped charging NSF fees, they would not need to replace any NSF fee revenue lost under the proposed rule.

[174] Overdraft and NSF Report at 17 tbl. 6.

[175] *See* CFPB October 2023 Data Spotlight.

covered financial institutions that have eliminated NSF fees on non-covered transactions could opt to start charging NSF fees on covered transactions under market scenarios above the lower bound projection.

For covered persons that are not charging NSF fees on covered transactions, the proposed rule would likely generate smaller costs and benefits.

For covered persons that are charging NSF fees on covered transactions or that would charge them under the baseline, the proposed rule would impose costs equal to the loss in NSF revenue due to the prohibition on NSF fees on covered transactions, net of any offsetting revenue increases from new fees. If future annual NSF fees from covered transactions represented between 5 and 20 percent of current total 2022 NSF revenue, the cost borne by covered persons charging NSF fees on covered transactions would be between $16.2 million and $64.6 million.

As mentioned above, the direct benefits, costs, and impacts on covered persons are likely to be the opposite of those discussed for consumers. However, for some of the potential indirect impacts, this may not be the case. For example, consumers may benefit from a reduced probability that an NSF fee would bring their account balance below zero and cause their account to be closed or their information to be furnished to a checking account reporting company. For covered financial institutions, these indirect impacts do not represent costs, and they may represent benefits as they no longer need to incur the costs associated with closing these depository accounts or furnishing information to checking account reporting companies.

Similarly, if the prohibition on NSF fees induces some financial institutions to not offer depository accounts to the consumer segments most likely to incur NSF fees on covered transactions, it could impose a cost on consumers in those segments who may find it more difficult to access a depository account. This would also impose a cost on the covered financial institutions that are no longer willing to offer these accounts, with the cost being equal to the expected revenue on the depository accounts they would have opened for these consumer segments under the baseline and NSF fee market projection, but which they are no longer willing to open under the proposed rule.

Any indirect effects for covered financial institutions from allowing additional transactions to go into overdraft are likely to be small and will depend on the relative size of expected revenue and cost from charging an overdraft fee compared to charging an NSF fee.

3. Benefits and Costs of Potential Alternative of Permitting Fees That Cover Costs of Processing NSF Transactions

The CFPB considered proposing an alternative in which financial institutions would be permitted to charge fees on covered transactions that are limited to the cost of handling NSF transactions. Such an alternative would have little effect on the estimates presented above. Research from the Board suggests the average cost of NSF handling was just $0.005 in 2021 and this has remained relatively stable since 2011.[176] If the CFPB assumes $32 per NSF fee along with our projections for future NSF fee revenue from covered transactions that correspond to between 5 and 20 percent of current annual NSF fee revenue,[177] wherein the proposed rule would result in between $16.2 million and $64.6 million in reductions in NSF revenue, this would represent between 506,250 and 2,018,750 NSF fees. At $0.005 per NSF fee, this would imply between $2,531 and $10,094 in total costs for financial institutions to handle NSF transactions that generated fees. The CFPB can also use the information requested from eight very large financial institutions in a supervisory capacity to adjust this number given that the eight institutions represented in the data assessed NSF fees on 13.4 percent of NSF transactions.[178] To account for the costs of NSF transactions that did not generate fees, the range of $2,531 to $10,094 in NSF handling cost totals can be inflated based on the number of fee-generating transactions by 1/0.134, to estimate that the total allowed cost recovery for financial institutions from their handling of NSF transactions would be between $18,888 and $75,328. The remaining benefit to consumers from reduced NSF fees after accounting for allowed cost recovery for financial institutions at between 5 and 20 percent of the upper bound projection for NSF fee practices would be between $16,181,112 and $64,524,672. As was the case above, these also represent the costs to covered persons after accounting for allowed cost recovery if NSF fees on covered transactions were assumed to be responsible for between 5 and 20 percent of projected annual NSF revenue.

F. Potential Specific Impacts of the Proposed Rule on Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets, As Described in Section 1026

Existing data do not clearly indicate whether there would be specific impacts of the proposed rule on depository institutions and credit unions with $10 billion or less in total assets that are different from the impacts on other affected financial institutions. As mentioned above, smaller financial institutions were less likely to have eliminated NSF fees as of 2022. If these institutions are more likely to have started charging NSF fees on covered transactions under an NSF fee market projection, they may be more likely to see NSF fee revenue decrease under the proposed rule relative to the baseline. However, whether there are specific impacts on depository institutions and credit unions with $10 billion or less in assets may also depend on interactions with the Overdraft Proposed Rule. The Overdraft Proposed Rule only applies to depository institutions with more than $10 billion in total assets. If financial institutions impacted by the Overdraft Proposed Rule are those most likely to charge NSF fees on covered transactions under the baseline, it would imply that depository institutions and credit unions with $10 billion or less in total assets may be less likely to be impacted by the proposed rule. Thus, whether there are specific impacts on depository institutions and credit unions with less than $10 billion in total assets will depend on which institutions opt to start charging NSF fees on covered transactions and, possibly, on interactions between the proposed rule and the Overdraft Proposed Rule.

G. Potential Specific Impacts of the Proposed Rule on Consumer Access to Credit and on Consumers in Rural Areas

The CFPB does not anticipate that the proposed rule will have any negative effects on consumer access to credit

[176] *See* FRB 2021 Interchange. Furthermore, as this estimate is based on the cost of handling authorized debit card transactions, the CFPB expects that the corresponding estimate for declined transactions would be smaller.

[177] Based on CFPB market monitoring activity conducted between December 2022 and August 2023, the median institution-level NSF fee among banks and credit unions charging NSF fees with more than $10 billion in total assets was $32. Including information from smaller financial institutions would change this estimate, but likely not by much, given that the already-included, larger financial institutions will be the source of most feed NSF transactions. Still, even if between $16.2 million and $64.6 million in NSF fee revenue were charged on covered transactions and if the feed transaction-level median NSF charged were to drop to $25, it would imply there were between 648,000 and 2,584,000 feed, covered NSF transactions in 2022 and the allowed cost recovery would be between $3,240 and $12,920.

[178] *See* Overdraft and NSF Report at 16, 17 tbl. 6.

under the baseline. To the extent that some financial institutions respond to the proposed rule by increasing the likelihood that they allow transactions to go into overdraft, the proposed rule could result in increased credit access for some consumers.

The CFPB does not have depository account-level data with geographic identifiers that would allow us to measure NSF fees assessed on consumers in rural areas. However, existing research suggests that consumers in rural areas are more likely to be unbanked [179] and more likely to live in a bank desert.[180] This lower access to depository accounts could mean consumers in rural areas are less likely than consumers in other areas to pay NSF fees on covered transactions, which could decrease the potential benefits to consumers in rural areas of the proposed rule.

The CFPB has also calculated the share of the unbanked in the lowest fifth of the income distribution in ZIP codes that the U.S. Census Bureau classifies as urban, rural, and mixed.[181] Seventy-four percent of consumers in the lowest income quintile in both urban and rural ZIP codes have a bank account. This would suggest that lower-income consumers in urban and rural areas have similar access to bank accounts and may also see similar benefits from the proposed rule.

VII. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The CFPB is also subject to specific additional procedures under the RFA involving convening a panel to consult with small business representatives before proposing a rule for which an IRFA is required. An IRFA is not required for this proposal because the proposal, if adopted, would not have a significant economic impact on a substantial number of small entities.

Small institutions, for the purposes of the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, are defined by the Small Business Administration. Effective December 19, 2022, depository institutions with less than $850 million in total assets are determined to be small.

As mentioned above, the CFPB understands that covered persons rarely currently charge NSF fees on covered transactions. As a result, under current market practices the proposed rule should not have a significant impact on a substantial number of small entities.

Moreover, even when combined with overdraft fees, total NSF fees generally represent well under 2 percent of total revenue at the smallest financial institutions that regularly report this information, suggesting that any potential reduction in NSF fee revenue would not be likely to have a significant impact on institutions with less than $850 million in total assets.[182] As a result, the proposed rule should not have a significant impact on a substantial number of small entities even if NSF revenue were entirely comprised of NSF fees on covered transactions.

Accordingly, the Director hereby certifies that this proposal, if adopted, would not have a significant economic impact on a substantial number of small entities. Thus, neither an IRFA nor a small business review panel is required for this proposal.

VIII. Paperwork Reduction Act

Under the PRA, the CFPB may not conduct or sponsor and, notwithstanding any other provision of law, a person is not required to respond to an information collection unless the information collection displays a valid control number assigned by OMB.

The CFPB has determined that the proposed rule would not impose any new information collections or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.

The CFPB has a continuing interest in the public's opinions regarding this determination. At any time, comments regarding this determination may be sent to: Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW, Washington, DC 20552, or by email to *CFPB_Public_PRA@cfpb.gov.*

List of Subjects in 12 CFR Part 1042

Banks, banking, Consumer protection, Credit, Credit unions, Electronic funds transfers, National banks, Savings associations, Trade practices.

■ For the reasons set forth in the preamble, the CFPB proposes to add part 1042 to chapter X in title 12 of the Code of Federal Regulations, as follows:

PART 1042—NONSUFFICIENT FUNDS FEES

Authority: 12 U.S.C. 5511, 5512, 5531(b) and (d).

§ 1042.1 Authority and purpose.

(a) *Authority.* The regulation in this part is issued by the Consumer Financial Protection Bureau (CFPB) pursuant to the Consumer Financial Protection Act of 2010 (CFPA), Public Law 111–203, title X, 124 Stat. 1955.

(b) *Purpose.* The purpose of this part is to identify certain abusive acts or practices in connection with certain consumer transactions by covered financial institutions.

§ 1042.2 Definitions.

For the purposes of this part, the following definitions apply:

(a) *Account* means an ''account'' as defined in Regulation E, 12 CFR 1005.2(b).

(b) *Covered financial institution* means a ''financial institution'' as defined in Regulation E, 12 CFR 1005.2(i).

(c) *Covered transaction* means 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.

(d) *Insufficient funds* refers to the status of an account that does not have

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[179] *See* FDIC 2021 Survey.

[180] *See* Consumer Fin. Prot. Bureau, *Data Spotlight: Challenges in Rural Banking Access,* at 7–10 (Apr. 2022), *https://files.consumerfinance.gov/f/documents/cfpb_data-spotlight_challenges-in-rural-banking_2022-04.pdf.*

[181] *See* Natalie Cox et al., *Financial Inclusion Across the United States* (Apr. 24, 2023), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3934498* (identified the unbanked in the universe of tax records as those not listing an account for rebates or payment over a ten-year period, focusing on the 50–59-old population in 2019. The Census links ZCTAs to an urban area (or none)).

[182] Calculations based on publicly available FFIEC Call Report data from 2022 suggest that only 11.9 percent of reporting financial institutions with total assets below $2 billion had combined revenue from overdraft and NSF fees on depository consumer accounts that exceeded two percent of their total revenue. In the past, the CFPB has estimated that NSF fees make up less than 20 percent of combined overdraft and NSF revenue. Since NSF fees on covered transactions are likely to represent less than half of combined overdraft and NSF revenue, this suggests that less than 12 percent of reporting banks would expect a decline in revenue of even 1 percent, suggesting that the rule would not have a significant impact on a substantial number of small entities. The CFPB caveats that this calculation relies on data from reporting financial institutions with between $1 billion and $2 billion in total assets to make projections about financial institutions with below $850 million in total assets.

enough money to cover a withdrawal, debit, payment, or transfer transaction.

(e) *Nonsufficient funds fee* or *NSF fee* means a charge that is assessed by a covered financial institution for declining an attempt by a consumer to withdraw, debit, pay, or transfer funds from their account due to insufficient funds. The label used by the covered financial institution for a fee is not determinative of whether or not it is a *nonsufficient funds fee.*

§ 1042.3 Identification and prohibition of abusive practice.

(a) *Identification.* It is an abusive practice for a covered financial institution to charge a nonsufficient funds fee in connection with a covered transaction.

(b) *Prohibition.* A covered financial institution must not assess a nonsufficient funds fee in connection with any covered transaction.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

[FR Doc. 2024–01688 Filed 1–30–24; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2024–0040; Project Identifier MCAI–2023–01196–T]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2014–15–09, AD 2020–15–09, and AD 2022–16–07. AD 2014–15–09 applies to all Airbus SAS Model A330–200 Freighter, A330–200 and –300, and A340–200, –300, –500, and –600 series airplanes. AD 2020–15–09 applies to all Airbus SAS Model A330–941 airplanes. AD 2014–15–09 and AD 2020–15–09 require repetitive operational tests of the hydraulic locking function on certain spoiler servo-controls (SSCs) and replacement if necessary. AD 2022–16–07 applies to certain Airbus SAS Model A330–200, A330–200 Freighter, and A330–300 series airplanes. AD 2022–16–07 requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. Since the FAA issued AD 2022–16–07, the FAA has determined that new or more restrictive airworthiness limitations are necessary. This proposed AD would continue to require certain actions in AD 2014–15–09, AD 2020–15–09, and AD 2022–16–07 and would require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, as specified in a European Union Aviation Safety Agency (EASA), which is proposed for incorporation by reference (IBR). This proposed AD also removes Model A340–200, –300, –500, and –600 series airplanes from the applicability. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by March 18, 2024.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2024–0040; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For EASA material that is proposed for IBR in this NPRM, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this material on the EASA website at *ad.easa.europa.eu.*
- For Airbus service information that is proposed for IBR in this NPRM, contact Airbus SAS, Airworthiness Office—EAL, Rond-Point Emile Dewoitine No: 2, 31700 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; email *airworthiness.A330-A340@airbus.com;* website *airbus.com.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available at *regulations.gov* under Docket No. FAA–2024–0040.

FOR FURTHER INFORMATION CONTACT: Vladimir Ulyanov, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3229; email *Vladimir.ulyanov@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2024–0040; Project Identifier MCAI–2023–01196–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *regulations.gov*, including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI