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No. 09-329

In the Supreme Court of the United States

CHASE BANK USA, N.A., PETITIONER

v.

JAMES A. MCCOY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The Federal Reserve Board's Regulation Z, 12 C.F.R. Pt. 226 (2008), amended by 74 Fed. Reg. 36,094-36,101 (2009), implements the Truth in Lending Act, 15 U.S.C. 1601 *et seq.* Because the events that gave rise to this suit occurred before Regulation Z was amended in 2009, this case is governed by the pre-amendment version of the regulation. The question presented is as follows:

Whether, at the time of the events at issue in this case, Regulation Z required a credit card issuer to provide a change-in-terms notice before increasing the periodic interest rate on a credit card account pursuant to a default-rate term that had previously been disclosed in the cardholder agreement governing the account.

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INTEREST OF THE UNITED STATES

The Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, imposes disclosure requirements on creditors that offer consumer credit plans, such as credit cards. The Board of Governors of the Federal Reserve System is authorized to issue regulations to carry out the Act. 15 U.S.C. 1604(a); see 15 U.S.C. 1602(b). The question in this case is whether, before its amendment in 2009, the Board's Regulation Z, 12 C.F.R. Pt. 226 (2008), required a credit card issuer to provide a change-in-terms notice before increasing the periodic interest rate on a credit card account pursuant to a default-rate term that had previously been disclosed in the cardholder agreement governing the account. The Board has taken the position

that Regulation Z in its pre-amendment form did not impose such a requirement. The United States therefore has a substantial interest in the proper interpretation of Regulation Z. At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. The Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.*, is designed to promote the "informed use of credit" by requiring "meaningful disclosure of credit terms." 15 U.S.C. 1601(a). The statute confers broad authority on the Board of Governors of the Federal Reserve System (Board) to issue regulations to carry out the Act. See 15 U.S.C. 1604(a); see also 15 U.S.C. 1602(b). Creditors that act in good-faith reliance on a rule, regulation, or interpretation by the Board or its staff are protected from civil liability under TILA. 15 U.S.C. 1640(f).

The Board's Regulation Z, 12 C.F.R. Pt. 226, adopted pursuant to Section 1604(a), requires credit card issuers to disclose certain information to consumers. At the time of the transactions at issue in this case, Regulation Z required credit card issuers to provide an "initial disclosure statement" specifying, *inter alia*, "each periodic rate that may be used to compute the finance charge." 12 C.F.R. 226.6(a)(2).[1] The regulation also required credit card issuers to provide a "periodic statement" notifying the consumer of the rates imposed during the previous billing cycle. 12 C.F.R. 226.7(d). Finally, the

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[1] As detailed p. 6, *infra*, in 2009, the Board amended Regulation Z's provisions relating to disclosure of changes in credit card finance charges, and Congress amended TILA to address the same subject. Unless otherwise noted, references to Regulation Z in this brief are to the pre-amendment version of the regulation.

regulation imposed certain "[s]ubsequent disclosure requirements," 12 C.F.R. 226.9, including a requirement to provide notice "[w]henever any term required to be disclosed under § 226.6 is changed," 12 C.F.R. 226.9(c)(1).

Some credit card agreements state the interest rate that will be used to calculate the account holder's finance charge, while further providing that the rate may be increased up to a particular amount upon the occurrence of specified contingencies, such as the account holder's failure to make timely payments. The question presented in this case is whether, under the pre-2009 version of Regulation Z, credit card issuers were required to give advance notice before effecting rate changes pursuant to such pre-existing contract terms.

The Board's Official Staff Commentary to the pre-2009 change-in-terms provision explained that the notice requirement did not apply "if the specific change is set forth initially, such as * * * 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." 12 C.F.R. Pt. 226, Supp. I, Official Staff Interpretations, cmt. 9(c)-1 (Official Staff Commentary). On the other hand, the commentary explained, "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)." *Ibid.*

Regulation Z generally mandated that any required change-in-terms notice be provided 15 days in advance of the effective date of the change. 12 C.F.R. 226.9(c)(1).

But when an interest rate increase resulted from the consumer's delinquency or default, the regulation permitted creditors to increase the rate with less than 15 days' notice, as long as notice was provided "before the effective date of the change." *Ibid.* The Official Staff Commentary explained:

> *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.

Official Staff Commentary, cmt. 9(c)(1)-3.

2. In 2004, the Board began an initial inquiry into whether to amend the disclosure requirements governing the implementation of contractual default-rate provisions. The Board explained:

> Under Regulation Z, some changes to the terms of an open-end plan require additional notice. * * * However, advance notice is not required in all cases. For example, if the interest rate or other finance charge increases due to a consumer's default or delinquency, notice is required, but need not be given in advance. 12 C.F.R. 226.9(c)(1); comment 9(c)(1)-3. And no change-in-terms notice is required if the creditor specifies in advance the circumstances under which an increase to the finance charge or an annual fee will occur. Comment 9(c)-1. For example, some credit card account agreements permit the card issuer to increase the interest rate if the consumer pays late, or if [the] card issuer learns the consumer paid late on another credit account, even if the con-

> sumer has always paid the card issuer on time. Under Regulation Z, because the circumstances are specified in advance in the account agreement, the creditor need not provide a change-in-terms notice 15 days in advance of the increase; the new rate will appear on the periodic statement for the cycle in which the increase occurs.

Truth in Lending, 69 Fed. Reg. 70,931-70,932 (2004) (advance notice of proposed rulemaking). Noting that "[c]onsumer advocates have expressed concerns that consumers who have triggered certain penalty rates may not be aware of the possibility of the increase, and thus are unable to shop for alternative financing before the increased rate takes effect," the Board asked for comment on whether these "existing disclosure rules" were "adequate to enable consumers to make timely decisions about how to manage their accounts." *Id.* at 70,932.

In 2007, the Board published proposed amendments to Regulation Z and to the Official Staff Commentary. *Truth in Lending*, 72 Fed. Reg. 32,948 (proposed rule). Describing Section 226.9(c) in its then-current form, *id.* at 33,009, the Board proposed an amendment that would require 45 days' advance written notice when "(i) A rate is increased due to the consumer's delinquency or default; or (ii) A rate is increased as a penalty for one or more events specified in the account agreement, such as making a late payment or obtaining an extension of credit that exceeds the credit limit." *Id.* at 33,058. The Board explained that "[t]he proposed rule would impose a de facto limitation on the implementation of contractual terms between a consumer and creditor, in that creditors would no longer be permitted to provide for the immediate application of penalty pricing upon the

occurrence of certain events specified in the contract." *Id.* at 33,012.

In 2009, the Board promulgated a final rule implementing the proposed changes. *Truth in Lending*, 74 Fed. Reg. 5254. The Board amended Section 226.9(c) to require 45 days' prior notice of contractual changes, including changes in the terms governing computation of finance charges. *Id.* at 5413. The Board also adopted new Section 226.9(g), which requires 45 days' advance notice of increases in rates due to delinquency, default, or as a penalty, including penalties for "events specified in the account agreement, such as making a late payment or obtaining an extension of credit that exceeds the credit limit." *Id.* at 5414.[2]

3. In March 2004, respondent filed suit on behalf of himself and others similarly situated. Respondent alleged, *inter alia*, that petitioner had violated TILA by raising the interest rates of members of the putative class, without providing advance notice of the increases, after class members made late payments to petitioner or another creditor. Pet. App. 2a, 35a, 38a.

The district court granted petitioner's motion to dismiss. Pet. App. 37a-47a. The court noted that petitioner's Cardmember Agreement "specifically authorizes

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[2] The 2009 amendments were scheduled to become effective on July 1, 2010. 74 Fed. Reg. at 5244. In May 2009, Congress enacted the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act), Pub. L. No. 111-24, 123 Stat. 1734. *Inter alia*, the Credit CARD Act amended TILA to require 45 days' advance notice of increases in annual percentage rates on credit card plans. § 101(a)(1), 123 Stat. 1735. That provision became effective on August 20, 2009. § 101(a)(2), 123 Stat. 1736. In response, the Board determined that the 2009 amendments to Regulation Z at issue in this case would likewise become effective on August 20, 2009. See 74 Fed. Reg. at 36,077, 36,095-36,096 (interim final rule).

[petitioner] to raise a cardholder's interest rate if the cardholder is delinquent with [petitioner] or another creditor." *Id.* at 39a. Citing the Official Staff Commentary to Regulation Z, Comment 9(c)-1, the court concluded that petitioner had not violated TILA or Regulation Z by failing to provide advance notice of the rate increase. The court explained:

> [B]ecause [petitioner] discloses the basis on which it will increase interest rates due to default, and discloses the highest rate that could apply, an increase in the interest rate based on these specific circumstances is not a change in terms within the meaning of Regulation Z, and no additional notice to the cardmember is required.

Pet. App. 43a-44a (footnote omitted).

4. The court of appeals reversed and remanded. Pet. App. 1a-33a.[3] The court "acknowledge[d] that the text of Regulation Z is ambiguous" with respect to the question presented here, and it recognized that a reviewing court must "defer to an agency interpretation of its own ambiguous regulation provided it is not 'plainly erroneous or inconsistent with the regulation.'" *Id.* at 4a (quoting *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997)). The court of appeals rejected petitioner's contention that the Board's "Official Staff Commentary interprets Regulation Z to require no notice in this case." *Ibid.* The court concluded that the "most salient Official Staff

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[3] The court of appeals issued its decision on March 16, 2009, see Pet. App. 1a—*i.e.*, after the 2009 amendments to Regulation Z had been published in the *Federal Register* but before those amendments took effect. Because the transactions at issue here occurred before the amendments' effective date, it is undisputed that this case is governed by the pre-2009 version of the rule.

Commentary" was Comment 9(c)(1)-3, which the court read "to require notice when a cardholder's interest rates increase because of a default, but to specify that the notice may be contemporaneous, rather than fifteen days in advance of the change." *Ibid.*

The court of appeals further concluded that Comment 9(c)-1, which provides that "[n]o notice of a change in terms need be given if the specific change is set forth initially," did not "dispel [petitioner's] obligation" under Comment 9(c)(1)-3 "to notify its account holders of discretionary rate increases." Pet. App. 5a (emphasis and citation omitted). The court assumed arguendo that Comment 9(c)-1 applied to interest-rate changes. *Id.* at 6a. The court concluded, however, that petitioner's Cardmember Agreement had not set forth a "specific" change within the meaning of the provision, since the Agreement did not state precisely what rate would apply in the event of a default, but instead permitted petitioner to increase the rate up to a stated maximum. *Id.* at 6a-9a.

Petitioner also contended that the 2007 notice of the Board's proposed rule, which described the Board's understanding of the regulatory regime in effect before the 2009 amendments, supported petitioner's interpretation of Regulation Z in its pre-amendment form. Pet. App. 9a. The court of appeals rejected that argument. The court found the 2007 proposed rule and accompanying explanation to be "ambiguous" as to whether notice was required under the circumstances of this case. *Id.* at 10a-11a. The court also stated that the 2007 notice of the Board's proposed rule would be of limited relevance in any event because the court would "defer to the [Board's] Official Staff Commentary, not incidental descriptions of current law contained in an [advance notice

of proposed rulemaking]." *Id.* at 13a n.14. The court of appeals concluded that the various explanatory materials issued by the agency left the court "firmly convinced of the [Board's] intent to require contemporaneous notice when rates are raised because of a consumer's delinquency or default, as [respondent] alleges occurred in this case." *Id.* at 13a-14a.

Judge Cudahy dissented. Pet. App. 19a-33a. In his view, the court of appeals should have deferred to the Board's explanation, expressed in both the 2004 advance notice of proposed rulemaking and the 2007 notice of the Board's proposed rule, that "requiring additional notice" before implementing contractual default-rate terms "is a change from" the requirements imposed by Regulation Z in its pre-amendment form. *Id.* at 22a. Judge Cudahy also found the court's reliance on Comment 9(c)(1)-3 to be misplaced. *Id.* at 28a-29a. He expressed the understanding that Comment 9(c)(1)-3 "does not purport to govern the question whether notice is required," but instead "specifically governs timing issues." *Ibid.* Judge Cudahy would instead have held that, under Comment 9(c)-1, no notice was required under the circumstances presented here because the Cardmember Agreement had set forth the "*specific change*" at issue. *Ibid.* (quoting Official Staff Commentary, cmt. 9(c)-1); see *id.* at 29a-32a.

5. After the court of appeals issued its decision in this case, the First Circuit confronted the same question as is presented here in *Shaner* v. *Chase Bank USA, N.A.*, 587 F.3d 488 (2009). In order to ascertain the Board's understanding of Regulation Z in its pre-2009 form, the First Circuit "asked the Board for its views on its own pre-amendment regulations," and the Board sub-

mitted an amicus brief addressing the question. See *id.* at 491. That amicus brief explained:

> [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.

Board Br. at 1, *Shaner*, *supra* (No. 09-1157).[4]

Consistent with the interpretation advanced in the Board's amicus brief, the First Circuit in *Shaner* held that the credit card issuer in that case was not required to provide advance notice before raising card holders' interest rates pursuant to a provision of the member agreement that authorized such increases upon the occurrence of a late payment. 587 F.3d at 492-493. The First Circuit explained that the Board's brief "was solicited [by the court] 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 mat-

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[4] The Board's brief in *Shaner* is reprinted in the appendix to this brief. App., *infra*, 1a-19a.

ter in question.'" *Id.* at 493 (quoting *Auer*, 519 U.S. at 462).

SUMMARY OF ARGUMENT

The court of appeals erred in concluding that, at the time of the transactions at issue in this case, Regulation Z required credit card issuers to provide a change-in-terms notice before implementing a contractual default-rate provision.

Before it was amended in 2009, Regulation Z required credit card issuers to provide notice before changing any contractual term that must be disclosed in an initial disclosure statement. In some circumstances, that notice requirement applied to changes in the cardholder's periodic interest rate. In its Official Staff Commentary to Regulation Z, however, the Board made clear that a change-of-terms notice was not required "if the specific change is set forth initially." Official Staff Commentary, cmt. 9(c)-1. The Board gave as an example "a rate 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." *Ibid.* The same rule applied, by analogy, when a cardholder agreement authorized the issuer to increase a consumer's interest rate if the consumer failed to make timely payments to his creditors. If a cardholder who had agreed to that contractual term made a late payment, any resulting rate increase did not represent a "change in terms," but rather the implementation of terms already set forth in the initial disclosure statement.

When the Federal Reserve Board amended Regulation Z in 2009 to require credit card issuers to provide

notice before implementing contractual default-rate provisions, it did so on the understanding that the pre-amendment version of Regulation Z imposed no similar requirement. Since that time, the Board has repeatedly confirmed its view that Regulation Z in its pre-2009 form did not require credit card issuers to provide a change-in-terms notice under the circumstances presented in this case. The Board's longstanding interpretation of its regulation is reasonable and entitled to deference.

ARGUMENT

BEFORE ITS AMENDMENT IN 2009, REGULATION Z DID NOT REQUIRE A CREDIT CARD ISSUER TO PROVIDE A CHANGE-IN-TERMS NOTICE BEFORE IMPLEMENTING A CONTRACTUAL DEFAULT-RATE TERM

A. Regulation Z And Accompanying Official Staff Commentary Did Not Require Credit Card Issuers To Provide A Change-In-Terms Notice Before Raising A Periodic Rate Under Circumstances Disclosed In The Card Agreement

1. At the time of the transactions at issue in this case, Regulation Z required a creditor to provide notice before changing any contractual term, such as the cardholder's periodic interest rate, that must be disclosed in an initial disclosure statement. 12 C.F.R. 226.9(c); see 12 C.F.R. 226.6(a)(2). Regulation Z did not, however, require a creditor to provide notice before implementing a term that had been previously disclosed. In its Official Staff Commentary addressing Section 226.9, the Board explained that "[n]o notice of a change in terms need be given if the specific change is set forth initially." Official

Staff Commentary, cmt. 9(c)-1.[5] The commentary provided as an example "a rate 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." *Ibid.*

In the present case, the contingency that triggered increases in respondents' interest rates was the failure to make timely payments rather than the failure to maintain a minimum balance. The Board's reasoning in Comment 9(c)-1, however, applies with full force to the situation presented here, where the cardholder agreements between petitioner and respondents authorized petitioner to increase respondents' interest rates if respondents were delinquent in their payments to creditors. If a cardholder who had agreed to that contractual term made a late payment, any resulting rate increase did not represent a "change in terms," but rather the implementation of terms already set forth in the initial

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[5] As the court below correctly recognized, the Official Staff Commentary constitutes an authoritative interpretation of Regulation Z. Pet. App. 13a & n.14; see *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980) ("Unless demonstrably irrational, Federal Reserve Board staff opinions construing [TILA] or Regulation [Z] should be dispositive."); see also *Anderson Bros. Ford* v. *Valencia*, 452 U.S. 205, 219 (1981) ("[A]bsent some obvious repugnance to the statute, the Board's regulation implementing this legislation should be accepted by the courts, as should the Board's interpretation of its own regulation."). Changes in the Commentary, like changes to Regulation Z itself, are made through notice-and-comment rulemaking. See, *e.g.*, 72 Fed. Reg. at 33,086-33,145 (proposing amendments to the Commentary); 74 Fed. Reg. at 5450-5498 (2009) (adopting final amendments). Good-faith compliance with the Official Staff Commentary and other staff interpretations provides protection from liability under 15 U.S.C. 1640(f).

disclosure statement. No notice was therefore required under Section 226.9 in its pre-2009 form.

2. In reaching a contrary conclusion, the court of appeals relied on Comment 9(c)(1)-3 of the Official Staff Commentary. Comment 9(c)(1)-3 stated that in the event of "an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default," a "notice of change in terms is required, but may be mailed or delivered as late as the effective date of the change" rather than the usual 15 days in advance. Official Staff Commentary, cmt. 9(c)(1)-3; see 12 C.F.R. 226.9(c). The court of appeals construed Comment 9(c)(1)-3 "to require notice when a cardholder's interest rates increase because of a default, but to specify that the notice may be contemporaneous, rather than fifteen days in advance of the change." Pet. App. 4a. The court viewed Comment 9(c)(1)-3 as applicable even when, as in this case, a cardholder's interest rate was increased pursuant to a pre-existing term of the cardholder agreement that authorized such a change upon the occurrence of specified contingencies. See *id*. at 5a.

The court of appeals' analysis reflects a misunderstanding of Comment 9(c)(1)-3. Properly construed, Comment 9(c)(1)-3 addressed situations in which a card issuer increased a consumer's finance charge based on the cardholder's delinquency or default, even though no provision of the pre-existing cardholder agreement authorized such an increase. Comment 9(c)(1)-3 also applied if the cardholder agreement authorized the issuer to raise a delinquent or defaulting consumer's interest rate up to a specified maximum, and the issuer responded to a cardholder's delinquency or default by raising the rate to a level *above* that maximum. In those circumstances, Section 226.9(c)(1) required notice of the

rate increase because that increase effected a change in the cardholder agreement rather than the implementation of its existing terms.

Rather than establishing a freestanding disclosure requirement, Comment 9(c)(1)-3 specified the time at which such disclosures must be made—*i.e.*, "as late as the effective date of the change" rather than the usual 15 days in advance. Comment 9(c)(1)-3's status as a timing requirement was made clear by its heading ("*Timing—advance notice not required*") and location (under the general heading "9(c)(1) Written Notice Required"). Comment 9(c)(1)-3 did not create substantive disclosure requirements where Regulation Z itself and Comment 9(c)-1 did not demand them. See Pet. App. 28a-29a (Cudahy, J., dissenting) (explaining that Comment 9(c)(1)-3 "does not purport to govern the question whether notice is required," but rather "assumes situations where notice is required and controls only timing"); *Shaner* v. *Chase Bank USA, N.A.*, 587 F.3d 488, 492 (1st Cir. 2009) (explaining that "comment 3 merely describes *when* notice must be given where it is otherwise required, whereas comment 1 explains *whether* changes specified in advance constitute changes in terms necessitating notice").

3. The court of appeals also concluded that Comment 9(c)-1 was inapplicable to this case because petitioner's Cardmember Agreement was insufficiently "specific"—that is, because it gave petitioner discretion to determine whether, and to what extent, it would increase a defaulting consumer's interest rate up to a specified maximum. See Pet. App. 7a-8a. That analysis is mistaken.

When a cardholder agreement identifies a contingency that triggers a rate increase, and the maximum

possible rate that the issuer may charge if that contingency occurs, the agreement does not lack the requisite specificity merely because it allows the issuer to exercise discretion in the consumer's favor. Under 12 C.F.R. 226.9(c)(2), no change-in-terms notice is required "when the change involves * * * a reduction of any component of the finance or other charge." If a particular cardholder agreement specified the exact rate that would apply automatically in the event of a default, the credit card issuer would retain discretion to reduce the increased rate, to a point between the penalty rate and the original rate, immediately after the penalty rate took effect. Even under the court of appeals' reading of Comment 9(c)-1, neither the automatic increase nor the subsequent decrease would require advance notice.

When (as here) a cardholder agreement authorizes the issuer to increase a cardholder's interest rate up to a specified maximum in the event of cardholder delinquency or default, the practical effect is to allow the issuer to combine into one discretionary rate increase the two steps described above. Petitioner's authority to proceed in that more direct manner, however, did not give respondents any greater need for advance notice of the specific increased rate that would be imposed than would the cardholders in the foregoing hypothetical. See Pet. App. 30a-31a n.6 (Cudahy, J., dissenting). And the Board's core rationale for declining to require notice in these circumstances applies equally whether the cardholder agreement *requires* or simply *allows* a specified increase in the cardholder's interest rate upon the occurrence of particular contingencies. Under either kind of agreement, Regulation Z in its pre-amendment form did not require notice of a rate increase because the in-

crease reflected an implementation of the parties' existing contract rather than a change in its terms.[6]

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[6] In support of its reading of the word "specific" in Comment 9(c)-1, the court of appeals relied on the comment's three examples of circumstances in which notice is not required. See Pet. App. 6a-7a; Official Staff Commentary, cmt. 9(c)-1 (providing as examples "rate increases under a properly disclosed variable-rate plan, a rate increase that occurs when an employee has been under a preferential rate agreement and terminates employment, 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"). Because the court of appeals read each example as involving implementation of a non-discretionary rate increase, it viewed the examples as "reinforc[ing]" the court's conclusion that a change-of-terms notice is required before a credit card issuer can implement a default-rate provision that allows the issuer the discretion to impose a rate lower than a specified maximum. Pet. App. 6a-7a. That reading is incorrect. As the dissenting judge explained, "ascertainability is not an essential element of the second and third examples," neither of which "states one way or the other whether they involve a precise and automatic increase." *Id.* at 32a (Cudahy, J., dissenting).

The court of appeals also viewed the penalty-rate provision of the Cardmember Agreement at issue here as comparable to a reservation of rights clause that permits the lender to change the periodic rate at any time. See Pet. App. 8a-9a. The court reasoned (*ibid.*) that, because notice must be given before a card issuer may increase the rate pursuant to such a clause, see Official Staff Commentary, cmt. 9(c)-1, petitioner was likewise required to give notice before raising respondents' interest rates to a level at or below the maximum specified in the applicable penalty-rate provision. The court of appeals erred in equating those contract terms. A provision that specifies that a creditor may impose a specific maximum rate upon the occurrence of a particular event is not comparable to a general reservation of the right to impose any periodic rate at any time.

B. The Federal Reserve Board's Longstanding Interpretation Of Its Regulations Is Entitled To Deference

1. In 2009, the Federal Reserve Board amended Section 226.9 to require credit card issuers to give 45 days' advance notice before implementing a contractual default-rate term. Before that amendment was adopted, however, the Board expressed its understanding that Regulation Z in its pre-amendment form imposed no similar requirement. In adopting that amendment, the Board confirmed that the notice requirement represented a change from prior law. And the Board's subsequent amicus brief in *Shaner*, *supra*, which was submitted after the court of appeals' decision in this case and in response to the First Circuit's request for the Board's views on the precise question presented here, eliminated any ambiguity that might previously have existed. The Board's understanding of its pre-2009 regulations is entitled to deference.

a. In its 2004 advance notice of proposed rulemaking, the Board stated that "no change-in-terms notice is required" for a rate increase pursuant to an agreement that "permit[s] the card issuer to increase the interest rate if the consumer pays late." 69 Fed. Reg. at 70,931-70,932. The Board explained that, "[u]nder Regulation Z, because the circumstances are specified in advance in the account agreement, the creditor need not provide a change-in-terms notice 15 days in advance of the increase; the new rate will appear on the periodic statement for the cycle in which the increase occurs." *Id.* at 70,932.

The Board expressed a similar understanding of the existing rule in 2007, when it proposed changing the rule. The Board explained that its "proposed rule would impose a de facto limitation on the implementation of

contractual terms between a consumer and creditor, in that creditors would no longer be permitted to provide for the immediate application of penalty pricing upon the occurrence of certain events specified in the contract." 72 Fed. Reg. at 33,012.

And when the Board ultimately amended Section 226.9 in 2009, the Board described the amendment as a "Major Change[]" to the existing rule. 74 Fed. Reg. at 5244. The Board further explained:

> Even though the final rule contain[s] provisions intended to improve disclosure of penalty pricing at account opening, the Board believes that consumers will be more likely to notice and be motivated to act if they receive a specific notice alerting them of an imminent rate increase, rather than a general disclosure stating the circumstances when a rate might increase.

Id. at 5254.

b. The court of appeals dismissed the Board's statements in those documents as purely "incidental descriptions of current law." Pet. App. 13a n.14. In fact, the 2004 and 2007 descriptions of then-current law were authoritative summaries of the Board's interpretation of the existing change-in-terms requirements, published in the *Federal Register*, and provided to explain the Board's proposal to change the very rule it was describing. As such, they were entitled to the court's deference. See, *e.g.*, *Anderson Bros. Ford* v. *Valencia*, 452 U.S. 205, 212-213, 219 (1981) (according weight to a proposed official staff interpretation of Regulation Z published in the *Federal Register*).[7]

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[7] Under established administrative-law principles, when an agency chooses to rescind or modify an existing policy, "the requirement that

c. The court of appeals (Pet. App. 10a-11a) also misread the 2004 and 2007 notices, finding ambiguity in their descriptions of then-existing law where no ambiguity existed. In particular, the court misread the 2007 notice's statement that "the creditor currently need not provide a change-in-terms notice" before implementing a contractual default-rate provision. *Id.* at 10a (quoting 72 Fed. Reg. at 33,009). Hypothesizing that "the term 'change-in-terms notice'" might "refer only to the fifteen days' advance notice required for changes in contractual terms," the court suggested that language was consistent with a rule requiring issuers to give *contemporaneous* notice of a rate increase. *Ibid.* The court's approach reflects an unnaturally circumscribed understanding of the phrase "change-in-terms notice," even if that phrase is considered in isolation. And as the court itself recognized, the relevant sentence of the 2007 notice went on to state that, under Regulation Z in its pre-amendment form, "the new rate will appear on the periodic statement for the cycle in which the increase occurs." *Ibid.*

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an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio*." *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). Thus, far from being "incidental to the purpose of" the relevant Federal Register notices (Pet. App. 13a & n.14), the Board's description of existing law was integral to its explanation of the new disclosure requirements it proposed to adopt. The Board's 2004 advance notice of proposed rulemaking, moreover, specifically requested public comment on whether the agency's "existing disclosure rules" were "adequate to enable consumers to make timely decisions about how to manage their accounts." 69 Fed. Reg. at 70,932. The public's ability to comment on (and the Board's ability to determine) the adequacy of the "existing disclosure rules" obviously depended on an accurate understanding of what those rules did and did not require.

(quoting 72 Fed. Reg. at 33,009). That statement makes clear that the Board did not construe its pre-amendment regulation to require even contemporaneous notice when an interest rate is increased pursuant to a contractual default-rate provision.

Moreover, if the court of appeals' interpretation of Section 226.9(c) were correct, it would not have been necessary for the Board to create a new Section 226.9(g) to govern notices of rate increases "due to delinquency, default or as a penalty * * * that are not due to a change in the contractual terms of the consumer's account," 12 C.F.R. 226.9(c)(2)(i) (revised text effective July 1, 2010), since notice would already have been required under the basic change-in-terms provision, Section 226.9(c). The Board's addition of subsection (g) provides further evidence that the Board did not interpret Section 226.9(c) to require notice when rates are raised in accordance with contractual default terms. Given the Board's explanations of the purpose of the amendment, and the nature of the amendment itself, the court of appeals erred in refusing to "tak[e] the Board at its word" that the 2009 amendment "ma[de] a real change." *Swanson* v. *Bank of Am., N.A.*, 559 F.3d 653, 657 (7th Cir. 2009).

2. In any event, whatever ambiguity might have remained after the series of *Federal Register* notices explaining the reasons for the amendments to Section 226.9, it has since been dispelled. After the court of appeals issued its decision in this case, the First Circuit in *Shaner*, *supra*, confronted the same question as is presented here. The First Circuit noted the conflict on that question between the Ninth Circuit's decision in this case and the Seventh Circuit's decision in *Swanson*. See 587 F.3d at 490-491. In order to ascertain the Board's

understanding of Regulation Z in its pre-2009 form, the First Circuit "asked the Board for its views on its own pre-amendment regulations," and the Board submitted an amicus brief addressing the question. See *id.* at 491. The Board's amicus brief explained:

> [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.

Board Br. at 1, *Shaner*, *supra* (No. 09-1157).

The Board's amicus brief in *Shaner* removed any doubt as to the proper application of the Board's pre-amendment regulations under the circumstances presented here. In particular, the brief made clear that "[n]o 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." *Ibid.* That proposition was implicit in prior agency pronouncements, see pp. 15-17, *supra*, but

it had not previously been made explicit. The Board's discussion of that point reflects the agency's clear disagreement with the court of appeals' conclusion in this case (see Pet. App. 7a-8a) that Comment 9(c)(1)'s reference to "specific" changes set forth in the initial cardholder agreement did not encompass provisions that allow card issuers to exercise discretion in deciding whether and to what extent to increase the periodic rate, up to a specified maximum rate, in the event of a default. For the reasons explained in this brief and in the brief that the United States previously filed at the petition stage in response to this Court's invitation, the Board continues to adhere to the position set forth in its brief in *Shaner*.

3. An agency's interpretation of its own regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (citation omitted); accord, *e.g.*, *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007). This Court has recognized that its "traditional acquiescence in administrative expertise is particularly apt under TILA." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980). As the Court explained in *Ford Motor Credit*, Congress delegated broad interpretive power to the Board in view of the "complexity and variety" of credit transactions, *id.* at 559, and the legislative history of the Act "evinces a decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation," *id.* at 568. For those reasons, this Court has concluded 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." *Ibid.*

The Board's view of its pre-2009 regulations is reasonable and is entitled to deference. Although the Board has prospectively decided to require advance disclosure before issuers may implement contractual default-rate provisions, its prior approach "simply cannot be said to be unreasonable." *Auer*, 519 U.S. at 458. How much disclosure to require in this context "is a judgment call," *Shaner*, 587 F.3d at 492, and TILA "entrusts matters of judgment such as this to the [Board], not the federal courts," *Auer*, 519 U.S. at 458; see *Ford Motor Credit*, 444 U.S. at 568-569. And, notwithstanding the Board's recent determination that advance notice should be required in these circumstances, issuers in petitioner's position have a substantial and legitimate interest in avoiding unwarranted liability for conduct that was lawful at the time it occurred.

The Board's interpretation of its pre-2009 regulations, as set forth in amicus briefs filed in the First Circuit and in this Court, reflects the Board's "fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462 (deferring to agency interpretation advanced in an amicus brief); *Shaner*, 587 F.3d at 493 (deferring to the Board's amicus brief). That judgment is controlling in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 2010

APPENDIX

THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 09-1157

JESSICA SHANER, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, PLAINTIFF-APPELLANT

v.

CHASE BANK USA, N.A. DEFENDANT-APPELLEE

Oct. 22, 2009

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM AS *AMICUS CURIAE* AT THE REQUEST OF THE COURT

The Court has asked the Board of Governors of the Federal Reserve System (the Board) whether Regulation Z, 12 C.F.R. § 226.9, as in effect prior to its amendment in 2009, "required that notice of a credit card interest rate increase due to a late payment be provided to the holder of the card on or before the first day of the billing cycle to which the increase is applied, where the

card member agreement provides that the issuer 'may increase' the customer's annual percentage rate upon occurrence of a late payment up to a maximum of a default rate specified in the agreement's rates and fees table." Order of August 4, 2009.

For the reasons set forth below, 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. 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.

A. Overview of Regulation Z

A brief discussion of the disclosure requirements of Regulation Z may assist the Court's consideration of this issue. In connection with open end credit such as credit card accounts, Regulation Z (as in effect at the time relevant to this action) requires three types of account disclosures: an initial disclosure, periodic statements, and, under some circumstances, subsequent disclosures—the type at issue in this case.

The "initial disclosure statement" is the disclosure document provided at account opening that includes disclosure of certain terms: the finance charge; other charges that may be imposed under the plan; and security interests that the creditor may acquire as part of the plan. 12 C.F.R. § 226.6(a)-(c). With regard to the finance charge, the initial disclosure statement must disclose "each periodic rate that may be used to compute the finance charge." *Id.* at 226.6(a)(2). "Periodic statements" are provided during the term of the plan, typically monthly, and reflect transactions during the billing period. 12 C.F.R. § 226.7. The periodic statement must include the periodic rates that may be used to compute the finance charge, the balances to which the periodic rate was applied, and the amount of the finance charge, among other things. *Id.* Thus, while the periodic statement alerts the consumer to the rates imposed during the just-ended billing cycle, it does not by itself provide notice of a rate increase before the application of that increase.

Finally, the regulation imposes "subsequent disclosure requirements," including the requirement to provide advance written notice "[w]henever any term required to be disclosed under § 226.6 is changed." 12 C.F.R. § 226.9(c)(1).[1] In most cases to which section

[1] Prior to its amendment in May 2009, the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* ("TILA"), did not address the issue of subsequent disclosure of changed terms in open-end credit; the requirement for subsequent disclosure was found only in the Board's Regulation Z. As discussed in text below, in January 2009 the Board amended Regulation Z to add a new section 226.9(g), providing for 45 days' advance notice of rate increases due to delinquency, default, or as a penalty. These provisions were set to become effective on July 1, 2010. On May 22, 2009, Congress enacted the Credit Card Accountability Responsibility

226.9(c)(1) applies, this notice of a change in the contract terms must be provided 15 days in advance of the effective date of the change. Section 226.9(c)(1) also specifies certain circumstances in which the written notice can be provided less than 15 days in advance, as long as it is provided "before the effective date of the change." One of these specified circumstances is an increase in the periodic rate of interest that is imposed by the creditor due to the consumer's delinquency. As explained below, however, changes in rates, including a rate increase due to delinquency, do not require a pre-effective date change-in-terms notice under section 226.9(c)(1) if the specific change is set forth in the initial contract.

As the regulation states, the subsequent disclosures prescribed in section 226.9(c)(1) are required only in the event that a term required to be disclosed under section 226.6 is "changed." The Board's Official Staff Commentary to Regulation Z, 12 C.F.R. Part 226, Supp. 1, ex-

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and Disclosure Act of 2009 ("Credit CARD Act"), Pub. L. 111-24, which among other things amended TILA to add a new section 127(i) requiring 45 days' advance notice of increases in annual percentage rates on credit card plans. Credit CARD Act § 101(a)(1), 123 Stat. 1735. The provision became effective on August 20, 2009. *Id.*, § 101(a)(2). Accordingly, the Board adopted an amendment to Regulation Z which essentially moved up the effective date of its January 2009 rule change to August 20, 2009. *See* 74 Fed. Reg. 36077, 36095-96 (July 22, 2009). Unless otherwise indicated, references to TILA and Regulation Z in this brief refer to those provisions in effect before these amendments.

plains this provision.[2] In the first comment under section 9(c), Changes in Terms, the Commentary states:

> 1. "*Changes" initially disclosed.* 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, a rate increase that occurs when an employee has been under a preferential rate agreement and terminates employment, 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.

Official Staff Commentary (OSC), comment 9(c)-1. The Board has never stated that the examples listed in this paragraph of the Commentary are exhaustive.

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[2] The Official Staff Commentary (OSC) is the means by which the Board's Consumer and Community Affairs staff issues official staff interpretations of Regulation Z. Good faith compliance with the OSC and other staff interpretations provides protection from liability under section 130(f) of TILA, 15 U.S.C. § 1640(f). *See* Regulation Z, Supp. 1, Comment I-1; *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 n.9 (1980). Changes in the OSC are made in the same way that changes to Regulation Z itself are made: through notice-and-comment rulemaking, including publication for comment in the Federal Register. *See, e.g.,* 72 Fed. Reg. 33086-33145 (June 14, 2007) (proposing amendments to OSC); 74 Fed. Reg. 5450-549 (January 29, 2009) (adopting final amendments). The Supreme Court has recognized the authoritative nature of these official staff interpretations. *See Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 222 (1981) (accepting proposed OSC amendment as reflecting the Board's interpretation of its regulation).

B. The Board's Interpretation of the Change in Terms Provision

The Board has consistently interpreted the language in section 226.9(c)(1) and the Commentary to mean that no pre-effective date notice is required when a creditor increases a rate as a result of a triggering event such as default, so long as the triggering event and the potential consequences have been previously disclosed in the initial agreement. 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.

There are two ways that penalty rates can be imposed in the event of a consumer's default on a credit card account, and they have very different consequences in terms of subsequent disclosure under Regulation Z. *First*, a creditor can change the actual terms of the underlying card member agreement to impose a penalty rate even when the agreement did not specify a penalty rate. Credit card agreements frequently contain a reservation of rights clause that permits the lender to change any term at any time, so long as notice is provided. Under section 226.9(c)(1), a creditor that decides to increase the consumer's interest rate due to delinquency pursuant to a reservation of rights clause is changing a term of the agreement and must give notice "before the effective date of the change." 12 C.F.R. § 226.9(c)(1).[3] *Second,* a creditor can impose a new rate

[3] A change-in-terms notice would also be required if the agreement specified a maximum penalty rate that was lower than the rate the creditor chose to impose, or if the creditor wanted to expand the list of events that would trigger the penalty rate. For example, if an agreement had a provision permitting a penalty rate of up to 20% and, be-

following default *in accordance with the existing terms* of the agreement. For example, a credit agreement may provide that a creditor may impose a penalty rate of up to 24% upon the consumer's default. Assuming that the default contingency set out in the agreement occurs, the creditor may implement the rate increase in accordance with the agreement. This does not result in a changed term; rather, it simply implements a term that was already agreed to between the creditor and the consumer in the initial contract. In this case *no* change-in-terms notice need be given under section 226.9(c), because there has been no change in terms. OSC comment 9(c)-1. Rather, the increased rate must be disclosed in the periodic statement for the billing cycle during which the increased rate became effective. 12 C.F.R. § 226.7.

This interpretation, which distinguishes between methods of rate changes, has been expressed in a number of *Federal Register* documents published by the Board in the past several years. In 2004, during the initial stage of a periodic review of Regulation Z, the Board specifically sought comment on whether the disclosures provided in connection with rate changes were adequate where creditors had disclosed the circumstances triggering rate increases in the initial disclosures. The Board wrote:

> *Disclosures about rate changes*. Under Regulation Z, some changes to the terms of an open-end plan require additional notice. . . . However, advance notice is not required in all cases. For example, if the interest rate or other finance charge increases due to

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cause of changed economic circumstances, the creditor wanted to impose a penalty rate of 24%, the creditor would have to provide notice under section 226.9(c) regarding that term change.

> a consumer's default or delinquency, notice is required, but need not be given in advance. 12 C.F.R. § 226.9(c)(1); comment 9(c)(1)-1. *And no change-in-terms notice is required if the creditor specifies in advance the circumstances under which an increase to the finance charge or an annual fee will occur. Comment 9(c)-1. For example, some credit card account agreements permit the card issuer to increase the interest rate if the consumer pays late, or if card issuer [sic] learns the consumer paid late on another credit account, even if the consumer has always paid the card issuer on time. Under Regulation Z, because the circumstances are specified in advance in the account agreement, the creditor need not provide a change-in-terms notice 15 days in advance of the increase; the new rate will appear on the periodic statement for the cycle in which the increase occurs.*

69 Fed. Reg. 70925, 70931-32 (December 8, 2004) (emphasis added). Noting that "[c]onsumer advocates have expressed concerns that consumers who have triggered certain penalty rates may not be aware of the possibility of the increase, and thus are unable to shop for alternative financing before the increased rate takes effect," *id.* at 70932, the Board asked for input on whether these "existing disclosure rules" are "adequate to enable consumers to make timely decisions about how to manage their accounts." *Id.*

The Board returned to this issue in 2007, when it published proposed amendments to Regulation Z and the OSC. 72 Fed. Reg. 32948 (June 14, 2007). Among the "major proposed changes" the Board published for comment was the proposal to "expand the circumstances

under which consumers receive written notice of changes in terms (e.g., an increase in the interest rate)", including "[r]equiring creditors to provide 45 days' prior notice before the creditor increases a rate due to the consumer's delinquency or default." *Id.* at 32949. In introducing the proposed rules on this subject, the Board wrote:

> *Penalty rates.* Currently, creditors must inform consumers about rates that are increased due to default or delinquency, but not in advance of implementation of the increase. Contractual thresholds for default are sometimes very low, and penalty pricing commonly applies to all existing balances, including low-rate promotional balances. An event triggering the default may occur a year or more after the account is opened. For example a consumer may open an account, and a year or more later may take advantage of a low promotional rate to transfer balances form another account. *That consumer reasonably may not recall reading in the account-opening disclosure that a single transaction exceeding the credit limit could cause the interests rates on existing balances, including on the promotional transfer, to increase. Thus, the proposal would expand the events triggering advance notice to include increases triggered by default or delinquency.* Advance notice of a potentially significant increase in the cost of credit is intended to allow consumers to consider alternatives before the increase is imposed, such as making other financial arrangements or choosing not to engage in additional transactions that will increase the balances on their account.

Id. at 32957 (emphasis added).

In accordance with this explanation, the Board proposed an amendment to Regulation Z that would add new section 226.9(g), "*Increase in rates due to delinquency or default or as a penalty.*" *Id*. at 33058. That provision would have required 45 days' advance written notice when "(i) A rate is increased due to the consumer's delinquency or default; or (ii) *A rate is increased as a penalty for one or more events specified in the agreement,* such as making a late payment or obtaining an extension of credit that exceeds the credit limit." *Id*. (emphasis added). In explaining the new proposed provision, the Board stated that the 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." *Id.* at 33012. The Board continued, "[t]he proposed rule would impose a de facto limitation on the implementation of contractual terms between a consumer and creditors, in that *creditors would no longer be permitted to provide for the immediate application of penalty pricing upon the occurrence of certain events specified in the contract*. The Board believes that this delay in implementing contract terms is appropriate in light of the potential benefit to consumers." *Id.* (emphasis supplied).

These statements by the Board clearly indicate the Board's understanding that Regulation Z, as it existed 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 to provide additional protection to consumers in the form of prior notice of penalty rate changes. The

2007 preamble explanation makes clear that the proposed amendment, which it identified as a "major proposed change," *id.* at 32949, represented a substantive change in requirements, not a clarification of existing regulatory language.

In early 2009, the Board adopted its final rule implementing the changes that had been proposed in 2007. *See* 74 Fed. Reg. 5244 (January 29, 2009). Again, the Board identified as a "Major Change" the provision "[r]equiring creditors to provide 45 days' prior notice before the creditor increases a rate either due to a change in the terms applicable to the consumer's account or due the consumer's delinquency or default or as a penalty." *Id.* With regard to penalty rates, the Board explained, in language similar to that used in 2007, that it was requiring advance notice of implementation of those rates even if they were disclosed in the account opening documents:

> *Penalty rates.* Currently, creditors must inform consumers about rates that are increased due to default or delinquency, but not in advance of implementation of the increase. Contractual thresholds for default are sometimes very low, and currently penalty pricing commonly applies to all existing balances, including low-rate promotional balances.
>
> The final rule generally requires creditors to provide 45 days' advance notice before rate increases due to the consumer's delinquency or default or as a penalty, as proposed. Permitting creditors to apply the penalty rate immediately upon the consumer triggering the rate may lead to undue surprise and insufficient time to consider alternative options regarding use of the card. Even though the final rule contain[s]

> provisions intended to improve disclosure of penalty pricing at account opening, the Board believes that consumers will be more likely to notice and be motivated to act if they *receive a specific notice alerting them of an imminent rate increase, rather than a general disclosure stating the circumstances when a rate might increase.*

Id. at 5253 (emphasis supplied).

The Board effected this change by taking two actions, corresponding to the two separate ways described above that rates may be increased upon a consumer's default—that is, increases that result from a change in the terms of the contract, and increases that result from implementation of a previously disclosed contract term. *See supra* pp. 6a-7a. First, the Board amended section 9(c) to require 45 days' prior notice of changes in particular terms in the contract itself, including the term governing the finance charge. *See* 12 C.F.R. § 226.9(c)(2)(i), 74 Fed. Reg. 5413 (January 29, 2009). Amended section 226.9(c)(2) explicitly provided that "[i]ncreases in the rate applicable to a consumer's account due to delinquency, default or as a penalty described in [new section 226.9(g)] *that are not due to a change in the contractual terms of the consumer's account* must be disclosed pursuant to paragraph (g) of this section instead of paragraph (c)(2) of this section." *Id.* (emphasis supplied). This underscores the fact that the Board interpreted section 9(c) as relating only to changes in rates that *are* "due to a change in the contractual terms" of the account.

Second, the Board adopted new section 9(g), which required 45 days' advance notice of increases in rates due to delinquency, default, or as a penalty, including

penalties for events "specified in the account agreement." *See* 12 C.F.R. § 226.9(g), 74 Fed. Reg. 5414. This latter provision was a substantive change that would not have been necessary if Regulation Z already required consumers to "receive a specific notice alerting them of an imminent rate increase" that occurred in accordance with an existing contractual term.[4]

Both before and after the amendments adopted in January 2009, then, the Board distinguished between rate changes that resulted from a *change* in the contract terms, and those that resulted from the *implementation* of contract terms that called for application of a different rate. Section 226.9(c) governed—and continues to apply to—changes in terms that result from a change in the underlying contract. But as the OSC made clear, prior to the recent adoption of section 226.9(g), "[n]o notice of a change in terms need be given if the specific change is set forth initially." OSC Comment 9(c)-1. So even if a rate changed as a result of the consumer's default, there was no need to provide any "subsequent disclosure" of that change under section 226.9(c)(1) if the circumstances of the change were set forth in the account opening disclosures. Through the adoption of section 226.9(g), the Board changed this rule to provide for advance notice if a rate is increased as a penalty, *including* circumstances where the events triggering the penalty are "specified in the account agreement". 12 C.F.R. § 226.9(g).

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[4] As noted above, *supra* n.1, new section 226.9(g) was adopted in final form with an effective date of July 1, 2010 through the Board's action in January 2009; following enactment of the Credit CARD Act of 2009, these provisions were adopted effective August 20, 2009 in accordance with the effective date of that statutory amendment.

The district court below understood correctly that the Board interpreted its prior regulation as permitting a creditor to impose a penalty rate without any specific prior notice so long as the circumstances under which the penalty could be imposed, and the maximum rate permitted, were disclosed in the account-opening disclosures. *Shaner v. Chase Bank, USA, N.A.*, 570 F. Supp. 2d 195, 200 (D. Mass. 2008). The district court was puzzled, however, by reference in another portion of the OSC that it believed might conflict with this rule. That provision is found at Comment 9(c)(1)-3, a comment to section 9(c)(1). The Comment, entitled "Timing," provides that 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—in two circumstances: If there is an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default . . . " In the district court's view, this Comment suggested that any change in finance charge attributable to delinquency or default required notice under section 9(c)(1).

Comment 9(c)(1)-3, however, 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. This is evident not only from the heading of the comment ("Timing—advance notice not required"), but from its location. Comment 9(c)-1 provides the Board's official interpretation of the entirety of section 9(c), relating to subsequent disclosures of changes in terms, and states, as discussed above, that "[n]o notice of a change in terms need be given if the specific

change is set forth initially. . . . " That comment, in the Board's view, controls this case. Comment 9(c)(1)-3 is an interpretation of section 9(c)(1) of Regulation Z, and sets out the timing rules applicable when pre-effective date notice of a rate increase must be given.[5]

The Board also 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. In other words, if an agreement that calls for a standard rate of 12% contains a provision stating that upon the consumer's default the creditor "may impose a penalty rate up to a maximum of 24%," the creditor would be permitted to raise the rate following default anywhere between 12% and 24% without providing any pre-effective date notice under existing section 226.9(c). No such notice would be required for the full increase to 24% for the reasons discussed above: imposition of that rate is not a *change* in terms, but an implementation of the existing term. That being the case, no pre-effective date notice would be required if the creditor increased the rate to an intermediate rate, such as 18% or 20%. The Board is aware that credit card companies frequently choose to impose less than the maxi-

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[5] *See* Comment I-5, explaining "Comment designations": "The comments are designated with as much specificity as possible according to the particular regulatory provision addressed. For example, some of the comments to section 226.18(b) are further divided by subparagraph, such as comment 18(b)(1)-1 and comment 18(b)(2)-1. In other cases, comments have more general application and are designated, for example, as comment 18-1 or comment 18(b)-1."

mum rate increase permitted under the contract terms,[6] 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.

In the Board's view, this is a simple application of the contractual provision previously disclosed in the initial card agreement, which allows, but does not require, the creditor to impose the maximum penalty rate.[7] This reading is also consistent with the provision of section 226.9(c)(2) that no change-in-terms notice is required "when the change involves . . . a reduction of any component of the finance or other charge." This provision reflects the Board's view that consumers need not be informed in advance of changes that are to their advantage because those changes obviously do not put them at added risk.[8] For the same reason, changes in interest

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[6] For example, a credit card company might choose not to impose any increase the first time a payment is late, and might impose less than the maximum allowable increase after a second late payment.

[7] As noted at the outset, the Court's hypothetical to the Board involved the situation where the card member agreement provides "that the issuer 'may increase'" the rate upon default "up to a maximum of a [specified] default rate." Order of August 4, 2009.

[8] The Commentary provides that no change in terms notice need be given if the "specific change is set forth initially," OSC Comment 9(c)-1, and identifies some examples of those provisions. The examples are illustrative only, and the Board did not mean by the reference to "specific change" to limit the circumstances for the absence of a change-in-terms notice to those where a precise percentage rate would necessarily be imposed under specified circumstances. For the reasons discussed in text, the Board interprets this provision to mean that if the change implemented by the creditor is permitted by the specific terms of the agreement—for example, if the rate is imposed is at or below the maxi-

rate that are less than the maximum that could be imposed by the creditor need not be disclosed in advance of the effective date if the creditor would not have been required to disclose imposition of the maximum rate.

C. The Court Should Defer To The Board's Interpretation Of The Relevant Provisions of Regulation Z and the Commentary

These interpretations of the Board's Regulation, set forth in the OSC, in the Federal Register notices accompanying the proposed and final amendments to Regulation Z, and indeed in this brief, are entitled to deference from the Court. Particularly in the area of Truth in Lending, the courts have granted great deference to the Board's interpretation of the statute and of its implementing Regulation Z. The Supreme Court has recognized that "because of their complexity and variety, . . . credit transactions defy exhaustive regulation by a single statute. Congress therefore delegated expansive authority to the Federal Reserve Board to elaborate and expand the legal framework governing commerce in credit." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. at 560. For that reason, "deference is especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z. *Unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive.*" *Id.* at 565 (emphasis added).

This early deference has continued through the years in a series of cases including *Anderson Brothers Ford v. Valencia*, 452 U.S. 205, 219 (1981), in which the Court

mum identified in the agreement—the provision is satisfied and the rate change does not require a change-in-terms notice.

considered, among other things, a proposed Commentary provision published by the Board; and most recently in *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232 (2004), where the Court again deferred to the Board's interpretation of TILA in Regulation Z.

The Board's interpretation of Regulation Z discussed here—that a change-in-terms notice is not required under the provisions of Regulation Z in effect prior to 2009 when the change implements a contractual term—is no less worthy of deference simply because it relies on statements contained in Federal Register notices published with proposed rule and Commentary amendments. Those statements are authoritative in and of themselves, as the Supreme Court has recognized. Moreover, they are consistent with the Board's *action* in proposing a revision to Regulation Z—the adoption of new section 226.9(g)—that would have been unnecessary had the regulation already required a change-in-terms notice for rate changes that implement the contract terms.

Finally, even if the positions expressed in this brief are not deemed by the Court to have been clear from the Board's prior interpretations, they are nonetheless worthy of deference. As the Supreme Court stated in *Auer v. Robbins*, 519 U.S. 452 (1997), with respect to a position taken in an *amicus* brief submitted, like this one, at the invitation of the Court, *see id.,* 519 U.S. at 461, the fact that the interpretation

> comes to us in the form of a brief . . . does not, in the circumstances of this case, make it unworthy of deference. The Secretary's position is in no sense a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack,

> *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988). There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.

Id. at 462.

The same is true here. The Board has been through a lengthy rule-making process in part in order to address some of the policy concerns raised by the prior rule—the rule that governs this case. The rule has now been changed prospectively, but that does not alter its interpretation prior to amendment. It is the Board's position that at the time of the transactions at issue in this case, Regulation Z did not require a change-in-terms notice to be provided when a creditor increased a rate to a figure at or below the maximum allowed by the contract in the event of default.

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