No. 09-329

IN THE
Supreme Court of the United States

CHASE BANK USA, N.A.,
Petitioner,
v.

JAMES A. MCCOY, on behalf of himself and all others similarly situated,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The applicable version of Regulation Z, the Federal Reserve Board's regulation implementing the Truth in Lending Act, required credit card issuers to provide an initial disclosure statement, before a cardholder completed any transaction on his or her account, containing "each periodic [interest] rate that may be used to compute the finance charge." 12 C.F.R. § 226.6(a)(2) (2004). It also required that when a card issuer later changed any term required to be disclosed in the initial disclosure statement, the card issuer "mail or deliver written notice" of that change in terms before the effective date of the change. *Id.* § 226.9(c).

Credit card issuers generally provided the requisite initial disclosures in or with the contract that governs the credit card account. Such contracts commonly specified an initial periodic rate of interest and also specified that, if the cardholder defaulted in a certain manner, the issuer could increase the rate on the account up to an identified maximum, with the new rate applied as of the beginning of the billing cycle in which the default occurred.

The question presented is:

When a credit card issuer increased the periodic interest rate on a card account in response to a cardholder default and pursuant to a previously disclosed default-rate term, did the applicable version of Regulation Z require the issuer to provide the cardholder with notice of a change in terms even though the contractual terms governing the account had not changed?

RULE 29.6 STATEMENT

Petitioner Chase Bank USA, N.A., formerly known as Chase Manhattan Bank USA, N.A., is a wholly owned indirect subsidiary of JPMorgan Chase & Co. No publicly held corporation owns 10 percent or more of the stock of JPMorgan Chase & Co.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 559 F.3d 963. The court's order denying rehearing and rehearing en banc (Pet. App. 49a-50a) is unreported, as is the district court's order dismissing respondent's complaint (Pet. App. 35a-36a). The district court's opinion explaining the dismissal (Pet. App. 37a-47a) is not reported in the *Federal Supplement* but is available at 2006 U.S. Dist. LEXIS 97257.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 2009. Pet. App. 1a. A timely petition for rehearing and rehearing en banc was denied on June 16, 2009. Pet. App. 49a. The petition for a writ of certiorari was filed on September 14, 2009, and granted on June 21, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

REGULATION INVOLVED

This case involves a prior version of Regulation Z, 12 C.F.R. pt. 226, the Federal Reserve Board's regulation implementing the Truth in Lending Act (TILA), Pub. L. No. 90-321, tit. 1, 82 Stat. 146 (codified as amended at 15 U.S.C. §§ 1601 *et seq.*). Two provisions from that version are particularly relevant here:

§ 226.6. Initial disclosure statement.

> The creditor shall disclose to the consumer, in terminology consistent with that to be used on the periodic statement, each of the following items, to the extent applicable:
>
> (a) *Finance charge*. The circumstances under which a finance charge will be imposed and an explanation of how it will be determined, as follows:
>
> * * *
>
> (2) A disclosure of each periodic [interest] rate that may be used to compute the finance charge, the range of balances to which it is applicable, and the corresponding annual percentage rate. When different periodic rates apply to different types of transactions, the types of

> transactions to which the periodic rates apply shall also be disclosed.

12 C.F.R. § 226.6 (2004) (footnotes omitted).

> § 226.9. Subsequent disclosure requirements.
>
> * * *
>
> (c) *Change in terms*—(1) *Written notice required*. Whenever any term required to be disclosed under § 226.6 is changed or the required minimum periodic payment is increased, the creditor shall mail or deliver written notice of the change to each consumer who may be affected. The notice shall be mailed or delivered at least 15 days prior to the effective date of the change. The 15-day timing requirement does not apply if the change has been agreed to by the consumer, or if a periodic rate or other finance charge is increased because of the consumer's delinquency or default; the notice shall be given, however, before the effective date of the change.

12 C.F.R. § 226.9 (2004).

INTRODUCTION

For the period at issue in this case, the Federal Reserve Board's Regulation Z required credit card issuers to state, in "[i]nitial disclosure[s]," each periodic interest rate that "may" be used on a cardholder's account. 12 C.F.R. § 226.6(a)(2) (2004). Regulation Z separately required that issuers provide "[s]ubsequent disclosure[s]" when "any term required to be disclosed under § 226.6 is changed." *Id.* § 226.9(c)(1).[1]

Misreading these provisions, a divided panel of the Ninth Circuit held that issuers must always provide notice of a change in terms, under § 226.9(c), when increasing a cardholder's interest rate because of a default—even when the increase is merely the *implementation* of a term previously disclosed in accordance with § 226.6 and not a *change* to any such term. In so holding, the panel majority failed to follow the Board's Official Staff Commentary to Regulation Z, which prescribes that "[n]o notice of a change in terms need be given if the specific change is set forth initially," 12 C.F.R. pt. 226, supp. I, cmt. ¶ 9(c)-1. The majority also wrongly disregarded explanations published by the Board in the Federal Register detailing the operation of its regulations. The decision below departs from that of every other federal court (indeed, every other federal judge) to have considered the same issue, including a prior Ninth Circuit panel.

Since the date of the Ninth Circuit's decision, the Board—at the invitation of the First Circuit—has made its view of its regulation indisputably clear, stating that no § 226.9(c) disclosure is required in the circumstances presented here. Especially in view of the Board's clearly stated and carefully considered views, and this Court's repeated and substantial deference to the Board regarding the interpretation of Regulation Z, the judgment of the court of appeals should be reversed.

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[1] As explained in the petition (at 12-14) and below, *see* pp. 11-13, the Board recently amended Regulation Z's disclosure requirements. Those amendments do not apply to this case.

STATEMENT

A. Industry Practices Regarding Interest-Rate Increases Triggered By Customer Defaults

This case concerns what disclosures a credit card issuer must make under the Truth in Lending Act when it increases a cardholder's interest rate: (1) in response to a contractually-specified default (*e.g.*, a late or missed payment) and (2) pursuant to a previously-disclosed contract term authorizing such an increase. Such default-based rate increases are common in the credit card industry, as issuers often consider the increases necessary to compensate for the heightened risk revealed by the borrower's default.

Credit card issuers adjust interest rates in response to changed circumstances in two principal ways. The first is by implementing terms in the cardholder agreement under which the parties have agreed, *ex ante*, that different periodic rates may be applied in the future in specified circumstances. For example, a card agreement may provide as follows:

> We may increase the annual percentage rate on all balances to a default rate of up to 24.99 percent … if you fail to make a payment to us or any other creditor when due, you exceed your credit line, or you make a payment to us that is not honored by your bank.

Mark Furletti, *Credit Card Pricing Developments and Their Disclosure* 9 (Federal Reserve Bank of Philadelphia Jan. 2003) (omission in original) (emphasis and internal quotation marks omitted). The major credit card issuers have long included such provisions in their contracts in one form or another. *See* Pet. 5-6 n.1. If the cardholder defaults, the issuer may increase rates pursuant to the already-disclosed contract term.

An alternative method by which a card issuer can adjust a cardholder's rates is to amend its contract with the cardholder. Credit card agreements invariably include a provision known as a "change-in-terms" or "reservation-of-rights" provision. These provisions allow the card issuer to change the previously-agreed contract terms (including the possible interest rates) as a condition of continuing to extend credit. *See, e.g.*, Pet. 5-6 n.1. Issuers use their reservation-of-rights authority to increase interest rates, in response to a cardholder's default, in ways not already disclosed to the cardholder. For example, the issuer might decide that the maximum default rate originally authorized by the agreement was inadequate to cover the additional lending risk revealed by a cardholder's default. The issuer would thus amend the contract, via its reservation-of-rights authority, to provide for a higher interest rate on the account.

The two ways in which an issuer may increase an interest rate have different substantive legal effects and practical ramifications. When a card issuer increases rates pursuant to an existing contractual term, the issuer's legal right to increase the rate is already established and there is no contractual requirement that the issuer delay implementation of the new rate. Typically, the increased rate takes effect the first day of the billing period during which the triggering event occurs, and applies to all existing balances.

By contrast, when a card issuer seeks to increase rates by changing the rate terms of the existing cardholder agreement, contract law requires an actual or legally implied agreement to the new terms. Under Delaware law, for example, the issuer must generally provide 15 days' written notice to the cardholder for an amendment to the credit card agreement that increases the interest rate, identifying the proposed amendment and advising the cardholder of his right to opt out of the contractual change. The issuer may not apply the increased rate to the existing account balances of any cardholder who opts out of the amendment and abstains from further use of the account. *See* Del. Code Ann., tit. 5, § 952. Other state banking laws are similar. *See, e.g.*, S.D. Codified Laws §§ 54-11-10, -11.

B. Regulation Z Disclosure Requirements

TILA is a disclosure statute, imposing standardized disclosure obligations relating to credit transactions with consumers. Rulemaking authority is vested in the Federal Reserve Board, 15 U.S.C. § 1604, which has implemented the statute through Regulation Z, 12 C.F.R. pt. 226. Regulation Z is supplemented by an Official Staff Commentary. *See id.* supp. I. The Commentary "is the vehicle by which the staff … of the Federal Reserve Board issues official staff interpretations of Regulation Z." *Id.* pt. 226, supp. I, cmt. I-1. This Court has noted that "Congress has conferred special status upon official staff interpretations," *Ford Motor Credit* v. *Milhollin*, 444 U.S. 555, 566 n.9 (1980), and accordingly the Court has treated a "proposed official staff interpretation" as evidence of the Board's interpretation of TILA, *Anderson Bros. Ford* v. *Valencia*, 452 U.S. 205, 222 (1981). The Commentary is promulgated and revised through the same notice-and-comment process that applies to Regulation Z itself. *See, e.g.*, *Truth in Lending*, 74 Fed. Reg. 5,244, 5,450-5,498 (Jan. 29, 2009) (final rule). Good-faith compliance with Regulation Z or the Commentary is a defense to claims of a violation of TILA or the regulation. 15 U.S.C. § 1640(f).

The disclosure practices governed by Regulation Z are broad and intricate: The regulation and Commentary fill more than 450 pages in the Code of Federal Regulations. The Board also frequently publishes revisions, together with explanations, of both the regulation and Commentary, in order to address new developments, uncovered ambiguities, and changes in law or policy. *See, e.g.*, *Truth in Lending*, 74 Fed. Reg. 5,244. From 2004 to the date of the petition for certiorari in this case, notices concerning revisions to Regulation Z and the Commentary, including explanatory material, consumed over 1,000 pages in the Federal Register. In light of the complex nature of the subject matter and Congress's delegation of broad interpretive authority to the Board, this Court has accorded substantial deference to the Board's expertise in Regulation Z matters. *See generally Ford Motor Credit*, 444 U.S. at 565.

Two provisions of the applicable version of Regulation Z are of primary relevance to this case. The first, 12 C.F.R. § 226.6, governs the "[i]nitial disclosure[s]" that credit card issuers must provide to a cardholder before any transaction on the account. During the period relevant to this case, § 226.6 required creditors to disclose "each periodic rate that *may* be used to compute the finance charge" under the terms of the governing contract. 12 C.F.R. § 226.6(a)(2) (2004) (emphasis added); *see also id.* § 226.5(b)(1) (requiring initial disclosure before any transactions occur on the account). This disclosure obligation included contractual default rates: "If the initial rate may increase upon the occurrence of one or more specific events, such as a late payment or an extension of credit that exceeds the credit limit, the creditor must disclose the initial rate and the increased penalty rate that may apply." *Id.* pt. 226, supp. I, cmt. ¶ 6(a)(2)-11. This default rate disclosure was required to "reflect the terms of the legal obligation between the parties" under the credit contract. *Id.* § 226.5(c) (2004).

The second provision concerns "[c]hange[s] in terms." 12 C.F.R. § 226.9(c) (2004). During the relevant period, this provision mandated that "[w]henever any term required to be disclosed under § 226.6 is changed or the required minimum periodic payment is increased, the creditor shall mail or deliver written notice of the change to each consumer who may be affected." *Id.* § 226.9(c)(1). Section 226.9(c) disclosures—triggered only when there was a *change* in one or more of the terms that § 226.6 required creditors to disclose initially—effectively operated as a new round of "initial disclosures" for the changed term. Thus, notice of a change in terms was not required for rate increases provided for in the cardholder's "[i]nitial" terms, such as application of a new rate for failing to maintain a certain account balance. In contrast, a change-in-terms notice was required if the card issuer invoked a reservation-of-rights provision to *amend the contract* to adopt a rate term different from the existing contract terms. As the Commentary explained:

> No notice of a change in terms need be given if the specific change is set forth initially, such as: rate increases under a properly disclosed variable-rate plan … or an increase that occurs when the consumer has been under an agreement to maintain a certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum. In contrast, notice must be given if the contract allows the creditor to increase the rate at its discretion but does not include specific terms for an increase (for example, when an

> increase may occur under the creditor's contract reservation right to increase the periodic rate).

12 C.F.R. pt. 226, supp. I, cmt. ¶ 9(c)-1 (hereafter Comment 9(c)-1).

Ordinarily, when Regulation Z required the creditor to send notice of a change in terms, the creditor had to send it 15 days in advance of the effective date of the change. 12 C.F.R. § 226.9(c)(1) (2004).[2] If, however, the creditor changed the rate terms of the agreement because of a cardholder's default or delinquency, then the 15-day period was inapplicable and the creditor needed only to send the notice before the effective date of the change. *Id.* Thus, in the event of a default, if the bank were to *amend* the cardholder agreement to provide for a rate not already authorized by that agreement, notice was required but the creditor did not have to send it 15 days in advance. As the Commentary stated:

> *3. Timing—advance notice not required.* Advance notice of 15 days is not necessary—that is, a notice of change in terms is required, but it may be mailed or delivered as late as the effective date of the change— … [i]f there is an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default.

12 C.F.R. pt. 226, supp. I, cmt. ¶ 9(c)(1)-3 (hereafter Comment ¶ 9(c)(1)-3).

Credit card issuers' initial disclosures—and, for that matter, any change-in-terms disclosure—do not

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[2] Under recent amendments to the regulation, that time is now 45 days. *See infra* pp. 12-13.

necessarily identify the particular rates that will be applicable to a card account at a particular time. As discussed, Regulation Z required these disclosures to identify all rates that "may" apply under the terms of the parties' agreement, whereas the rate that does apply in any instance may depend on which credit features a cardholder utilizes, cardholder behavior, external events (*e.g.*, the movement of a variable-rate index), or other circumstances. Under Regulation Z, ongoing disclosure to the cardholder of which rates are being applied to the account was (and is) conveyed by "[p]eriodic statements," typically rendered monthly. 12 C.F.R. § 226.7(d) (2004). The periodic statement identifies transactions on the account and discloses each rate "in effect during the billing cycle reflected on the periodic statement." *Id.* pt. 226, supp. I, cmt. ¶ 7(d)-2.

C. Recent Revisions To Regulation Z

This case is governed by the provisions of Regulation Z described above. Last year, the Federal Reserve Board revised the regulation twice, first to implement changes in its regulatory policy, and later to reflect changes enacted by Congress. Unlike the provisions in place at the time of the events of this case, Regulation Z now requires advance notice when a card issuer is implementing an increased periodic rate pursuant to a default-rate term, even where the term was included with a card issuer's initial disclosures.

The first change to Regulation Z, reflecting a change in Board policy, was initiated through a rulemaking process begun in late 2004. Repeatedly during that process, the Board stated—in discussing the version of Regulation Z applicable here—that the Regulation authorized the implementation of a contractual default-rate term without a change-in-terms notice. In 2007, for instance, the Board stated:

> [N]o change-in-terms notice is required if the specific change is set forth initially by the creditor in the account-opening disclosures. See current comment 9(c)-1. For example, some credit card account agreements permit the card issuer to increase the periodic rate if the consumer makes a late payment. Because the circumstances of the increase are specified in advance in the account agreement, the creditor currently need not provide a change-in-terms notice; under current § 226.7(d) the new rate will appear on the periodic statement for the cycle in which the increase occurs.

Truth in Lending, 72 Fed. Reg. 32,948, 33,009 (June 14, 2007) (proposed rule); *accord Truth in Lending*, 69 Fed. Reg. 70,925, 70,931-70,932 (Dec. 8, 2004) (advance notice of proposed rulemaking (ANPR)).

The Board explained that it was changing its policy on this point out of concern that some cardholders—notwithstanding the notice that they had previously received—were not aware that by defaulting they could incur certain penalty rates. *See, e.g.*, *Truth in Lending*, 72 Fed. Reg. at 32,957, 33,012. The Board thus added a new paragraph (g) to § 226.9 that requires 45 days' advance notice when a cardholder's interest rate is increased because of a default and the increase is pursuant to a previously disclosed contract term. *See Truth in Lending*, 74 Fed. Reg. at 5,414. The Board also amended § 226.9(c) to increase, from 15 days to 45 days, the advance notice that cardholders must receive when actual changes in terms are made on their accounts, including changes concerning penalty or other interest rates. *See id.* at 5,413.

Before the Board's amended regulation took effect, Congress passed the Credit Card Accountability Responsibility and Disclosure Act ("CARD Act"), which requires 45 days' advance notice for most credit card interest-rate increases, regardless of whether an increase reflects a change in contract terms or an implementation of existing terms. Pub. L. No. 111-24, § 101(a), (b) 123 Stat. 1734, 1735 (2009). In July 2009, the Board adopted new regulations to implement the CARD Act, but retained separate provisions, as in the January 2009 rule, applicable to (1) changes in rate terms and (2) implementations of previously disclosed default-rate terms. *See Truth in Lending*, 74 Fed. Reg. 36,077, 36,094-36,096 (July 22, 2009) (interim final rule) (promulgating new versions of 12 C.F.R. § 226.9(c), (g), effective August 20, 2009).

The regulatory amendments discussed in this section do not apply to this case.

D. Proceedings Below

Respondent's complaint. Respondent James McCoy filed this putative class action in California state court to challenge petitioner Chase Bank USA's practice of increasing a cardholder's interest rate following a default without providing notice of a change in terms under § 226.9(c). The cardholder agreement governing McCoy's account with Chase provided that his entitlement to "Preferred" rates was contingent on his avoiding specified events of default. Pet. App. 20a-21a n.1 (Cudahy, J., dissenting). In the event of such a default, Chase was authorized to impose different rates "up to the maximum Non-Preferred rate described in the

Pricing Schedule." Pet. App. 20a n.1 (Cudahy, J., dissenting).

Following McCoy's default, Chase increased his interest rate in accordance with the contract. Pet. App. 2a. McCoy's complaint alleged that Chase had violated Regulation Z by "'failing to notify its customers of increases in interest rates on or before the effective date of the change.'" Pet. App. 41a (citing the Second Amended Complaint).

The district court decision. Chase removed the action to the United States District Court for the Central District of California and sought dismissal of the complaint. Pet. App. 37a. Chase contended that McCoy's rate increase constituted an implementation of—not a change to—the contractual terms governing the account and set forth in Chase's initial disclosures, and that the Commentary to Regulation Z specifically provided that "[n]o notice of a change in terms need be given if the specific change is set forth initially," Comment ¶ 9(c)-1.

The district court granted Chase's motion, agreeing with every other court to have considered the TILA issue in concluding that no change-in-terms notice was required in connection with "the implementation of terms [that had previously been] explicitly disclosed." Pet. App. 42a; *see also* Pet. 22 n.4; Pet. App. 40a-41a (citing similar decisions). McCoy appealed.

The Ninth Circuit decision. Before the Ninth Circuit decided the appeal in this case, it confronted another case involving the same issue, brought by the same counsel, also against Chase, based on a virtually identical cardholder agreement—*Evans* v. *Chase Bank USA, N.A.*, 267 F. App'x 692 (9th Cir. 2008). The *Evans* panel rejected the § 226.9(c) claim unanimously, holding that Regulation Z did not require sending "change-in-terms notices prior to implementing discretionary interest rate increases after default." *Id.* at 693.

Approximately one year later, having stayed this case pending decision in *Evans*, a different panel of the Ninth Circuit rejected the *Evans* decision and reached a contrary result. *See* Pet. App. 12a-14a. Judge Cudahy, sitting by designation from the Seventh Circuit, dissented. Pet. App. 19a-33a.

The panel majority concluded that the "text of Regulation Z is ambiguous" and turned to the Board's Official Staff Commentary. Pet. App. 4a. Among the Commentary's provisions pertinent to § 226.9(c), the majority found Comment 9(c)(1)-3, the "[t]iming" comment, to be "the most salient," holding that the comment's "plain-meaning … is to require notice when a cardholder's interest rates increase because of a default." Pet. App. 4a. The majority disagreed that Comment 9(c)-1, which states that "[n]o notice of a change in terms need be given if the specific change is set forth initially," was relevant to rate increases based on default or delinquency, even implementation of a default-rate term. *See* Pet. App. 5a. The majority went on to state that even if Comment 9(c)-1 were relevant, the various examples in that comment show that rate increases are excluded from its scope if the card issuer retains some discretion not to impose the increase. *See* Pet. App. 6a-9a.

In reaching its conclusions, the panel majority rejected the view of the *Evans* panel and every district court to have confronted the same question. Pet. App. 11a-12a. The majority also declined to defer to the Board's explanations of Regulation Z in the recent rulemaking proceeding, on the ground that they were "tersely worded 'interpretations' of existing law [that were] incidental to the purpose of the agency action, … stated in conclusory fashion, … themselves ambiguous, and have now been superceded." Pet. App. 13a n.14.[3]

In dissent, Judge Cudahy criticized the majority for failing to defer to the Board's clear explanation of § 226.9(c) in its rulemaking, and concluded that under this Court's precedent the Board's opinion regarding the correct interpretation of Regulation Z is entitled to deference, "even if that opinion appears in an ANPR rather than Official Staff Commentary." Pet. App. 27a.

Chase petitioned for panel rehearing and rehearing en banc, noting that days after the panel decision the Seventh Circuit had issued a decision reaching the opposite result. *See Swanson* v. *Bank of America, N.A.*, 559 F.3d 653 (7th Cir. 2009), *reh'g denied with op.*, 563 F.3d 634 (7th Cir. 2009). The Ninth Circuit denied the petition. Pet. App. 49a-50a.

E. The Board's Amicus Brief In *Shaner*

In seeking rehearing en banc, Chase urged the Ninth Circuit to invite the Board to express its views on the question presented. The court did not do so. The First Circuit, however, which had a similar appeal pending, did solicit such a brief. *See* Order 1-2, *Shaner* v. *Chase Bank USA, N.A.*, No. 09-1157 (1st Cir. Aug. 4, 2009). The Board accepted the invitation and filed a brief explaining that it had long construed Regulation Z as Chase and other card issuers did:

[3] Due to an error in preparing the Petition Appendix, footnote 14 in the Appendix is footnote 5 in the official version of the Ninth Circuit's decision.

> [T]he Board has interpreted the applicable provisions of Regulation Z not to require a pre-effective date change-in-terms notice for an increase in annual percentage rate when the contingency that will trigger a rate increase and the specific consequences for the consumer's rate are set forth in the initial card member agreement. No pre-effective date disclosure is required even if the creditor retains discretion in the initial agreement to impose, or not impose, the higher rate upon the occurrence of the contingency, and even where the creditor increases the rate to some level below the maximum set forth in the agreement in the event the disclosed contingency occurs, so long as the contingency is identified and the maximum rate is disclosed in the initial card member agreement.

Brief for the Board of Governors of the Federal Reserve System as *Amicus Curiae* at the Request of the Court at 1, *Shaner* (Oct. 22, 2009) (hereafter Board Br.).[4] "In the Board's view, a rate increase under these circumstances was not considered a 'change in terms,' but rather was considered the implementation of terms already disclosed in the initial disclosures." *Id.* at 5.

Deferring to the views expressed in the Board's amicus brief, the First Circuit affirmed the dismissal of the TILA claim in that case, which was substantively

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[4] The Board's brief is available through the First Circuit's online docket sheet for *Shaner* (*i.e.*, PACER) but not on LEXIS or Westlaw. Chase has therefore submitted a letter seeking permission to lodge the brief with the Court.

identical to McCoy's. *See Shaner* v. *Chase Bank USA, N.A.*, 587 F.3d 488, 493 (1st Cir. 2009). The court explained that it had solicited the brief from the Board "to supply the Board's view of its own regulations and as such it is entitled to due respect as the agency's 'fair and considered judgment on the matter in question,' which happens to be the agency's own regulation." *Id.* (quoting *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997)).

SUMMARY OF ARGUMENT

I. The question presented here is whether, in the circumstances of this case, the applicable version of Regulation Z required Chase (and other card issuers) to provide McCoy (and other cardholders) with a change-in-terms notice. The Federal Reserve Board's amicus brief in *Shaner*, filed at the invitation of the First Circuit, provides an unmistakably clear answer. The Board does not, and did not, interpret Regulation Z to require notice of a change in terms in the circumstances here. The Board, the brief explains, interpreted interest-rate increases like those at issue here to constitute an implementation of terms rather than a change in terms. The Solicitor General's petition-stage brief in this case, filed at this Court's invitation, provides the same clear answer. The two briefs discuss the bases for the Board's views, and address several errors that led the panel majority in this case to its contrary interpretation of the regulation. These include the majority's misreading of Comments 9(c)-1 and 9(c)(1)-3, and its mistaken view that the analysis here depends partly on whether the card issuer had discretion regarding the imposition of default-based rate increases. The two briefs also emphasize that the interpretation of Regulation Z offered therein is one that the Board has held consistently for years.

Under this Court's case law, the views expressed in these briefs warrant substantial judicial deference. This Court has instructed that an agency's interpretation of its own regulation is "controlling" unless "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (internal quotation marks omitted). The Court has also specifically directed courts to give great deference to the Board's interpretations of Regulation Z, because TILA delegates interpretive authority to the Board and because the subject matter is technical and complicated. Only when a Board interpretation is "irrational" can a court properly decline to defer to it. *Ford Motor Credit*, 444 U.S. at 568. The standards for deference are satisfied here. The Board's interpretation in this case is correct and consistent both with the principles on which the underlying credit card contract are based and with TILA's consumer-protection goals. The Board's view also properly focuses on the substance of the relevant transactions rather than their form. That the Board's views were most recently expressed in legal briefs does not diminish the level of deference that those views are to receive.

II. The Ninth Circuit's decision—which departs from that of every other court to address this issue—is erroneous even without consideration of the two amicus briefs. The panel majority's ruling is inconsistent with the text of the relevant provisions of both Regulation Z and the Official Staff Commentary. Those provisions make clear that notice of a change in terms was required, as the name suggests, only when there was in fact a change to one or more of the initially disclosed terms, rather than when there was simply an implementation of those terms. Far from refuting Chase's position, as the panel majority concluded, the illustrative examples included in the Commentary support that position.

The panel majority also went astray in failing to defer to statements the Board made during the rulemaking proceedings, statements that clearly explain that the applicable version of the regulation did not require a change-in-terms notice for interest-rate increases like those at issue here. The panel majority dismissed these statements as "incidental," when in fact they were an integral part of the process for revising the rule. The majority also labeled the statements "terse," even though they were more specific and detailed than the relevant provisions of the regulation itself and the Commentary. And while the panel majority saw ambiguity in the statements, they were in reality entirely clear. More generally, the panel majority failed to recognize that if its interpretation were correct, then a critical component of the years-long rulemaking process was entirely unnecessary. In failing to defer to the Board's statements, the panel majority failed to appreciate the extent to which issuers require a clear and consistently applied body of rules regarding the meaning of Regulation Z. Congress has expressly directed that the Board, not the courts, provide and interpret that body of rules in the first instance. The decision below is inconsistent with that legislative command.

ARGUMENT

I. THE FEDERAL RESERVE BOARD'S AMICUS BRIEF IN *SHANER* PROVIDES A CLEAR—AND CONTROLLING—ANSWER TO THE QUESTION PRESENTED, AS DOES THE SOLICITOR GENERAL'S INVITATION BRIEF HERE

McCoy's claim is that, notwithstanding the notice he received in the initial disclosures that certain defaults could lead to higher interest rates, TILA and Regulation Z required Chase to provide him with notice of a change in terms before implementing such increases. The Board's amicus brief in *Shaner* expressly rejects that view of Regulation Z. The invitation brief filed in this case by the Solicitor General reiterates that position. Granting appropriate deference to the views in these briefs leaves no doubt that the Ninth Circuit's judgment should be reversed.

A. The Amicus Briefs Unambiguously State That Regulation Z Did Not Require Provision Of A Change-In-Terms Notice Here

The question in this case is whether the applicable version of Regulation Z required Chase to send McCoy notice of a *change* in terms when it *implemented* the initially disclosed default-rate term in his cardholder agreement—a term that specified both the events of default that could lead to an increased rate and the maximum possible rate that could result. The Board's amicus brief in *Shaner* clearly states that the Board's answer to that question is "no." The brief explains (at 1) that the Board "has interpreted the applicable provisions of Regulation Z not to require a pre-effective date change-in-terms notice for an increase in annual percentage rate when the contingency that will trigger a rate increase and the specific consequences for the consumer's rate are set forth in the initial card member agreement." The Board considers such a rate increase to be "the implementation of terms already disclosed in the initial disclosures," and not "a 'change in terms.'" *Id.* at 5.

The Solicitor General's invitation brief in this case makes the same point. It states (at 10) that "[a]t the time of the transactions at issue in this case, Regulation

Z did not require credit card issuers to provide cardholders with a change-of-terms notice before implementing a default-rate provision contained in the preexisting credit card account agreements." "[A]ny resulting rate increase," the brief adds, "did not represent a 'change in terms,' but rather the implementation of terms already set forth in the initial disclosure statement." *Id.* at 12.

The Board's amicus brief in *Shaner* also makes clear that the answer to the question presented is the same even if, as here, the issuer retains discretion not to impose any penalty rate or to impose one below the specified maximum. *See* Board Br. 15 ("The Board … interprets Regulation Z (prior to the 2009 amendments) to provide that no change-in-terms notice is required where a creditor exercises discretion to impose less than the full disclosed penalty rate or no penalty rate at all when a contingency set forth in the contract occurs."). And here again, the Solicitor General's invitation brief (at 15-16) reiterates the point.

The two briefs go on to correct several errors that underlay the Ninth Circuit's ruling. Initially, both briefs address the panel majority's erroneous view of Comment 9(c)(1)-3, which the court referred to as Comment 3 and which addresses the "[t]iming" of any "[w]ritten [n]otice [r]equired" by § 226.9(c)(1). The majority placed dispositive weight on that comment, concluding that it "require[s] notice when a cardholder's interest rates increase because of a default." Pet. App. 4a; *see also* Pet. App. 5a ("Comment 3[] … is directly on point and therefore governs."). The Board's brief explains why that view is mistaken. Comment 9(c)(1)-3 "relates only to the *timing* of subsequent disclosures in those circumstances where section 226.9(c)(1) of the regulation already requires that subsequent disclosures be made; it does not create a substantive requirement to provide disclosures where the regulation and commentary do not already demand them." Board Br. 14 (emphasis added). The Solicitor General's brief repeats this critical distinction, stating (at 14) that "[r]ather than establishing a freestanding disclosure requirement, Comment 9(c)(1)-3 specified the time at which such disclosures must be made."

The amicus briefs thus confirm that Comment 9(c)(1)-3 had no application when a credit card issuer implemented an initially disclosed term. The comment applied, instead, only where Regulation Z already required provision of a change-in-terms notice. For example, the comment would have applied when, in response to a cardholder's default, a creditor "change[d] the actual terms of the underlying card agreement to impose a penalty rate … when the agreement did not specify a penalty rate." Board Br. 5. In such circumstances, the timing rule of Comment 9(c)(1)-3 would have specified that the issuer need not provide the required change-in-terms notice 15 days in advance of such a change, but instead may mail or deliver it "as late as the effective date of the change."

The amicus briefs also reject the panel majority's view of Comment 9(c)-1, which provides that no notice of a change in terms is required for "[c]hanges initially disclosed." The majority below considered Comment 9(c)-1 inapplicable, both because it thought Comment 9(c)(1)-3 governed more specifically, *see* Pet. App. 5a, and because it read Comment 9(c)-1 as inapposite where the creditor retained discretion not to impose the initially disclosed rate increase, or to impose a rate below the disclosed maximum, *see* Pet. App. 6a-9a.

The Board's amicus brief dispels those misunderstandings. It first explains (at 14) that Comment 9(c)-1, and not Comment 9(c)(1)-3, governs in the circumstances here because Comment 9(c)-1 "provides the Board's official interpretation of the entirety of section [226.]9(c), relating to subsequent disclosures of changes in terms." The Board's brief (at 15) also rejects the panel majority's interpretation of Comment 9(c)-1 as excepting rate-increase provisions that leave the creditor some discretion not to make the rate change in question, or to do so to a lesser extent. The Board was "aware that credit card companies frequently choose to impose less than the maximum rate increase permitted under the contract terms, and has never viewed that exercise of discretion in the consumer's favor to require a change-in-terms notice where none would have been required had the full increase been immediately imposed." Board Br. 15 (footnote omitted); *accord* U.S. Pet.-Stage Br. 15. As for the examples in Comment 9(c)-1, from which the panel majority derived its restrictive view, the Board's brief explains (at 16 n.8) that they "are illustrative only, and the Board did not mean … to limit the circumstances for the absence of a change-in-terms notice to those" examples. *See also id.* at 5 ("The Board has never stated that the examples listed in this paragraph … are exhaustive.").

The Board's interpretation set forth in the two briefs reflects a considered, long-held view. *See* Board Br. 6-10; U.S. Pet.-Stage Br. 3-6, 16-17. As the briefs explain, that position was confirmed by statements the Board made during the rulemaking proceedings. *See, e.g.*, Board Br. 9-10 ("These statements by the Board clearly indicate the Board's understanding that Regulation Z, … prior to the 2009 amendments, *did* 'permit immediate application of penalty pricing upon the occurrence' of 'events specified in the contract.' In fact, it was the absence of any notice requirement in this circumstance that led the Board to propose the amendment to Regulation Z[.]" (quoting *Truth in Lending*, 72 Fed. Reg. at 33,012)). The briefs also point to additional supporting evidence from the rulemaking proceedings—specifically the fact that the Board twice categorized the creation of a notice requirement in the circumstances here as a "major proposed change," and the fact that the Board effected that change by adding an entirely new paragraph (g) to section 226.9. *See id.* at 8, 10-12; U.S. Pet.-Stage Br. 13.

B. Under This Court's Precedent, The Views Expressed By The Board Warrant Great Deference

The views expressed in the Board's amicus brief and the Solicitor General's invitation brief should be dispositive here. This Court has instructed—often unanimously—that an agency's interpretation of its own regulation is "controlling" unless the interpretation is "'"plainly erroneous or inconsistent with the regulation."'" *Auer*, 519 U.S. at 461 (quoting *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting, in turn, *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))); *see also Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 872 & n.7 (2009) (unanimously reaffirming and applying *Auer*); *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 168-171 (2007) (same). "This broad deference is all the more warranted when, as here, the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (quoting *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)).

These principles have been considered especially important in the TILA and Regulation Z context, not only because the subject matter is highly complex but also because TILA itself delegates expansive interpretive authority to the Board. *See, e.g.*, *Ford Motor Credit*, 444 U.S. at 568 (TILA's "legislative history evinces a decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation."); *Mourning* v. *Family Publ'ns Serv., Inc.*, 411 U.S. 356, 365 (1973) ("Congress determined to lay the structure of the Act broadly, and to entrust its construction to an agency with the necessary experience and resources to monitor its operation."). This Court thus has cautioned that "judges ought to refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter's lawmaking is not irrational," and that "[u]nless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive." *Ford Motor Credit*, 444 U.S. at 565, 568.

The views expressed in the two briefs easily satisfy these standards for deference. The briefs were submitted pursuant to judicial invitation to explain the regulation and Commentary in the Board's role as neutral expositor of its own regulatory actions, and not as a party with a litigant's stake in the outcome. As explained below, moreover, the position taken in the amicus briefs is demonstrably correct. Notably, every other court to consider the question presented has embraced the Board's views, most even without the benefit of the Board's amicus brief. At a bare minimum, the Board's position is a reasonable construction of the regulatory text (which the panel majority considered "ambiguous," Pet. App. 4a). The Board's construction is certainly neither "plainly erroneous [n]or inconsistent with the regulation." *Auer*, 519 U.S. at 461. Not even the panel majority took that position.

Nor is there anything "irrational" about the Board's interpretation. *Ford Motor Credit*, 444 U.S. at 568. To the contrary, the Board was correct to construe its regulation not to require a creditor to send notice of a change in terms when the creditor was implementing, rather than changing, the initially disclosed rate term. That construction is consistent with how a credit card contract works, and with the Board's reference to such contracts as a basis for disclosure. Regulation Z requires disclosures to "reflect the terms of the legal obligation between the parties." 12 C.F.R. § 226.5(c) (2004). Implementation of a default-rate term does not change any "terms of the legal obligation between the parties" in effect at the time of the initial disclosures.

The Board's interpretation is also consistent with TILA's consumer-protection goals. It avoided imposing an additional burden on creditors that chose to help defaulting cardholders by not automatically increasing their rate to the permissible maximum. Even McCoy and the panel majority appeared to agree that the pre-amendment version of Regulation Z did not require provision of a change-in-terms notice if the initial disclosures specified the exact rate that would result from a particular default and left the issuer no discretion to impose a smaller increase (or no increase at all). *See* Pet. App. 6a-7a. Thus, where an issuer retained discretion to help cardholders by imposing a less-than-maximum penalty rate, or no penalty rate, in response to a default, the majority's reading would have imposed a burden, in the form of an additional notice requirement, on the issuer. Issuers routinely exercise their discretion to excuse such defaults, to accommodate a cardholder's hardship or emergency, for example, or because of a cardholder's historic creditworthiness. *See* Board Br. 15. The panel majority's approach would have discouraged such lenity. The Board's rejection of that approach was thus in keeping with TILA's consumer-protection goals. *See* Pet. App. 32a-33a (Cudahy, J., dissenting); *see also* Brief of Amicus Curiae Robert A. Glen, Delaware State Banking Commissioner, In Support of the Appellee's Petition for Panel Rehearing and Rehearing *En Banc* and Supporting Affirmance at 10, *McCoy* v. *Chase Manhattan Bank, USA, N.A.*, No. 06-56278 (9th Cir. May 6, 2009) ("Discretion benefits consumers by permitting accommodations[.]"); *id.* at 13.

The Board's position is also rational because the contrary view, adopted by the panel majority, would elevate form over substance. As noted, there should be no dispute that Regulation Z did not previously require notice of a change in terms for a non-discretionary rate increase to the penalty rate disclosed in advance. And no notice of a change in terms is required when an issuer *lowers* a cardholder's interest rate. *See* 12 C.F.R. § 226.9(c)(2) (2004) ("No notice under this section is required when the change involves … a reduction of any component of a finance or other charge[.]"). As a result, no notice would have been required where a non-discretionary penalty rate was triggered by a default, but the issuer then lowered the cardholder's rate as a matter of discretion. As the district court observed, that is no different in substance than the situation here.

See Pet. App. 43a-44a n.26; *cf. also Swanson*, 559 F.3d at 655, 656.[5] The Board's decision to interpret its regulation as applying the same notice requirement to two substantively identical situations was rational, not demonstrably irrational.

That the Board most recently presented its views in a legal brief does not affect the deference due to those views. As the panel majority recognized, *see* Pet. App. 13a n.14, in *Auer* this Court unanimously deferred to agency views that were similarly presented in a brief, after noting that those views were "in no sense a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack," 519 U.S. at 462 (alteration in original) (quoting *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)); *see also Household Credit Servs., Inc.* v. *Pfennig*, 541 U.S. 232, 244 (2004) (relying, in interpreting Regulation Z, on the Board's amicus brief in the court of appeals). The same is true here: McCoy does not challenge any agency action, nor is there any reason to question whether the Board's views "reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462, *quoted in Kennedy*, 129 S. Ct. at 872 n.7, *and Long Island Care*, 551 U.S. at 171. Indeed, the views set forth in the Board's and the Solicitor General's briefs follow from, and are consistent with, those the Board had repeatedly expressed over several years in the rulemaking proceedings. *Cf. Kennedy*, 129 S. Ct. at 872 n.7 (deferring to agency's interpretation of its own regulation even when (unlike here) "the Government's position … has fluctuated").

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[5] Footnote 26 in the Petition Appendix is footnote 4 in the LEXIS version of the district court's opinion.

II. THE NINTH CIRCUIT'S DECISION IS ERRONEOUS EVEN WITHOUT REGARD TO THE AMICUS BRIEFS

The amicus briefs' clear answer to the question presented should suffice to resolve this case. The decision below, however, would be erroneous even if the amicus briefs had never been solicited.

A. The Majority Below Misunderstood The Regulation And Accompanying Official Staff Commentary

The panel majority misunderstood the regulatory provisions at issue, which required notice of a change in terms when the parties' contract obligations were changed, not when they were implemented in accordance with the initially disclosed terms. As discussed, § 226.9(c) required a change-in-terms notice "[w]henever any term required to be disclosed under § 226.6 is changed." 12 C.F.R. § 226.9(c)(1) (2004). Section 226.6 required initial disclosure of "each periodic rate that may be used to compute the finance charge." *Id.* § 226.6(a)(2). For example, it required initial disclosure of default rates that *could* be applied to the account, including rates not presently (or possibly ever) actually applied to account balances. *See id.* cmt. ¶ 6(a)(2)-11. When circumstances varied—for example, the cardholder defaulted—implementation of the default-rate terms that were "initially disclosed" under § 226.6(a)(2) could lead to use of an increased rate, but that would occur without any change to the initially disclosed rate terms governing the account. There was accordingly no "change in terms" to disclose. Nothing in § 226.9(c) stated that a new disclosure notice was due when "term[s] required to be disclosed under § 226.6" were implemented in accordance with the initial disclosures of the parties' agreement.

The key Commentary provision addressing change-in-terms notices states that "[n]o notice of a change in terms need be given if the specific change is set forth initially"—that is, in the initial disclosures. Comment ¶ 9(c)-1. Chase did set forth its default-rate terms initially, as the Commentary envisions. The cardholder agreement "disclose[d] the specific event or events" of default "that may result in the increased rate," and also disclosed the specific "increased penalty rate that may apply" in the event of such defaults. 12 C.F.R. pt. 226, supp. I, cmt. ¶ 6(a)(2)-11; *see* Pet. App. 20a-21a n.1 (Cudahy, J., dissenting). The Commentary provides, as an illustrative example, that no change-in-terms notice is required for "an increase that occurs when the consumer has been under an agreement to maintain a certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum." Comment ¶ 9(c)-1. Similarly here, where an increase occurs because the consumer has been under an agreement to pay on time in order to keep what Chase refers to as "Preferred Rates," and the consumer fails to do so, no change-in-terms notice is required because both the default and the applicable penalty rates have been "set forth initially."[6]

The panel majority's holding was, for these reasons, contrary to the text of the regulation and Com-

[6] The panel majority concluded that Chase's default-rate term was "like" a general reservation of rights to amend the cardholder agreement, in the sense that Chase retained a certain degree of discretion to charge *less* than the rate specified by the agreement. Pet. App. 8a-9a. But Chase's default-rate term was nothing like a general reservation of an unbounded power to *increase* rates. It limited the application of default rates to specific circumstances, and specified the maximum default rate that could be applied.

mentary that prescribes when change-in-terms notifications are required. Comment ¶ 9(c)(1)-3, on which the panel majority relied for its contrary conclusion, *see* Pet. App. 4a-5a, is off point: As discussed, it addresses only the timing of a change-in-terms notice, if one is otherwise required.

B. The Panel Majority Improperly Rejected The Board's Federal Register Statements That A Change-In-Terms Notice Was Not Required For The Implementation Of Default Rates

The panel majority wrongly refused to defer to the Board's statements, during the rulemaking proceedings, regarding what Regulation Z then required in the circumstances of this case. The Board's statements addressed the precise issue in controversy here, explaining that, under existing regulatory requirements, a card issuer "need not provide a change in terms notice" upon the implementation of a default rate "[b]ecause the circumstances of the increase are specified in advance in the account agreement." *Truth in Lending*, 72 Fed. Reg. at 33,009. The majority below gave no weight to those interpretations, stating that courts "defer to the FRB's Official Staff Commentary, not incidental descriptions of current law contained in an ANPR." Pet. App. 13a n.14.[7] The refusal to defer to the Board's officially published interpretation of its own regulatory requirements was an unwarranted departure from established principles of deference.

[7] Throughout its opinion, the panel mistakenly referred to the 2007 proposed rule as an advance notice of proposed rulemaking. *See, e.g.*, Pet. App. 10a.

The panel majority identified no valid justification for its refusal to respect the Board's interpretation of its own regulation. The majority did not contend that the Board's interpretation was inconsistent with the regulation. The opinion characterizes the Board's statements as "incidental" and "tersely worded" (Pet. App. 13a n.14), but those characterizations were misaimed. The Board's interpretive statements, quoted above, were explicit, directly on point, and more extensive, focused, and definitive in addressing the issue than the Official Staff Commentary itself. Nor did the Ninth Circuit have any reason to suspect, despite an insinuation that it did (*see id.*), that the Board's repeatedly stated interpretation of § 226.9(c) failed to represent the agency's "considered" views, *Auer*, 519 U.S. at 462. To the contrary, the Board's interpretations were issued as explanations, repeated over several years, in formal notice-and-comment rulemaking preambles published in the Federal Register, and specifically advanced by the Board as a significant part of the required justification for its decision to adopt the new § 226.9(g).[8]

There is nothing ambiguous about the Board's statement that under § 226.9(c) "no change-in-terms is required" when a card issuer raises the applicable rates based on default rate "agreements [that] permit the

[8] Providing such an explanation was an appropriate and necessary aspect of the Board's rulemaking. When an agency is changing a previously announced rule, "the requirement that an agency provide reasoned explanation for its action … ordinarily demand[s] that it display awareness that it *is* changing position …. And of course the agency must show that there are good reasons for the new policy." *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

card issuer to increase the periodic rate if the cardholder makes a late payment." *Truth in Lending*, 72 Fed. Reg. at 33,009. The Board's words, and its reasoning that it would need to add new § 226.9(g) if it chose to impose a disclosure obligation for implementation of a disclosed default rate, are, as Judge Cudahy put it, "more than clear." Pet. App. 27a.[9]

The panel majority cited a different passage from the same Federal Register notice, but that passage is neither ambiguity-creating nor inconsistent with the language above. *See* Pet. App. 10a-11a. The cited passage stated that the Board proposed to:

> [A]dd § 226.9(g)(1) to require creditors to provide 45 days advance notice when a rate is increased due to a consumer's delinquency or default, or if a rate is increased as a penalty for one or more events specified in the account agreement, such as a late payment or an extension of credit that exceeds the credit limit. This

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[9] Discussing language from the same passage of the proposed rule (language quoted *supra* p. 12), the panel majority stated that "the term 'change-in-terms notice' could, as Chase argues, refer to contemporaneous notice required for changes in interest rates, but might instead refer only to the fifteen days' advance notice required for changes in contractual terms." Pet. App. 10a. That suggestion fails for two reasons. First, the majority's attempt to limit the definition of "change-in-terms notice" to 15 days' advance notice is refuted by Comment 9(c)(1)-3, which uses that term in describing a situation in which less than 15 days' advance notice is permitted. *See supra* p. 10 (quoting the comment). Second, the court's suggestion ignores the last portion of the quoted language, which makes clear that pre-effective-date notice was *not* required, stating that instead "the new rate will appear on the periodic statement for the cycle in which the increase occurs." *Truth in Lending*, 72 Fed. Reg. at 33,009.

> notice would be required even if, *as is currently the case*, the creditor specifies the penalty rate and the specific events that may trigger the penalty rate in the account-opening disclosures.

Truth in Lending, 72 Fed. Reg. at 33,012 (emphasis added). The panel conceived that the phrase "currently the case" in this passage could be a reference to extant disclosure requirements under § 226.9(c). But that is plainly wrong: The passage is explicit that it is discussing the proposed § 226.9(g), and "currently the case" refers to the industry practice of including a default-rate provision in cardholder agreements and initial disclosures, *not* regulatory requirements under § 226.9(c).

The court of appeals also was wrong in stating that the ANPR and proposed rule have been "superceded" by the final rule. Pet. App. 9a n.11.[10] Nothing in the final rule—which enacted the changes as proposed in 2007, with only minor amendments—offers a different interpretation of the pre-amendment regulation's change-in-terms notice requirements. To the contrary, the final rule's statements in this regard are fully consistent with those in the ANPR and the proposed rule. *See, e.g.*, *Truth-in-Lending*, 74 Fed. Reg. at 5,253-5,254. To the extent a final rule could ever supersede an ANPR or a proposed rule, it surely could do so only to the extent that it contradicted the earlier publications. That did not occur here.

Further undermining the panel majority's interpretation is the fact that it would render a central part

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[10] Footnote 11 in the Petition Appendix is footnote 2 in the official version of the Ninth Circuit's decision.

of the Board's rulemaking process superfluous. Were that interpretation correct, then the Board's addition of paragraph (g) to § 226.9 was entirely unnecessary. Regulation Z already would have required advance notice under the circumstances covered by the new paragraph (g)—*i.e.*, rate increases "as a penalty for one or more events specified in the account agreement, such as making a late payment." 12 C.F.R. § 226.9(g)(ii) (2010). This Court has previously relied on similar circumstances to support its conclusion regarding the meaning of an agency regulation. *See Bowles*, 325 U.S. at 418 n.9 ("Indeed, the fact that the Administrator found it necessary to make such amendments is some evidence that … the rules here in issue" had a different meaning than the post-amendment rules.). The Ninth Circuit erred in not "taking the Board at its word that § 226.9(g) makes a real change." *Swanson*, 559 F.3d at 657; *see also id.* ("Swanson effectively wants the benefit of tomorrow's regulations, today.").[11]

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[11] Relatedly, the Board's proposed rule stated that "[t]he Board received over 200 comment letters in response to the December 2004 ANPR," including over 100 from "individual consumers" and "about 20 … from consumer advocates." *Truth in Lending*, 72 Fed. Reg. at 32,949. The proposed rule then discussed the substance of these comments—without giving any indication that even a single one challenged the ANPR's statements regarding the lack of a change-in-terms notice requirement under the circumstances of this case. *See id.* at 32,950. Much the same occurred in the final rule. Indeed, there the Board stated that the consumers and consumer groups affirmatively acknowledged that the new disclosure requirement represented a change. *See Truth in Lending*, 74 Fed. Reg. at 5,351 ("Consumers and consumer groups were supportive of the proposal's requirement to give 45 days' advance notice of the imposition of a penalty rate, noting that the proposal represented a *substantial improvement over the current rule*." (emphasis added)). Were the panel majority's view of § 226.9(c)

The Board's ability to render authoritative interpretations of its regulations is an adjunct of its delegated authority to promulgate those regulations. *See Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991) ("Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, [the courts] presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." (citing *Ford Motor Credit*, 444 U.S. at 566, 568)). Where an agency has interpreted its regulation, a court's responsibility is not to decide *de novo* "which among several competing interpretations best serves the regulatory purpose," but rather to defer to the agency save in extreme circumstances. *Thomas Jefferson Univ.*, 512 U.S. at 512 (citing *Bowles*, 325 U.S. at 414). In TILA cases specifically, this Court has accorded weight to a proposed interpretation of Regulation Z and comments made by the Board in Federal Register preambles in interpreting statutory terms. *See Anderson Bros. Ford*, 452 U.S. at 212-213, 217.

Whether or not the Ninth Circuit agreed with the Board's pre-2009 policy choices, it was obligated to defer to them. *See Ford Motor Credit*, 444 U.S. at 567-569. Its refusal to do so seriously undermines the Board's role and creditors' ability to rely on the Board's pronouncements. Card issuers and other creditors depend on every piece of published guidance from the Board because, in order to lend, they must make the

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correct, the comments received by the Board surely would have included some suggestion that the proposed change was in fact unnecessary.

necessary disclosures, and in order to make those disclosures they must have "a coherent and predictable body of technical rules" on which to rely. *Id.* at 568 n.12. It is the prerogative of the Board (and Congress) to change Regulation Z based on evolving policy judgments. That is precisely what happened in the 2009 statutory and regulatory amendments. But it is not appropriate for the courts to mandate such changes by retrospectively interpreting the regulation to conflict with the Board's definitive interpretations. *See id.* at 568 ("[J]udges ought to refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter's lawmaking is not irrational."). That is what the court of appeals did here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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