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## Coming Soon – CFPB Proposals Would Characterize Certain Overdraft Fees as Finance Charges; Certain NSF Fees as UDAAP\*

The CFPB announced its Fall 2023 rulemaking agenda in early December. The agenda covers the CFPB's regulatory plans for the period of November 2023 through October 2024. One of the more noteworthy items within the CFPB's agenda was its announcement that the CFPB intends to issue proposed rules concerning overdraft and insufficient funds (NSF) fees. According to the CFPB's agenda, these will be addressed in two separate proposals, to be issued in the next month.

**Overdraft Proposal.** The CFPB's agenda indicates that its overdraft proposed rule to be issued in the next month would, if finalized, amend Regulation Z to address when overdraft fees for overdraft services "are considered finance charges." The exact scope of the proposal remains to be seen, but some industry pundits are predicting that the proposal will be broadly drafted to encompass more than just typical overdraft fees that are charged per transaction. For example, it is possible the proposal will also encompass other overdraft-related fees such as continuous overdraft fees charged on extended negative balances and fees for account-to-account overdraft transfers.

**NSF Proposal.** The CFPB's agenda states that its NSF proposal to be issued in the next month would, if finalized, "preliminarily identify the assessment of NSF fees in certain circumstances as [UDAAP] under . . . Consumer Financial Protection Act [Section 1031(b)] and impose requirements to prevent such UDAAPs." While the exact scope of this proposal remains to be seen, it is possible that the proposal could be similar to the FDIC's 2022 *Supervisory Guidance on Multiple Re-Presentation NSF Fees*, which outlined a number of compliance risks and proposed risk-mitigating approaches in connection with certain NSF fee practices.

The CFPB's Fall 2023 rulemaking agenda may be viewed at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=3170-AA42>.

The CFPB's upcoming proposals are another reminder of the heightened regulatory scrutiny applied to overdraft and NSF fees. For more information regarding overdraft and NSF fee-related risks, contact Tricia E. Engelhardt at [TEngelhardt@ABLAWYERS.COM](mailto:TEngelhardt@ABLAWYERS.COM).

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