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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

Petitioner's Rule 29.6 disclosures appear in its opening brief (at ii). There are no changes to those disclosures.

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ARGUMENT

This case concerns the meaning of the Federal Reserve Board's Regulation Z, 12 C.F.R. pt. 226. In the last year, the author of the regulation, the Board, has explained, in briefs filed at the invitation of federal courts, its long-held interpretation of the regulation. According to the Board, Regulation Z means just what petitioner Chase Bank USA has argued and the industry as a whole has always understood. The Board's position should be dispositive of the question presented, because under this Court's precedent an agency's interpretation of its own regulation is entitled to substantial deference. In the present context—the Board's construction of a technical classification in Regulation Z—that deference is near if not at its apex. Respondent James McCoy asks for deference to be denied, asserting that the regulation is unambiguous and that deference should be limited to the Board staff's commentary, to Board views subject to a formal notice-and-comment process, or to Board positions based upon explicitly described policy bases. No authority supports any of these contentions and none has merit.

Even absent deference, the Board's and Chase's reading of Regulation Z is correct. It is supported by the regulation's text, the Board staff's commentary, and the Board's repeated statements in rulemaking proceedings over the past six years. McCoy's contrary arguments ignore critical language from both the regulation and the commentary. But even if his arguments were credited, at best they demonstrate that the regulation was ambiguous. And that conclusion leads back to the starting point for analysis—deference to the Board's resolution of that ambiguity is appropriate.[1]

[1] McCoy's brief repeatedly mischaracterizes both the Board's interpretation and card issuers' practices as to notice of rate increases resulting from cardholder defaults. For example, McCoy states (Br. 43) that the Board's interpretation allows issuers "to increase rates without providing notice." In reality, under the Board's view, issuers had to disclose—before any rate increase could occur—each triggering event for an increase and the corresponding maximum penalty rate. *See* U.S. Br. App. 6a. Issuers also had to notify cardholders, in the appropriate periodic statement, about increases that occurred pursuant to those previously disclosed terms. *See id.* at 7a. McCoy's repeated assertion that Chase increases rates without any notice is thus simply false.

I. DEFERENCE TO THE VIEWS EXPRESSED IN THE BOARD'S AMICUS BRIEFS IS WARRANTED

McCoy acknowledges (*e.g.*, Br. 33-34) that the Board, in responding to invitations from this Court and the First Circuit, has explained in recent amicus briefs that it has consistently interpreted the applicable version of Regulation Z just as Chase does, *i.e.*, not to require notice of a change in terms in the circumstances here. McCoy also acknowledges (Br. 12) that "the Board has substantial discretion to interpret TILA, and that this Court in *Auer* [v. *Robbins*, 519 U.S. 452 (1997),] granted a high level of deference to an agency amicus brief that interpreted the agency's own regulations." And McCoy does not dispute that here, as in *Auer*, the relevant interpretation is not "advanced by an agency seeking to defend past agency action against attack." *Id.* at 462, *quoted in* Pet. Br. 29. McCoy nonetheless argues that deference to the Board's interpretation of Regulation Z, as expressed in the amicus briefs, is unwarranted. That argument is meritless.

A. The Board's Views Do Not Conflict With The Plain Language Of Regulation Z

McCoy first contends (Br. 35) that deference is improper because the Board's construction is foreclosed by Regulation Z's plain text. *Auer* deference is indeed unwarranted if a regulation's text is clear. *See, e.g.*, *Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000). But there is no serious argument here that Regulation Z unambiguously requires McCoy's reading. In fact, as explained below, *see* Part II.A, the regulation's plain text, if anything, supports the Board's and Chase's interpretation. No court—not even the panel majority below—has endorsed McCoy's contention that the regulation unambiguously supports his position. *See*

Pet. App. 4a ("Regulation Z is ambiguous."); *accord Shaner* v. *Chase Bank USA, N.A.*, 587 F.3d 488, 493 (1st Cir. 2009); *Swanson* v. *Bank of Am., N.A.*, 559 F.3d 653, 655, 656 (7th Cir. 2009) (subsequent history omitted). The division on the question presented between the panel majority below on one hand, and every other judge to have considered the issue on the other, confirms that the regulation is at minimum ambiguous. *See Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996).

B. Deference Is Not Limited To The Official Staff Commentary

McCoy next seeks (Br. 35-37) to deny deference to the Board on the ground that under Regulation Z, the staff of the Board's Division of Consumer and Community Affairs issues official interpretations of the regulation only in the Official Staff Commentary. But the views in the amicus briefs are not a staff interpretation. They are the views of the Board itself. *See Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 n.9 (1980) (noting the distinction). Nothing in Regulation Z, or any other authority, restricts the Board's ability to provide its *own* authoritative interpretations, whether through amicus briefs, preambles to its regulations, or in other ways. Nor does McCoy contend otherwise. His discussion of the Commentary's history (Br. 36-37) is therefore simply irrelevant.

McCoy seeks to make much the same point by persistently referring to the views in the Board's amicus briefs as those of "agency counsel" (*e.g.*, Br. 33-35). But again, the briefs express the views of the Board itself, not of its attorneys. As the First Circuit explained in *Shaner*, the court "asked the Board for *its* views on its own pre-amendment regulations and *it* has submitted them through an amicus brief." 587 F.3d at 491 (emphases added). The Board's *Shaner* amicus brief also makes this clear. *See* U.S. Br. App. 2a ("[T]he Board has interpreted the applicable provisions of Regulation Z…."), 19a ("It is the Board's position…."), 1a ("Brief for the Board"). The agency briefs in *Auer* and later cases were likewise written by "agency counsel"—including, as here, the Solicitor General—yet this Court granted deference to the agency's views.

C. Board Interpretations Of Regulation Z Need Not Be The Product Of Notice-And-Comment Rulemaking

McCoy next seeks (Br. 38-39) to deny deference to the Board because its views are expressed in briefs rather than following formal notice-and-comment rulemaking. That argument cannot be squared with *Auer* or other cases in which this Court (unanimously) deferred to agency views in amicus briefs. *See Auer*, 519 U.S. at 461; *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 872 (2009); *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007).[2]

The cases McCoy invokes—which all predate *Kennedy* and *Long Island Care*—are inapposite. The relevant portions addressed deference to an agency's *statutory* interpretation, *see Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), not an interpretation of the agency's regulations. The sentence in *Christensen* from which McCoy excerpts his "lack

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[2] *Kennedy* and *Long Island Care* refute the suggestion, made in the lower-court decisions McCoy cites (Br. 45 n.7), that "there is little left of *Auer*," *Keys* v. *Barnhart*, 347 F.3d 990, 993 (7th Cir. 2003).

the force of law" quote (Br. 38) makes this clear, expressly referring to "*Chevron*-style deference." 529 U.S. at 587.[3] *United States* v. *Mead Corp.* similarly concerned *Chevron* deference. *See* 533 U.S. 218, 226 (2001) (review granted "to consider the limits of *Chevron* deference"). So did *Barnhart* v. *Walton*, 535 U.S. 212, 217 (2002) ("question before us is … the Agency's interpretation of the statute").[4] To Chase's knowledge this Court has never declined *Auer* deference to views expressed in an agency's brief on the ground that the brief was not the product of a formal notice-and-comment procedure.

D. The Rationales For Deference Are Present Here

McCoy argues finally (Br. 39-45) that the rationales for deferring to agencies' interpretations of their own regulations do not apply here. That is incorrect.

1. As this Court has explained, courts defer to an agency's construction of its regulations because Congress has given the agency interpretive power. *See Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991) ("[T]he power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."). That rationale applies fully here. Indeed, in explaining this rationale the Court in *Martin* cited its earlier deci-

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[3] *Christensen* separately declined *Auer* deference, but not because of a lack of notice-and-comment rulemaking. Rather, the Court deemed the regulation unambiguous. *See* 529 U.S. at 588.

[4] As McCoy acknowledges (Br. 38), *Barnhart* confirms that even in the *Chevron* context, *Christensen* did not make rulemaking a prerequisite for deference. *See* 535 U.S. at 221-222.

sion in *Ford Motor Credit* about deference to the Board under the Truth in Lending Act (TILA). *See id.* And in *Ford Motor Credit*, the Court observed that Congress "delegated expansive authority to the … Board to elaborate and expand the [statutory] framework." 444 U.S. at 559-560. The power to interpret Regulation Z definitively "is a component of" that broad delegation. *Martin*, 499 U.S. at 151.

McCoy's contrary argument (Br. 40) relies primarily on *Gonzales* v. *Oregon*, 546 U.S. 243 (2006). But *Gonzales* adopted the same view as the cases just discussed. It explained that one reason for deferring in *Auer* was that the agency's "regulations gave specificity to a statutory scheme the [agency] was charged with enforcing." *Id.* at 256. The same is true here.

As McCoy notes (Br. 40), *Gonzales* elaborated a second ground for deference in *Auer*: The agency's "regulations … reflected the considerable experience and expertise the [agency] had acquired over time with respect to the complexities of the" statute. 546 U.S. at 256. That does not help McCoy, however, because Regulation Z unquestionably reflects the Board's "experience and expertise," acquired over time, regarding TILA's "complexities." *Id.* In fact, it was TILA's complex, "highly technical" nature that this Court pointed to in *Ford Motor Credit* as a primary reason to defer to Board interpretations. 444 U.S. at 566.

McCoy also states (Br. 40) that *Gonzales* declined *Auer* deference because the agency's expertise did not inform resolution of the pertinent issue. In reality, the Court withheld *Auer* deference because "the underlying regulation does little more than restate … the statute," and therefore "the question here is not the meaning of the regulation but the meaning of the statute."

546 U.S. at 257. That is not the situation here. *Gonzales*' holding, then, like its reasoning, does not support McCoy.[5]

2. McCoy next argues (Br. 41) that deference is inappropriate because policy considerations are supposedly absent from the Board's amicus briefs. That is both factually and legally incorrect.

As a factual matter, policy considerations are not absent from the Board's briefs. For example, the *Shaner* amicus brief explains that the Board interprets Regulation Z not to have required notice of a change in terms in the circumstances of this case because the rate increases were "the implementation of terms already disclosed." U.S. Br. App. 6a. In the Board's view, in other words, cardholders like McCoy received sufficient notice in their initial disclosures. This is consistent with views the Board stated in modifying Regulation Z in 1980. It explained then that the regulation did not emphasize "disclosures relating to events after the initial credit choice" because, "[i]n the Board's view, the primary goals of [TILA] are not particularly enhanced by regulatory provisions relating to changes in terms on outstanding obligations and on the effects of the failure to comply with the terms of the obligation." *Truth in Lending*, 45 Fed. Reg. 80,648, 80,649 (Dec. 5, 1980) (proposed rule). That judgment, regarding how much disclosure is optimal, is steeped in policy and expertise. Indeed, it is the very policy judgment that this Court flagged in *Ford Motor Credit* as quintessentially for the

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[5] A second rationale for declining *Auer* deference in *Gonzales* was that the agency's authority to issue the relevant interpretation was granted after the regulation's promulgation. *See* 546 U.S. at 257-258. Again, that is not true here.

Board. *See* 444 U.S. at 568-569 ("*Meaningful* disclosure does not mean *more* disclosure. Rather, it describes a balance between 'competing considerations[.]' … And striking the appropriate balance is an empirical process that … [a]dministrative agencies are simply better suited than courts to engage in[.]").

The Board also noted in the *Shaner* amicus brief that it was "aware that credit card companies frequently choose to impose less than the maximum rate increase permitted under the contract terms." U.S. Br. App. 15a-16a. The Board explained that it "has never viewed that exercise of discretion in the consumer's favor" to require a notice of a change in terms because its policy judgment is 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." *Id.* at 16a.

More fundamentally, there is no merit to McCoy's legal contention that *Auer* deference is warranted only if the agency sufficiently discusses the policy considerations underlying its regulatory interpretation. As explained, deference is granted because Congress has decided that gaps in a regulation are to be filled by the agency. *See Martin*, 499 U.S. at 151. There is no basis to hold that this applies to "policy" gaps but not others. Certainly nothing about Congress's delegation of "expansive [interpretive] authority" to the Board, *Ford Motor Credit*, 444 U.S. at 559, suggests anything like McCoy's proposed limitation. McCoy notably cites no case in which deference to an agency's interpretation of its regulation was refused because the agency did not discuss the policy that informed its interpretation or because the interpretation involved "only … the[] reading of the [regulation's] ordinary English meaning." Resp. Br. 43.

More generally, this Court has repeatedly granted deference even where the case for doing so was less compelling than here. For example, the Court has deferred where an agency actually changed its interpretation of a regulation. *See Kennedy*, 129 S. Ct. at 872 n.7; *Long Island Care*, 551 U.S. at 171. The Board, in contrast, has interpreted its regulation consistently, *see* U.S. Br. App. 6a, and addressed policy concerns by changing the regulation itself (through formal proceedings). It should not be penalized for doing so, in the form of lost deference. To the contrary, the extensive attention the Board paid to these issues in conducting the rulemaking confirms the propriety of giving deference here, by demonstrating that the Board's interpretation "reflect[s] the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462; *see also* Resp. Br. 5 (rulemaking involved "a comprehensive review" and "extensive record"). Because it does, the Board's interpretation is "controlling." *Auer*, 519 U.S. at 461.

II. THE REGULATION AND COMMENTARY, AS WELL AS THE BOARD'S INTERPRETATIONS OF BOTH, CONFIRM THE NINTH CIRCUIT'S ERROR

The views in the Board's amicus briefs, combined with this Court's admonition that deference to the Board's interpretations of Regulation Z is particularly appropriate, *see* Pet. Br. 26, provide ample grounds to reverse. But the text of Regulation Z and the Commentary, and the Board's interpretation of both in rulemaking proceedings, lead to the same result.

A. McCoy's Plain-Text Argument Ignores The Key Regulatory Language

1. McCoy's assertion (Br. 13-15) that Regulation Z unambiguously required notice of a change in terms in cases like this ignores the critical regulatory text. As McCoy acknowledges (Br. 13), Regulation Z required such notice "[w]henever any term required to be disclosed under § 226.6 is changed." 12 C.F.R. § 226.9(c)(1).[6] The critical question, then, is whether a "term" that § 226.6 required a card issuer to disclose at account-opening "is changed" in cases like this.

McCoy glides over this central question, baldly asserting (Br. 13) that the answer is yes because "[o]ne of the terms that § 226.6 requires to be disclosed is the loan's APR." McCoy quotes no language in support, and § 226.6 in fact required "disclosure of each periodic rate that *may* be used to compute the finance charge, … and the corresponding annual percentage rate." 12 C.F.R. § 226.6(a)(2) (emphasis added). In other words, § 226.6 required disclosure of both the initial rate (that is, the rate in effect at the time of the initial disclosures) and the other rates that "may be used." *Id.* And the Commentary was clear that one type of periodic rate that "may be used," and which an issuer therefore must disclose under § 226.6(a)(2), is a default rate. *See id.* pt. 226, supp. I. cmt. ¶ 6(a)(2)-11, *quoted in* Pet. Br. 8. If a cardholder defaulted, and the issuer applied a rate at or below the disclosed maximum, there was no change to what was initially disclosed, *i.e.*, no change to the rates that "may be used." Rather, the issuer im-

[6] All citations herein to Regulation Z are to the 2004 version.

plemented the default-rate term by applying a previously disclosed rate.[7]

The error of McCoy's reading of §§ 226.6(a) and 226.9(c) to require a change-in-terms notice "whenever a loan's APR is changed" (Br. 13) is clear from the irreconcilable conflict between that reading and the Commentary. Under McCoy's view, notice of a change in terms was required every time a variable rate on a credit card increased due to an increase in the index upon which that rate is based (*e.g.*, the prime rate). But the Commentary expressly states that no change-in-terms notice was required in that instance. *See* 12 C.F.R. pt. 226, supp. I cmts. ¶ 6(a)(2)-9, ¶ 9(c)-1. Nor was notice required in other circumstances where, to use McCoy's words (Br. 13), "a loan's APR is changed." *See* 12 C.F.R. pt. 226, supp. I cmt. ¶ 9(c)-1 (providing two additional examples). Chase's and the Board's construction of §§ 226.6(a) and 226.9(c) is thus not only the most natural reading of the text of those provisions, but also the only reading that is consistent with the Commentary's construction of the change-in-terms requirement overall.

2. Lacking textual support for his position, McCoy (Br. 15) accuses Chase of arguing "that the phrase 'any term required to be disclosed under § 226.6' refers not to changes to the … terms of the loan, but to

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[7] The cardholder still received notice of the newly applicable rate, of course, notwithstanding McCoy's persistent suggestions to the contrary (*e.g.*, Br. 1). As Chase and the Board have explained, notice appeared on the periodic statement. *See* 12 C.F.R. § 226.7(d), (g); *id.* pt. 226, supp. I, cmt. ¶ 7(d)-2, *quoted in* Pet. Br. 11; *Truth in Lending*, 72 Fed. Reg. 32,948, 33,009 (June 14, 2007) (proposed rule).

changes to the terms of the [parties'] contract." To the contrary, as Chase's opening brief makes clear, the phrase in § 226.6(a)(2) means exactly what it says: the terms that must be disclosed initially under § 226.6, including the rates that "may be used." *See* Pet. Br. i, 8, 30. Hence, as explained, if a card issuer merely implements a default rate that it said in its initial disclosures "may be used," then the issuer has not changed the rates that "may be used," *i.e.*, has not changed any term required to be disclosed by § 226.6.

McCoy's loan-contract distinction also reflects an apparent misunderstanding of the subject matter of TILA disclosures. The terms under which card issuers extend credit are established by the contract governing the loan, *i.e.*, the card agreement. Thus, what McCoy labels the APR "loan" term is, in fact, the APR "contract" term. That is why Regulation Z disclosure requirements are grounded in the contract terms; the regulation states that disclosures shall "reflect the terms of the legal obligation between the parties." 12 C.F.R. § 226.5(c), *quoted in* Pet. Br. 8-9. McCoy simply ignores this point.

3. McCoy also seeks refuge (Br. 13) in the third and final sentence of § 226.9(c)(1). But that sentence, and the one preceding it, simply specified *when* card issuers had to send a change-in-terms notice if it was required by the section's first sentence. Specifically, the second sentence provided that "[t]he notice" required by the first sentence had to be sent "at least 15 days prior to the [change's] effective date." 12 C.F.R. § 226.9(c)(1). The third sentence then provided an exception to "[t]he 15-day timing requirement" for certain changes, including rate increases resulting from "delinquency or default." *Id.* Rather than 15 days, the tim-

ing requirement for a notice in this instance was merely "before the [change's] effective date." *Id.*

Through selective excerpting, McCoy asserts that this third sentence of § 226.9(c)(1) imposes a freestanding notice requirement applicable to all default-based rate increases. He renders the sentence as follows: "[I]f a periodic rate or other finance charge is increased because of the consumer's delinquency or default[,] *the notice shall be given* … before the effective date of the change." Resp. Br. 13 (omission and alterations in original); *see also id.* at 2, 10, 17, 34. But the complete version shows that, as just explained, this third sentence only concerns timing and does not address whether change-in-terms notice was required in the first place. The complete sentence reads: "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(c)(1). Thus, if, upon a cardholder's default or delinquency, the issuer determined to change any term required to be disclosed by § 226.6, *see, e.g.*, Pet. Br. 10, the last sentence of § 226.9(c)(1) provided that the issuer did not need to send the required change-in-terms notice 15 days in advance. The issuer instead needed to send the notice only before the new term's effective date.[8]

[8] The first sentence of § 226.9(c)(1) parallels—and is addressed by—Official Staff Comment 9(c), which concerns whether a change-in-terms notice is required. The second and third sentences of § 226.9(c)(1) parallel—and are addressed by—Comment 9(c)(1)-3, the "timing" comment that the Ninth Circuit majority

McCoy also points (Br. 14-15) to § 226.9(c)(2), which lists changes that did not require notice of a change in terms. The list includes changes resulting "from the consumer's default or delinquency (other than an increase in the periodic rate or other finance charge)." 12 C.F.R. § 226.9(c)(2). Contrary to McCoy's contention, that parenthetical exception did not mean that all rate increases that resulted from a default or delinquency would require a change-in-terms notice. Rather, it meant that *some* rate increases resulting from a default or delinquency (*e.g.*, new terms adopted pursuant to a reservation-of-rights provision) would require such notice. That is consistent with Chase's and the Board's position. *See* Pet. Br. 10; U.S. Br. 14-15.

In short, Regulation Z's text demonstrates that Chase's and the Board's reading is correct. At a minimum, the regulation does not unambiguously dictate McCoy's position, and therefore could not preclude *Auer* deference.

B. The Commentary Supports The Board's And Chase's Interpretation

McCoy's arguments regarding the Commentary are also infirm. McCoy (Br. 23-25) echoes the Ninth Circuit's view (*see* Pet. App. 4a) that Comment 9(c)(1)-3 mandated change-in-terms notice for all default-based rate increases. Like the Ninth Circuit, however, McCoy bases his argument on a distorted excerpt of the comment. *See Swanson* v. *Bank of Am., N.A.*, 563 F.3d 634, 636 (7th Cir. 2009) ("The majority in *McCoy* replaced with ellipses the language in comment [9(c)(1)-]3

misunderstood. *See* Pet. Br. 10 (quoting the comment), 22-23 (explaining the majority's error); *see also* U.S. Br. 3-4.

showing that it concerns timing of notice otherwise required."). The full version (*see* Pet. Br. 10; U.S. Br. 4) leaves no doubt that the comment—like the regulatory language it addresses, *see supra* n.8—does not establish a freestanding notice requirement, but instead addresses the timing of notice otherwise required. This is particularly clear from the comment's title, "Timing." *See* Pet. Br. 22; U.S. Br. App. 14a. McCoy ignores this point, even though this Court has relied on headings in interpreting a statute, deeming them proper "tools available for the resolution of a doubt" about statutory meaning, *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) (citing cases).[9]

Perhaps recognizing the weakness in his argument about Comment 9(c)(1)-3, McCoy retreats to the position (Br. 24) that the comment "need not stand on its own." But Comment 9(c)-1, which McCoy discusses next (Br. 25-30), does not support his position either. That comment obviates the need for a change-in-terms notice where "the specific change is set forth initially." 12 C.F.R. pt. 226, supp. I cmt. ¶ 9(c)-1. As Chase explained (Br. 31), it initially informed cardholders of the "specific" defaults that could trigger penalty rates and the "specific" maximum rate that could result from each default. McCoy contends that more specificity was required, but this was precisely the level of specificity that the Commentary mandated: "If the initial

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[9] McCoy's argument (Br. 20-21) that TILA forbids application of a default rate to all charges during the pertinent billing cycle, which McCoy calls "retroactive," suffers from the same flaw as his Comment 9(c)(1)-3 argument. His authority—Comment 9(c)(1)-2, another "Timing" comment, and its regulatory history—applies only *if* Regulation Z otherwise required change-in-terms notice. *See* 12 C.F.R. pt. 226, supp. I cmt. ¶ 9(c)(1)-2.

rate may increase upon the occurrence of one or more *specific* events, such as 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." 12 C.F.R. pt. 226, supp. I cmt. ¶ 6(a)(2)-11 (emphases added). McCoy's complaint boils down to dissatisfaction with Chase's retention of discretion to apply a default rate lower than the initially-disclosed maximum. *See, e.g.*, Resp. Br. 26. But "the agreement does not lack the requisite specificity merely because it allows the issuer to exercise discretion in the consumer's favor." U.S. Br. 16. That allowance is fully consistent with the Commentary.[10]

The examples in Comment 9(c)-1 further support Chase's position. McCoy asserts (Br. 29) that all three examples in which a change-in-terms notice was deemed unnecessary "involve[] circumstances where the cardholder can identify whether the higher rate applies and, if so, what that rate actually is." That is wrong. For instance, the third example is a rate increase caused by a consumer's failure to maintain a required savings-account balance. Contrary to McCoy's view (Br. 30), such a failure is closely analogous to a cardholder default like McCoy's—each makes continua-

[10] McCoy also offers no genuine answer to Chase's argument (Br. 28-29; *accord* U.S. Br. 16-17) that: (1) rate increases to below the disclosed maximum (as here) are substantively identical to increases to the maximum followed immediately by discretionary rate reductions, and (2) even under McCoy's reading of Regulation Z the latter situation did not trigger change-in-terms notice. McCoy responds only (Br. 27-28) that consumers could better compare interest rates under his reading. But the comparative difficulties he outlines apply equally to both scenarios just described. The two are indeed substantively identical.

tion of a specific rate contingent on specified conduct by the consumer (maintaining a certain balance or making timely payments). *See* U.S. Br. 12-13. And the Commentary does not state that the consumer must know the exact rate that would result from failing to maintain the required balance. *See* Pet. App. 31a-32a (Cudahy, J., dissenting). The example thus confirms that the specificity McCoy demands was not required.

Finally, McCoy is wrong in contending (Br. 28) that his position is helped by the one example in Comment 9(c)-1 of when notice *was* required. That example refers to rate increases under a reservation-of-rights clause. McCoy repeatedly seeks (Br. 11, 21, 25, 28) to equate such a clause with a default-rate term. But the two are quite different. A reservation-of-rights clause gives a card issuer unlimited discretion to change the terms of the card agreement, including interest-rate terms, meaning that the agreement does not notify cardholders about when (or if) any changes will be made. A default-rate provision, by contrast, does not authorize changes to the initially-disclosed terms, and the discretion it gives is circumscribed both as to the specific occurrences that can trigger a default rate (which are stated for cardholders in the card agreement) and as to the specific maximum default rate for each default (which is also stated in the agreement).

Regulation Z and its Commentary recognize this distinction (as McCoy himself does (Br. 4)). First, the Commentary to § 226.6(a)(2) differentiates between, on one hand, a "creditor's contract reservation to increase the rate ... that simply provides that the creditor reserves the right to raise its rates," 12 C.F.R. pt. 226, supp. I cmt. ¶ 6(a)(2)-2, and, on the other hand, a disclosure of an "initial rate and the penalty rate that may apply" "upon the occurrence of one or more specific events," *id.* cmt. ¶ 6(a)(2)-11. Second, as to open-end home-equity loans, Regulation Z prohibits lenders from changing contract terms—*i.e.*, from including a reservation-of-rights clause, *see* 12 C.F.R. § 226.5b(f)(3)—but allows lenders to "provide in the initial agreement that specified changes will occur if a specified event takes place," *id.* § 226.5b(f)(3)(i). And Comment 9(c)-1, upon which McCoy relies, refers specifically to this § 226.5b(f) "limit" on lenders' ability to change home-equity plans. The Commentary thus provides no support for McCoy's argument. At most, it could only be considered ambiguous as to how "specifically" a change had to initially be set forth to dispense with the requirement of a change-in-terms notice. The Board is entitled to resolve any such ambiguity.

C. The Board's Statements During Its Rulemaking Further Confirm Chase's Construction

Although McCoy disputes (Br. 30-33) that the Board's rulemaking statements support Chase's position, he does not engage with most of Chase's arguments (Pet. Br. 32-38). He instead dwells on three points, none of which has merit.

First, relying on his mischaracterization of Chase's argument as resting on a distinction between loan terms and contract terms, McCoy discounts the rulemaking history on the ground that the Board did not specifically describe "the phrase 'change in terms required to be disclosed'" in § 226.9(c)(1) "to refer to the text of a contractual provision." Resp. Br. 31. This argument is untenable because, as discussed above, *see* pp. 12-13, its premise is wrong.

Second, McCoy disputes Chase's and the Board's point that his reading of Regulation Z would render superfluous a "major" change intended to be accomplished by the amended regulation, and specifically by the new § 226.9(g). *See* Pet. Br. 25, 35-36; U.S. Br. 19; U.S. Br. App. 10a-11a. McCoy argues (Br. 31-32) that the major change was "not the addition of a new notice requirement …, but the merging of the previously separate [notice] requirements into a single 45-day advance-notice rule." That argument ignores the actual rulemaking. The Board did amend § 226.9(c) to merge previously separate requirements regarding the timing of change-in-terms notice (and labeled that a "major" change). But it *also* made the major change of adding § 226.9(g) to the regulation in order to create a new requirement of notice in the very circumstances of this case, *i.e.*, default- and delinquency-based rate changes. Both the proposed and final rulemakings make this clear, stating that the "major" changes included revisions to both the timing of notices and the circumstances in which notice was required in the first place. *See Truth in Lending*, 74 Fed. Reg. 5,244, 5,244 (Jan. 29, 2009) (final rule) ("The final rule *expands the circumstances* under which consumers receive written notice of changes in the terms …, *and* increase[s] the amount of time these notices must be sent before the change becomes effective." (emphases added)); *Truth in Lending*, 72 Fed. Reg. at 32,949 (proposed rule) (same). That is why the Board not only amended § 226.9(c) to increase the lead time for notice, but also added § 226.9(g) to address the new circumstances in which notice is required. If McCoy's reading of § 226.9(c) were correct, this second ("major") step would have been unnecessary. *See* Pet. Br. 36 (citing cases); U.S. Br. 21; U.S. Br. App. 12a-13a.

Third, McCoy inaccurately portrays (Br. 32-33) the meaning of the Board's statement in the 2007 proposed rule that a change-in-terms notice was not required where the card agreement "permit[ted] the card issuer to increase the periodic rate if the consumer makes a late payment," *Truth in Lending*, 72 Fed. Reg. at 33,009, *cited in* Pet. Br. 32-34; *see also* U.S. Br. App. 7a-8a (quoting same language in the 2004 advance notice of proposed rulemaking). According to McCoy (Br. 33), that statement "does not indicate whether the … rate would … automatically apply in the event of a default or, as in Chase's cardholder agreement, allows the creditor discretion to set the new rate somewhere within a wide range." McCoy's assertion is incorrect. The Board's statement explicitly refers to a contract that "permit[s]" a creditor to raise rates in response to a default, not one that requires it. *Truth in Lending*, 72 Fed. Reg. at 33,009. The Board thus was referring not to an automatic, nondiscretionary rate increase, but rather to one just like McCoy's. The Board's stated position was therefore clear: Under the applicable version of Regulation Z, no change-in-terms notice was required here.

D. McCoy's "Purpose" Arguments Lack Merit

Finally, McCoy argues (Br. 19-23) that Chase's interpretation of the prior Regulation Z is inconsistent with TILA's broad purposes. That argument is without merit.

According to McCoy, Chase's reading undermines the "primary purpose[] of protecting consumers." Resp. Br. 19 (capitalization altered). As Chase explained, however (Br. 27-28), it is McCoy's view that could have hurt consumers. If McCoy's interpretation were correct, card issuers would have had an incentive to eliminate their discretion to impose less than the maximum penalty rate in response to a default, because retaining such discretion would have incurred an increased disclosure burden. That is hardly an approach likely to benefit consumers. And McCoy offers no response.

Under Chase's and the Board's interpretation, moreover, cardholders were given notice, in advance, of applicable defaults and corresponding maximum penalty rates. McCoy argues (Br. 20) that this information was insufficient, that unless cardholders knew the exact rate that applied to each default—or at least the formula by which issuers would select the penalty rate—TILA's disclosure regime would be "render[ed] meaningless." As Judge Cudahy explained, that is at minimum highly debatable:

> McCoy had all the information he needed … to enjoy the informed use of his credit. He knew the conditions in which Chase could increase his interest rate and those conditions were under his control. He also knew the highest possible [penalty] rate …. It seems extremely doubtful that in deciding whether to pay his bills on time, McCoy might have attempted to use [Chase's] formula to determine what his chances were of keeping the same interest rate.

Pet. App. 32a-33a (Cudahy, J., dissenting); *see also Ford Motor Credit*, 444 U.S. at 568-569, *quoted supra* p. 8 (explaining that meaningful disclosure does not mean more disclosure). McCoy may disagree about the most effective disclosure, but there can be no dispute that under Chase's and the Board's construction, Regulation Z afforded significant disclosure—at the outset of the credit relationship.

The Board, of course, has recently reweighed its policies, following a multi-year study of the subject, and amended the regulation as a result. Contrary to McCoy's urging, however, the findings that led the Board to do so cannot be superimposed on the old version of the regulation, somehow requiring McCoy's construction. The Board properly concluded that its change of views was best implemented by amending the regulation through notice-and-comment rulemaking. In deference to Congress's determination that it is for the Board to implement TILA through its broad rulemaking power, McCoy's request—that the earlier regulation be judicially revised so as to have the same meaning as the version that the Board concluded required the amendment process—should be rejected.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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