Summary of CFPB Proposed Rule: Fees for Instantaneously Declined Transactions

On January 24, 2024, the Consumer Financial Protection Bureau (CFPB or Bureau) released a notice of proposed rulemaking to prohibit covered financial institutions from charging fees, such as nonsufficient funds (NSF) fees, when consumers initiate payment transactions that are instantaneously declined. Under the rule, charging such fees would constitute an abusive practice under the Consumer Financial Protection Act's prohibition on unfair, deceptive, or abusive acts or practices.

Highlights

- NSF Fees on instantaneously declined transactions, regardless of transaction method (e.g., debit card, ATM, person-to-person) would be prohibited as an abusive act or practice under the Bureau's prohibition on Unfair, Deceptive, or Abusive Acts or Practices (UDAAP).
- These types of fees are relatively uncommon.
- This rule can be viewed as the CFPB taking proactive steps to regulate NSF fees as technological advancements may eventually make instantaneous payments ubiquitous.
- Unlike the CFPB's overdraft proposal, the NSF proposal does not include an asset-based exemption and would apply to all credit unions.
- Comments to the proposed rule are due to the CFPB by March 25, 2024.

Impact on Credit Unions

The charging of NSF fees for instantaneously declined transactions is exceedingly rare, as such, the impact of this rule for credit unions can be expected to be minimal. Credit unions that currently charge NSF fees subject to the proposal would need to adapt their fee structures and ensure compliance with the new rule, potentially requiring changes in internal policies and systems. This rule can be useful to credit unions seeking to ensure compliance with UDAAP as it provides insight into the types of acts and practices that the Bureau considers abusive.

Section Summary

Definitions (§1042.2)

Section 1042.2 of the proposal outlines several key definitions:

- **Account (§ 1042.2(a)):** This definition aligns with Regulation E, specifically 12 CFR 1005.2(b). It includes checking, savings, or other consumer asset accounts held by financial institutions for personal, family, or household purposes, as well as prepaid accounts. However, it excludes accounts held under a bona fide trust agreement, occasional or incidental credit balances, profit-sharing and pension accounts under trust agreements, escrow accounts for specific purposes, and accounts for purchasing U.S. savings bonds. This alignment aims to maintain consistency with Regulation E and maximize consumer protection.

- **Covered Financial Institution (§ 1042.2(b)):** This term refers to a "financial institution" as defined in Regulation E, 12 CFR 1005.2(i). It includes banks, savings associations, credit unions, or any entity that holds consumer accounts or issues access devices for electronic fund transfers. Motor vehicle dealers predominantly engaged in vehicle sales and servicing are excluded. This alignment is intended to maintain consistency and ensure a level playing field among financial institutions.
- **Covered Transaction (§ 1042.2(c)):** A "covered transaction" pertains to a consumer's attempt to withdraw, debit, pay, or transfer funds from their account that is instantly or nearly instantly declined by a covered financial institution due to insufficient funds. The key factor is that the transaction is processed in real time without significant delays. Transactions declined hours or days later are not covered, nor are transactions initially authorized but later rejected due to insufficient funds. Checks and ACH transactions are typically not covered under this definition unless they evolve to allow instantaneous or near-instantaneous declines.
- **Insufficient Funds (§ 1042.2(d)):** This definition relates to the status of an account lacking sufficient funds to cover a withdrawal, debit, payment, or transfer transaction. It aims to avoid circular definitions.
- **Nonsufficient Funds Fee or NSF Fee (§ 1042.2(e)):** This term refers to a fee charged by a covered financial institution when a consumer's attempt to withdraw, debit, pay, or transfer funds from their account is declined due to insufficient funds. The name used by the institution for the fee does not determine its classification as an NSF fee. Unlike overdraft fees, NSF fees are only charged after a declined transaction and can have various labels. The proposal broadly encompasses fees that, if charged, would constitute an abusive practice.

Abusive conduct/lack of understanding (§§ 1042.2 and 1042.3)

The CFPB is proposing to categorize charging NSF fees for covered transactions as abusive conduct under Consumer Financial Protection Act (CFPA) section 1031(d)(2)(A). This would be based on the premise that such fees take unreasonable advantage of consumers' lack of understanding of the material risks, costs, or conditions associated with their deposit accounts.