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 others similarly situated,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Where a creditor reserves discretion to increase a cardholder's interest rate up to a stated maximum rate in the event of default, does the Truth in Lending Act (TILA), as implemented by the applicable version of Regulation Z, require the creditor to notify the cardholder when it chooses to increase the cardholder's rate, and to disclose the new rate it has chosen to apply?

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INTRODUCTION

If the Truth in Lending Act (TILA) stands for anything, it is that creditors must prominently inform borrowers of the precise interest rate that applies to a loan *before* lending money at that rate. TILA's fundamental purpose is the "meaningful disclosure of credit terms"—in particular, the clear and uniform disclosure of interest rates and fees using a standardized formula known as the Annual Percentage Rate (APR). 15 U.S.C. §§ 1601(a), 1606. As implemented by Regulation Z, an essential element of TILA's mandatory disclosures is the requirement that creditors disclose the applicable APR not only at the time the loan is made, 12 C.F.R. § 226.6(a), but also "[w]henever any term required to be disclosed under § 226.6 is changed." 12 C.F.R. § 226.9(c)(1). The requirement of notice when the terms of the loan change is critical to TILA's disclosure scheme. Without it, creditors could circumvent TILA's disclosure requirements by prominently disclosing a low initial rate, only to raise that rate later without notice.[1]

This case is about Chase's practice of increasing its credit cardholders' APR without notice that the rate has increased or of the new rate that applies. Although Chase's cardholder agreement discloses an initial APR, it also provides that Chase "may" increase the initial rate "up to" a specified maximum rate if a monthly credit review discloses that the cardholder has made a late payment either to Chase or to any "other creditors." Under that provision, a single late payment on an electricity or phone bill, for example, would authorize Chase to increase the cardholder's interest rate, in its discretion, to

[1] Unless otherwise specified, citations to Regulation Z refer to the pre-2009 version of the regulation.

anywhere between the initial and maximum rates. When Chase chooses to increase the rate, it does not inform cardholders of the new rate, or even of the fact that the rate has changed, thus causing cardholders to accrue debt at an undisclosed rate and denying them the opportunity to switch to a different lender for their credit purchases. Even worse, Chase applies the new rate *retroactively* to the first day of the billing cycle, meaning that the new rate covers both future purchases and purchases the consumer has already made.

Chase's failure to provide notice of these rate increases flouts the plain language of Regulation Z, which requires that "if 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." 12 C.F.R. § 226.9(c)(1). Chase's practice also undermines TILA's core purpose of ensuring that borrowers know the specific APR that will apply to money they borrow. Because the court below correctly concluded that Regulation Z does not permit increases in APR without notice, its decision should be affirmed.

STATEMENT

A. Regulation Z's Disclosure Requirements

Congress enacted TILA in response to creditors' widespread practice of not disclosing a loan's interest rate, or disclosing it in a way that was misleading and difficult to compare with competing loans. Rather than imposing limits on the interest rates that creditors could charge, TILA addressed these problems by requiring "meaningful disclosure of credit terms"—in particular, the clear and uniform disclosure of a loan's APR. 15 U.S.C. §§ 1601(a), 1606. Congress intended TILA's disclosure requirements to serve the dual functions of "protect[ing] the consumer against inaccurate and unfair … credit card practices" and allowing the credit marketplace to function more efficiently by making it possible for consumers to "compare more readily the various credit terms available." 15 U.S.C. § 1601(a). Under TILA, a consumer can have confidence that a 10% APR is really better than a 15% rate, and a creditor can have confidence that competitors are not gaining an unfair advantage by calculating or disclosing their interest rates in misleading ways.

TILA is thus essentially a disclosure statute, and the most important piece of information that it requires to be disclosed is the APR that applies to a loan. *See* 15 U.S.C. § 1606. The specific form of the required disclosures is set forth by the Federal Reserve Board in Regulation Z under the Board's authority to "prescribe regulations to carry out [TILA's] purposes." 15 U.S.C. § 1604(a). For open-end credit plans, such as credit-card accounts, Regulation Z requires a creditor to provide an "[i]nitial disclosure statement" that includes disclosure of several "items." 12 C.F.R. § 226.6. First among these required disclosures is the "circumstances under which a finance charge will be imposed and an explanation of how it will be determined," including "each periodic rate that may be used to compute the finance charge." *Id.* § 226.6(a). TILA and Regulation Z require the APR disclosure to be both "conspicuous[]" (more prominent than other disclosures), and "specific" (accurate to within an eighth of a percentage point). *See* 15 U.S.C. §§ 1606(c) & 1632(a).

Under Regulation Z, the start of the credit relationship is not the end of the creditor's disclosure obligations. The rules also require creditors to disclose the applicable APR upon a "[c]hange in terms." *Id.* § 226.9(c). Disclosure of term changes is a key component of Regulation Z's required disclosures because, without it, creditors could impose undisclosed rates on borrowers by prominently disclosing a low initial rate, only to raise that rate later without notice. That outcome would frustrate both TILA's consumer-protection function (by misleading consumers into acquiring debt that they might have avoided if they had known the actual rate), and its marketplace-efficiency rationale (by denying consumers the opportunity to shop for a better rate, both at the time they enter into a loan agreement and at the time the rate increases).

Importantly for this case, the applicable version of Regulation Z creates a dual scheme for providing notice of an APR increase, in which the notice required depends on the event that triggers the increased rate. *Id.* § 226.9(c)(1). For most APR changes, the regulation requires that "notice shall be mailed or delivered at least 15 days prior to the effective date of the change." *Id.* The "15-day timing requirement does not apply," however, when a lender increases the rate "because of the consumer's delinquency or default." *Id.* In that case, although § 226.9(c)(1) still expressly requires that "notice shall be given," it provides that the notice need only be sent "before the effective date of the change." *Id.*

B. Recent Amendments to Regulation Z

Beginning in the late 1990s, some creditors began including in their cardholder agreements language designed to reserve broad authority to change the terms of their loans. Mark Furletti, *Credit Card Pricing Developments and Their Disclosure* 8-9 (Federal Reserve Bank of Phila. Jan. 2003). These terms included creditors' reservation of the right to change any terms of their cardholder agreements unilaterally. They also included the imposition of "universal-default" provisions, under which creditors could increase the cardholder's interest rate if a monthly review of the cardholder's credit report showed a late payment to *any* creditor. *See Truth in Lending*, 72 Fed. Reg. 32,948, 33,009, 33,012 (June 14, 2007) (proposed rule) (discussing universal default). A creditor's APR increase under a universal-default provision often comes as a surprise to consumers because the increase is unrelated to the cardholder's record of payment to that creditor. *See id.*

Concerned that Regulation Z's existing requirement of either contemporaneous or 15-day advance notice did not provide consumers with adequate notice of surprise term changes, the Board in December 2004 published an advance notice of proposed rulemaking that "commence[d] a comprehensive review of the open-end credit rules" provided in Regulation Z. *Truth in Lending*, 70 Fed. Reg. 60,235, 60,235 (Oct. 17, 2005). The stated goal of the rulemaking, which would be the first major revision of Regulation Z's open-end credit provisions since 1981, was "improv[ing] the effectiveness of the disclosures that creditors provide to consumers at application and throughout the life of an open-end … account." 72 Fed. Reg. at 32,948.

Over five years, the Board developed an extensive record that culminated in a final rule issued in January 2009. *Truth in Lending*, 74 Fed. Reg. 5,244 (Jan. 29, 2009) (final rule). The record includes consumer testing designed to measure comprehension of disclosures, which show that consumers did not understand that creditors' reservation-of-rights clauses allowed changes in a disclosed rate without advance notice. 72 Fed. Reg. at 32,951-32,952, 33,009-33,011. Based on the results of its testing, the Board's staff concluded that "consumers are likely unaware of the events that will trigger such pricing" because "[t]he account-opening disclosures may be provided to the consumer too far in advance for the consumer to recall the circumstances that may cause his or her rates to increase," and because "the consumer may not have retained a copy of the account-opening disclosures and may not be able to effectively link the information disclosed at account opening to the current repricing of his or her account." *Id.* at 33,012.

Rather than prohibiting creditors from reserving the right to change APR, the Board addressed these problems by adopting a "major proposed change" to the timing of required disclosures under § 226.9(c). *Id.* at 32,948-32,949. The amended rule eliminated the timing distinction between term changes resulting from default and other sorts of term changes, consolidating the dual requirements of either contemporaneous or 15-day advance notice into a single 45-day advance-notice rule. *Id.* at 33,009-33,011; *see* 74 Fed. Reg. 5,244. By eliminating the option of contemporaneous notice and requiring 45 days' notice regardless of the reason for an increase in APR, the Board established 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 33,009-33,011.

In May 2009, shortly after the Board adopted its final rule, Congress passed the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act), which imposed a variety of new substantive and disclosure requirements on creditors, including notice provisions. Pub. L. No. 111-24, sec. 101(a)(1), 123 Stat. 1734, 1735-36. Like the Board's own rules, the Credit CARD Act required 45 days' advance notice of interest-rate increases and significant changes in terms. *Id.* § 101(a), 123 Stat. 1735. The law prompted another round of rulemaking that resulted in the rule presently in effect. Because the Credit CARD Act's notice requirements largely paralleled those already adopted by the Board, the amended rule did not adopt further material changes to those requirements. *Truth in Lending*, 74 Fed. Reg. 36,077, 36,079 (July 22, 2009) (interim final rule).

C. Chase's Disclosure Practices and the Proceedings Below

The parties agree that, because the transactions at issue in this case took place before the effective date of the amended rules, the new 45-day advance-notice requirement adopted in 2009 for default-based APR increases does not apply to this case. Chase, however, takes the position that it is not required to provide even the *contemporaneous* notice of an APR increase required under Regulation Z's pre-amendment rule.

Chase bases this position on its cardholder agreement. The agreement discloses an initial APR, but also includes a universal-default provision reserving the right to increase the rate. *See* Pet. App. 20a-21a n.1. The provision states that Chase will conduct a monthly review of the cardholder's credit. *Id.* If the review discloses a late payment either to Chase or to any "other creditors," the agreement provides that Chase "may" increase the initial rate "up to" a specified maximum rate—in other words, anywhere in the range between the base and maximum rates. *Id.* In addition, Chase's agreement provides that the new rate "will apply to existing as well as new balances and will be effective with the billing cycle ending on the review date," meaning that Chase will apply the new, higher APR retroactively to the first day of the just-ended billing cycle. *Id.* For example, if a cardholder is late in making a minimum payment due on the 25th day of a billing cycle and Chase decides to increase the cardholder's interest rate, the agreement allows Chase to apply the increased rate to the beginning of the just-ended cycle—i.e., 25 days before the default even occurred.[2]

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[2] The relevant provision of the cardholder agreement states:

> **Preferred Customer Pricing Eligibility …** Your Account will be reviewed every month on your Statement Closing Date to determine its continued eligibility for the Preferred or Non-Preferred rates. On each monthly review, we may change your interest rate and impose a Non-Preferred rate up to the maximum Non-Preferred rate described in the Pricing Schedule for each occurrence when you do not meet the conditions described below to be eligible for Preferred [rates]. Any changes in pricing as a result of the monthly reviews for Preferred or Non-Preferred rates will apply to existing as well as new balances and will be effective with the billing cycle ending on the review date.
>
> To keep Preferred rates, the following conditions must be met as of the review date:
>
> - you have made at least the required minimum payments when due on your Account and on all other loans or accounts with us and your other creditors; and
> - the credit limit on your Account has not been exceeded; and
> - any payment on your Account has not been returned unpaid.
>
> If you do not meet all of these conditions … your Account may lose its Preferred rates … .
>
> We may obtain consumer reports from credit bureaus on you at any time in the future. We may use the reports and their contents, as well as information about your Account including its payment history and level of utilization over the life of your Account, and your other relationships with us and our affiliates to review your Account including for the purposes of determining its eligibility for Preferred rates and of establishing the Non-Preferred rate that may apply to your Account.

Pet. App. 20a-21a n.1.

After Chase increased his interest rate pursuant to its default-rate provision, respondent James A. McCoy filed suit in California claiming that Chase's practices violated TILA and state law. Chase removed the case to the United States District Court for the Central District of California and filed a motion to dismiss. Pet. App. 37a. Chase's motion argued that § 226.9(c)'s requirement that a creditor provide notice of a change in "any term required to be disclosed under § 226.6" did not refer to increases in APR or other terms of the *loan*, but to changes in the terms of the *contract* between the parties (i.e., the text of the cardholder agreement). Because Chase had not amended the language of its "Preferred Customer Pricing Eligibility" clause, it contended that there had been no change in "terms" and thus that Regulation Z required no notice of the increased rate. As a separate argument, Chase also contended that, because its cardholder agreement disclosed that it reserved discretion to increase a cardholder's APR up to a maximum rate, it was excused from providing notice under the Official Staff Commentary to Regulation Z—the Board's only authorized interpretation of Regulation Z—which provides that "[n]o notice of a change in terms need be given if the *specific change* is set forth initially." 12 C.F.R. pt. 226, supp. I, cmt. 9(c)-1 (emphasis added).

The district court granted Chase's motion to dismiss, accepting Chase's argument that the decision to increase APR was an "implementation," rather than a change, in the "terms required to be disclosed." Pet. App. 42a. The court of appeals reversed. The court relied on language in the Official Staff Commentary stating that "a notice of change in terms is required" for "an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default." Pet. App. 4a. The court held that the plain meaning of this language "is to require notice when a cardholder's interest rates increase because of a default." *Id.*

SUMMARY OF ARGUMENT

Chase's practice of retroactively increasing cardholders' APR without providing notice of the increase and the new rate it has chosen to apply flouts the plain language of Regulation Z. Section 226.9(c)(1) requires notice "[w]henever any term required to be disclosed under § 226.6 is changed," and a loan's APR is not only one of the terms "required to be disclosed under § 226.6," but is the most important disclosure that section requires. *Id.* § 226.6(a). Indeed, § 226.9(c)(1) states explicitly that, "if 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." 12 C.F.R. § 226.9(c)(1) (emphasis added).

In spite of § 226.9's clear mandates, Chase argues that Regulation Z requires a creditor to provide notice of an increased APR only if it changes the text of its underlying cardholder agreement and, even then, only when the agreement does not expressly reserve the right to make such an amendment. Neither Chase nor the government's amicus brief, however, presents a plausible explanation of how § 226.9(c)'s requirement of notice of a change in "any term required to be disclosed under § 226.6" could refer to changes to the text of a creditor's cardholder agreement, such as Chase's "Preferred Customer Pricing Eligibility" clause, rather than to the terms that § 226.6 requires to be disclosed, such as the APR. And although Chase entirely ignores the issue, its argument also depends on the assumption that Regulation Z allows it not only to raise rates without notice, but also to impose the new rates retroactively to existing debt. Even if the regulation allowed Chase's other practices, increasing the APR retroactively to a time before notice was even possible would violate § 226.9.

Neither Chase nor the government provides a convincing explanation of how their reading of Regulation Z could be squared with the regulation's central purpose of requiring prominent and specific disclosure of a loan's APR. Chase's reading would radically change creditors' obligations under TILA in a way that would largely eviscerate the statute's remedial scheme, eliminating the notice requirement for an increase in APR when the creditor reserves the right to make the increase in the cardholder agreement, regardless of whether the increase results from a cardholder default or some other reason. Indeed, Chase's position would continue to allow creditors to increase APR without notice even under the 2009 Regulation Z amendments, thus frustrating a central purpose for which Chase agrees the amendments were adopted.

Aside from the plain language of Regulation Z itself, the agency's Official Staff Commentary states no fewer than three times that notice is required under precisely the circumstances at issue here. 12 C.F.R. pt. 226, supp. I, cmt. 9(c)-1 ("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"); *Id.* (providing, "as an example," that notice is required "when an increase may occur under the creditor's contract reservation right to increase the periodic rate"); *Id.*, cmt. 9(c)(1)-3 ("a notice of change in terms is required" for "an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default"). The commentary only exempts from the notice requirement cases where the "specific change" has previously been disclosed. *Id.*, cmt. 9(c)-1. Chase's cardholder agreement's provision that it may (or may not) exercise its discretion to set the interest rate somewhere within a range of possible rates (for example, between a starting rate of 9.99% and a maximum rate of 31.99%) is not, under any sense of the word, "specific."

Chase urges this Court not to consider the serious consequences raised by its position and instead to defer to the position of the Board's legal counsel, as set forth in recent amicus briefs in this Court and the First Circuit. *See* Pet.'s Br. 19 (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Respondent McCoy does not dispute that the Board has substantial discretion to interpret TILA, and that this Court in *Auer* granted a high level of deference to an agency amicus brief that interpreted the agency's own regulations. But deference even to the Board's authoritative interpretations of Regulation Z is appropriate only "absent a clear expression" in the statutory and regulatory language. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 560 (1980). Here, Regulation Z is clear that notice is required when a creditor increases a cardholder's APR.

In any event, the Board's *official* interpretation of Regulation Z and the unofficial views expressed in its rulemaking proceedings—as opposed to the views its legal counsel has expressed in briefs—are both consistent with McCoy's understanding of the regulatory language and independently demonstrate that notice is required in these circumstances. In contrast, the briefs of agency counsel are not official expressions of agency opinion and, under the terms of Regulation Z itself, are not entitled to deference. *See* 12 C.F.R. pt. 226, app. C; *Ford Motor Credit Co.*, 444 U.S. at 567 n.10. Moreover, Chase's plea for deference does not rely on agency counsel's special expertise or knowledge about the purposes of Regulation Z to which this Court would be justified in deferring. On the contrary, the Board has itself determined that practices such as Chase's undermine the purposes of TILA by misleading consumers about the interest rate that applies to their loans. This Court is just as capable as the agency's lawyers of reading the relevant regulatory language. Given the absence of any reason to defer to the government's unsupported reading of Regulation Z, the Court should read the rule, as its language and purpose demand, to require notice when a creditor increases a loan's APR due to a default.

ARGUMENT

I. Regulation Z Requires Chase to Inform Cardholders When It Increases Their APR.

A. Regulation Z's Plain Language Provides That Notice of an Increased APR Due to Default "Shall Be Given … Before the Effective Date of the Change."

Regulation Z's plain language requires that Chase disclose an increase in its APR that results from a cardholder's default. The first sentence of § 226.9(c)(1) ("Change in terms") requires written notice "[w]henever any term required to be disclosed under § 226.6 is changed." One of the terms that § 226.6 requires to be disclosed is the loan's APR. *See* 12 C.F.R. § 226.6(a)(2). The meaning of the two sections taken together is both straightforward and inescapable—written notice is required whenever a loan's APR is changed. If there were any doubt that § 226.9(c)(1) refers to changes in interest rates, it would be dispelled by its second (and last) sentence, which says so explicitly: "[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." (emphasis added).[3]

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[3] The entire text of the notice provision in the applicable version

(continued …)

Notice of an increase in APR resulting from default is not only expressly mandated by § 226.9(c)(1), which governs cases where notice is required, but also by § 226.9(c)(2), which governs cases where it is *not* required. That subsection provides a catalog of instances in which no additional notice is necessary, and an increase in APR resulting from default is not one of them. To the contrary, the subsection provides that no notice is required when the change results from a default "*other than an increase in the periodic rate or other finance charge*." *Id.* § 226.9(c)(2) (emphasis added). Because the change here *did* involve an increase in the periodic rate,

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of Regulation Z (excluding one portion relevant only to home-equity plans) reads as follows:

> (c) Change in terms—
>
> (1) Written notice required. *Whenever any term required to be disclosed under § 226.6 is changed* or the required minimum periodic payment is increased, *the creditor shall mail or deliver written notice of the change to each consumer who may be affected.* The notice shall be mailed or delivered at least 15 days prior to the effective date of the change. The 15-day timing requirement does not apply if the change has been agreed to by the consumer, or *if a periodic rate or other finance charge is increased because of the consumer's delinquency or default; the notice shall be given, however, before the effective date of the change.*
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> (2) Notice not required. No notice under this section is required when the change involves late payment charges, charges for documentary evidence, or over-the-limit charges; a reduction of any component of a finance or other charge; suspension of future credit privileges or termination of an account or plan; or when the change results from an agreement involving a court proceeding, or 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 (emphasis added).

the plain meaning of the language again dictates that an increase in APR should have been disclosed.

The notice required for the imposition of a default rate is not discussed elsewhere in § 226.9 or, for that matter, in any other Regulation Z provision governing open-end credit. Therefore, the regulation's only two mentions of default rates expressly contradict Chase's position here.

B. Chase's Contractual Reservation of Rights Was Not a "Term Required to Be Disclosed Under § 226.6."

Chase's only textual explanation for how its failure to provide notice is consistent with § 226.9(c)(1)'s clear notice requirements is its contention that the phrase "any term required to be disclosed under § 226.6" refers not to changes to the APR and other terms of the *loan*, but to changes to the terms of the *contract* between the parties (i.e., the text of the cardholder agreement). Chase argues that the relevant "term" here was the contractual provision giving it the right to increase cardholders' interest rate to anywhere between the starting and maximum rates. Because it initially disclosed the *possibility* that it could increase the rate to somewhere within this range, Chase argues that subsequently setting the APR anywhere within that range amounted to an "implementation" of the terms of the agreement and not a "change" in those terms.

Although Chase has had success in convincing lower courts of this view of the law, its distinction between "implementations" and "changes" appears nowhere in the language of TILA, Regulation Z, or the associated Official Staff Commentary. Although the word "terms," taken out of its context in the regulation containing it, could reasonably be read to mean either *contractual* terms (i.e., the precise language of the contract), or *cred-*

it terms (i.e., the APR and other relevant features of the loan), regulatory language, like statutory language, cannot be read in isolation. *See McCarthy v. Bronson*, 500 U.S. 136, 139 (1991). "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (internal quotation marks omitted) (interpreting TILA); *see also Christensen v. Harris County*, 529 U.S. 576, 583–84 (2000) (rejecting an agency's interpretation as inconsistent with a statute "viewed in the context of the overall statutory scheme"). Indeed, the Board's counsel in other cases have themselves stressed the importance of reading TILA and its implementing regulations in the context of the statute's purpose and language as a whole. *See, e.g.*, Brief for the Board of Governors of the Federal Reserve System as Amicus Curiae, *Consol. Bank v. Office of the Comptroller of the Currency*, No. 95-4831 (11th Cir. Feb. 28, 1996).

By focusing exclusively on the regulation's use of the phrase "any term," Chase and the lower courts that have accepted its view ignore the meaning of those words in the context in which they appear. Section 226.9 refers not just to "any term," but to "any term *required to be disclosed under § 226.6*." 12 C.F.R. § 226.9(c)(1) (emphasis added). Although § 226.6 does not use the word "term," it does require disclosure of five specific "items," of which, as applied to Chase's and other typical credit-card plans, only three must be disclosed:

1. The finance charge, including "disclosure of *each periodic rate* that may be used to compute the finance charge, the range of balances to which it is

applicable, and the corresponding annual percentage rate." *Id.* § 226.6(a) (emphasis added).

2. "Other charges," which the section defines as "[t]he amount of any charge other than a finance charge that may be imposed as part of the plan, or an explanation of how the charge will be determined." *Id.* § 226.6(b).
3. "A statement that outlines the consumer's rights and the creditor's responsibilities under 12 C.F.R. §§ 226.12(c) and 226.13 and that is substantially similar to the statement found in Appendix G." *Id.* § 226.6(d).[4]

These specific required disclosures constitute the entirety of § 226.6, and § 226.9(c)'s reference to "any term required to be disclosed under § 226.6" could only conceivably refer to two of them: (1) the finance charge, including the loan's APR, and (2) charges other than the finance charge. *Id.* § 226.6(a), (b). Here, although Chase may not have changed the terms of its contract, it *did* change the APR, which is the most important "term required to be disclosed by § 226.6." The only reasonable reading of Regulation Z's language is that the change in APR should have been disclosed. Moreover, Regulation Z itself confirms that a loan's APR is one of the "terms" required to be disclosed by expressly requiring notice "if a periodic rate or other finance charge is increased because of the consumer's delinquency or default." *Id.* § 226.9(c)(1).

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[4] The remaining two required disclosures both deal with secured credit: (1) "the creditor's security interest in property purchased under the plan," and (2) "information about home equity plans." 12 C.F.R. § 226.6(c), (e).

Chase's contrary interpretation of "any term required to be disclosed under § 226.6" to refer to a change in the text of its default-rate provision, rather than a change in a credit term like APR, is nonsensical. Congress designed TILA to "assure a meaningful disclosure of *credit* terms so that the consumer will be able to compare more readily the various *credit* terms" available in the market. 15 U.S.C. § 1601(a) (emphasis added). The central purpose of TILA is to ensure that such terms—and in particular, the loan's APR and finance charges—are communicated precisely and prominently to the consumer. *Id.* §§ 1601(a), 1606. Regulation Z therefore does not require disclosure of contract terms (such as Chase's "Preferred Customer Pricing Eligibility" provision), but of specific "credit terms" (in particular, interest rate) that creditors in the past had routinely communicated to consumers in ways that were confusing and impossible to compare effectively. Indeed, there would be no need for TILA to require disclosure of contractual terms—contracts, after all, require consent, and creditors have no choice but to disclose the language of their credit agreements if they wish borrowers to be bound by them.

Both TILA and Regulation Z thus regularly use the word "terms" to refer to the terms of *credit*, especially APR, and not to the specific language of the cardholder agreement. *See, e.g.*, 15 U.S.C. § 1601(a) (stating TILA's purpose as to "assure a meaningful disclosure of credit terms"); 12 C.F.R. § 226.16(a) ("If an advertisement for credit states specific credit terms, it shall state only those terms that actually are or will be arranged or offered by the creditor."). In general, "identical words used in different parts of the same act are intended to have the same meaning." *Dept. of Revenue v. ACF Indus.*, 510 U.S. 332, 342 (1994) (internal quotation marks omitted); *see also Barnhart v. Walton*, 535 U.S. 212, 221 (2002) (words should not be interpreted differently in closely related contexts). Given the centrality of disclosure of APR and other credit terms to TILA and Regulation Z, it is implausible that the Board would have switched to a discussion of *contract* terms when referring to the key section of the regulation that requires *credit* terms to be disclosed.

C. Chase's Interpretation of Regulation Z Would Eviscerate Its Primary Purposes of Protecting Consumers and Facilitating Accurate Comparison of Loans.

Congress enacted TILA in response to a rise in "inconsistent and noncomparable [credit disclosure] practices," which created "confusion in the public mind about the true costs of credit." H.R. Rep. No. 90-1040, at 5 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1970. To combat this problem, and to allow consumers to more accurately compare loans, TILA requires that the "cost of credit … be disclosed fully, simply, and clearly." *Id.* at 3, 1968 U.S.C.C.A.N. at 1965. Central to TILA's required disclosures is the uniform disclosure of a loan's APR. The required APR disclosures must be both specific, *see* 15 U.S.C. § 1606(c) (providing the maximum permissible margin of error as one-eighth of one percent), and prominent, *see* 15 U.S.C. § 1632(a) (providing that APR and finance charges "shall be disclosed more conspicuously than other terms"). By requiring specific and prominent APR disclosure, TILA allows consumers to focus on a single term while shopping for credit, giving them an easy mechanism for accurately comparing costs—the objective at the very "heart" of TILA's remedial scheme. H.R. Rep. No. 90-1040, at 24, 1968 U.S.CC.A.N. at 1990 (supplemental views of Rep. Wright Patman et al.); *id.* at 40, 1968 U.S.CC.A.N. at 2005 (supplemental views of Rep. William B. Widnall et al.).

Chase's interpretation of Regulation Z would eviscerate TILA's notice requirements. Under Chase's reading, any creditor could satisfy the regulation's requirements by—as Chase did here—providing a precise and prominent disclosure of a *base* APR and finance charges and reserving the right to change those terms in the future. A creditor that set a maximum rate at 50%, 100%, or even 300% could then freely change the rate to anywhere within that range. As long as the creditor included, somewhere in the agreement's fine print, the *possibility* that the loan's terms might later change, the creditor would be under no obligation to notify the cardholder when it chose to increase the APR, or to disclose the new rate it had chosen to apply. As a result, the cardholder would accrue additional debt at an undisclosed rate and would lose the opportunity to shop for a lower-priced loan. Congress could not have intended that creditors could render meaningless its careful system of specific and prominent disclosures by disclosing one set of terms only to impose a different set of undisclosed terms later.

Chase's reading of the law would go even further, allowing creditors at the end of the first month to apply the new rate *retroactively* to the date of the cardholder agreement, rendering the initial disclosed rate an irrelevancy. The retroactive imposition of interest rates, however, is fundamentally incompatible with TILA's notice scheme. Before 1981, Regulation Z prohibited creditors from changing the terms of a loan in the middle of a billing cycle, instead requiring notice of a change at least 15 days before the start of the cycle in which the change would become effective. *See Truth in Lending*, 46 Fed. Reg. 20,848, 20,863 (Apr. 7, 1981). The regulations at issue in this case come from the Board's 1981 revisions to Regulation Z, which amended the rules to allow mid-cycle changes, but only when the creditor provides notice of the change and "*when there is clearly no retroactive impact*." *Id.* at 20,863 (emphasis added); *see* 12 C.F.R. pt. 226, supp. I, cmt. 9(c)(1)-2. By increasing interest rates without notice *and* applying those rates retroactively, Chase entirely circumvents these protections. Chase cites no authority for the proposition that Regulation Z allows it to increase a cardholder's interest rate retroactively to a time before notice was even possible.

Recognizing the unacceptable ramifications of its rule, Chase attempts to limit the damage by imposing an artificial distinction between a creditor's increase in APR pursuant to a contract provision that generally reserves the right to change contract terms (which Chase classifies as an example of the imposition of a new term), and an increase pursuant to a contract provision that reserves the right to increase the APR in the event of cardholder delinquency or default (which Chase classifies as an implementation of an existing term). But the plain language of the Official Staff Commentary directly contradicts Chase's reading, providing that notice is required even when the increase is "under the creditor's contract reservation of right to increase the periodic rate." 12 C.F.R. pt. 226, supp. I, cmt. 9(c)-1. Moreover, nothing in § 226.9(c)'s notice requirements distinguishes APR increases resulting from default from other sorts of APR increases, except to provide that notice in the case of defaults can be provided contemporaneously instead of 15 days in advance. Regardless of whether the rate increase was pursuant to a "reservation of rights" or a "default provision," a creditor would still be "implementing" a contractual term—and consequently immune from § 226.9(c)'s requirements—as long as the possibility of the rate increase were disclosed somewhere in the cardholder agreement. Holding § 226.9(c) inapplicable to implementation of previously disclosed terms would thus exempt creditors from disclosing *any* increase in APR, not to mention changes in other terms of the loan.

Indeed, if Chase were correct that "changes in terms" as used in § 226.9 is limited to textual changes in the contract, even the Board's recent amendments to § 226.9—which Chase agrees were the result of the Board's policy decision to require improved notice of rate increases—would deprive consumers of notice of many increases in their APR. To be sure, amended Regulation Z would narrowly remedy the specific problem at issue in this case by requiring creditors to disclose increases in interest rates that result from a cardholder's default. That specific change is the result of new subsection 226.9(g), which requires notice whenever "[a] rate is increased due to the consumer's delinquency or default," rather than (as in the prior rule) when there has been a "change in any term required to be disclosed." 12 C.F.R. § 226.9(g) (2009). But increases in rates for reasons *other* than delinquency or default remain covered by amended rule § 226.9(c), which continues to require notice only when there has been a change in "terms required to be disclosed" under § 226.6. *See id.* § 226.9(c)(2)(i) (2009); *see also id.* § 226.9(c)(2)(ii) (2009) (defining "significant change in account terms" as "a change to a term required to be disclosed" under § 226.6). Chase's view that changes in terms occur only on amendment of a cardholder agreement would therefore create the paradoxical effect of requiring notice *only* when a creditor increases the interest rate pursuant to a contractual default provision. Any other APR increase, and any changes in credit terms other than APR (including any changes related to home-equity loans, *id.* § 226.9(c)(1)(i) (2009)), would not require notice. Because Regulation Z could not reasonably have been intended to require notice only when a consumer defaults, its references to changes in terms "required to be disclosed" must refer to APR, not to the text of a lender's cardholder agreement.

II. The Board's Past Interpretations of Regulation Z Strongly Support the Conclusion that the Regulation Requires Disclosure of Increases in a Loan's APR.

Chase makes little effort to address the plain language of Regulation Z, and instead devotes the bulk of its brief to urging this Court to defer to the agency's interpretations of that regulation. Because the plain language of Regulation Z establishes that notice is required, however, there is no reason for the Court to look beyond that language. *See Ford Motor Credit Co.*, 444 U.S. at 560; *see also Christensen*, 529 U.S. at 588. Even if this Court were to defer to the agency, deference would be warranted only to the agency's authoritative interpretations of Regulation Z. *See Ford Motor Credit Co.*, 444 U.S. at 567 n.10 ("Unofficial interpretations have no special status under [TILA]."). The sole source of official interpretations of the rules is the Official Staff Commentary. *See* 12 C.F.R. pt. 226, supp. I, cmt. I-1. In all of its official commentary, the agency has stated, consistent with the plain language of Regulation Z, that notice is required in the circumstances here.

A. The Official Staff Commentary, Like Regulation Z, Expressly Requires Disclosure of Increased APR Due to Default.

1. Like Regulation Z itself, the Official Staff Commentary expressly requires notice when a creditor increases a loan's APR pursuant to a default-rate provision. Comment 9(c)(1)-3 provides that "a notice of change in terms *is required* … if there is an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default." 12 C.F.R. pt. 226, supp. I, cmt. 9(c)(1)-3 (emphasis added). Although the notice need not be provided in advance, the commentary requires that the notice be sent at least contemporaneously with the increase in the rate. *Id.* (providing that the notice may be "mailed or delivered as late as the effective date of the change").

Chase argues (at 22-23) that this express notice requirement does not apply here because the comment only governs "timing" and is therefore relevant only when some other provision independently requires notice. But the comment's statement that "notice of change in terms is required" is an express, affirmative requirement, not a limitation on timing. Although the comment also explains that contemporaneous notice instead of 15-day advance notice is required for a default-based rate increase, that does not diminish the clear import of the commentary's language. *Cf. Aaron v. SEC*, 446 U.S. 680, 697 (1980) ("[I]t would take a very clear expression in the legislative history of congressional intent to the contrary to justify the conclusion that the statute does not mean what it so plainly seems to say."). Indeed, the apparent purpose of the language is make clear that by dispensing with the requirement of *advance* notice, the regulation did not also eliminate the requirement that *contemporaneous* notice be provided. Chase's position that it need not send even contemporaneous notice is therefore flatly inconsistent with the comment's plain language. Moreover, Comment 9(c)(1)-3 need not stand on its own—Comment 9(c)-1 independently provides, without any mention of timing, that "notice must be given" when, as here, "an increase may occur under the creditor's contract reservation right to increase the periodic rate." 12 C.F.R. pt. 226, supp. I, cmt. 9(c)-1.

Chase's reading of Comment 9(c)(1)-3 would transform it from a notice requirement into a license to further deprive consumers of notice. Because, under Chase's view, notice of imposition of a default rate would be excused whenever the rate is specified in the cardholder agreement, the comment would come into play only when a creditor applied a penalty rate that was *not* specified in the agreement, such as a rate that exceeded the maximum disclosed rate. And the only role for the comment to play in those circumstances would be to permit the creditor to give *contemporaneous*, rather than advance, notice of the new rate. In other words, the comment in Chase's view serves the sole function of providing that a creditor can increase a cardholder's APR *above* the maximum default rate specified in the cardholder agreement, without providing prior notice that the terms of the agreement have changed. That, however, would render a cardholder agreement's "maximum" default rate an irrelevancy, subject to arbitrary and limitless increase by the creditor. That cannot be what the Board's staff had in mind when it required notice of "an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default." 12 C.F.R. pt. 226, supp. I, cmt. 9(c)(1)-3.

2. As an alternative to its argument that a rate increase is not a "change in terms," Chase relies on an exception to the notice requirement in Comment 9(c)-1, which explains that no notice of a change of terms need be given if the "specific change is set forth initially" in the cardholder agreement. 12 C.F.R. pt. 226, supp. I, cmt. 9(c)-1. Comment 9(c)-1's exception, however, is patently inapplicable to Chase here because Chase's agreement did not set forth the "specific change" in APR that it later imposed. As the comment expressly states, "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," including, as here, when "an increase may occur under the creditor's contract reservation right to increase the periodic rate." *Id.* (emphasis added).

Comment 9(c)-1's narrow exception to the notice requirement serves the common-sense purpose of avoiding redundant disclosures by providing that a creditor need not re-disclose a specific change of which it has already informed the cardholder. For example, if a creditor provides in its initial disclosure that a special introductory rate will apply for the first six months, after which the rate will automatically increase to a different rate, the lender does not need to re-disclose the rate increase at the time the new rate goes into effect. *See Moore v. Canal Nat'l Bank*, 409 A.2d 679, 687 (Me. 1979) ("If the terms of the original loan were fully disclosed, the debtor has no reason to be surprised or aggrieved by a virtually automatic increase in rate in accordance with those terms.").

Chase, however, takes Comment 9(c)-1 far beyond its language, arguing that the comment excuses it from providing notice even when it has *never* disclosed the specific rate that it will apply. Without defining the word "specific" or even acknowledging it as a potential limit on the scope of Comment 9(c)-1's exception, Chase appears to assume that its reservation of right to increase a cardholder's interest rate in the event of a default anywhere "up to" the maximum default rate is a "specific change" under the exception because it put cardholders on notice of the *possibility* of an APR increase and a maximum rate that Chase could apply.

The comment, however, says nothing about "potential" rate increases or "maximum" rates. As the Board's staff explained during rulemaking on a parallel exception for home-equity loans, a "specific change" is a change that is "contemplated on the occurrence of a *specific event*," for which "*[b]oth* the triggering event and the resulting modification must be stated with *specificity*." *Truth in Lending*, 54 Fed. Reg. 24,670, 24,680 (June 9, 1989) (final rule) (emphasis added). Here, Chase's reservation of right states only that it "may," in its discretion, increase a cardholder's rate "up to" a stated maximum. Moreover, Chase's exercise of discretion could be triggered by a late payment to Chase or any "other creditors," is based on a variety of vague factors such as "payment history" and "other relationships with [Chase] and [its] affiliates," and is subject to a complex formula that Chase never disclosed to cardholders. Tr. of Oral Argument, *McCoy v. Chase Manhattan Bank*, No. 06-56278, 2008 WL 5109240 (9th Cir. Nov. 21, 2008) (statement by Chase's lawyer that, "having seen some of the complicated math that goes into that formula I can frankly say [that] I'm not smart enough to figure it out"). Chase's reservation-of-rights clause therefore gives cardholders no way of knowing with certainty whether the provision has been triggered at all, much less how Chase would choose to exercise its discretion in setting the new rate. Cardholders could not predict based on Chase's clause whether it would leave the APR at the base rate, increase it to the maximum, or set it somewhere in between. A disclosure that leaves borrowers subject to an unknown interest rate is, in no sense of the word, "specific."

Even if cardholders were able to determine whether Chase had exercised its discretion to increase their interest rates, requiring creditors to comply with the commentary's plain language by providing notice of the *specific* applicable APR would not, as Chase suggests (at 28), "promote form over substance." Permitting disclosure of maximum rates or ranges of potential rates would make it impossible for consumers to effectively compare the rates of competing loans at the time they enter into their cardholder agreements. TILA is designed to ensure that consumers are able to compare very accurate and specific APRs, but consumers under Chase's view of the law would be faced with the impossible task of comparing, for example, an APR of 25% with APRs of "maximum 50%" or "between 5% and 50%." The relative value of such non-specific disclosures would depend on how each lender chose to exercise its discretion. For example, a loan with a base rate of 5% and a maximum rate of 50% would be more expensive to a consumer than a competing loan with a base rate of 25% and a maximum rate of 75% if the first lender routinely increased the rate to the maximum while the second lender almost always left the rate unchanged. Indeed, TILA's requirement that creditors disclose a rate accurate to within an eighth of a percentage point, 15 U.S.C. § 1606(c), would be rendered meaningless if lenders could disclose a double- or even triple-digit range of possible rates that the lender might later impose without notice.

3. As an "example" of a case where notice would be required, Comment 9(c)-1 provides that "notice must be given" when "an increase may occur under the creditor's contract reservation right to increase the periodic rate." 12 C.F.R. pt. 226, supp. I, cmt. 9(c)-1. The example squarely governs this case because Chase's contract allowed it to "increase the rate in its discretion," and Chase did not disclose the "specific" APR that it would apply in the event of a rate increase.

The three other examples included in the comment set forth, "[i]n contrast," the kinds of cases in which no notice is required because the "specific change" had previously been disclosed. *Id.* Each example involves situations where both a specific new rate and the circumstances that trigger that rate are disclosed in advance:

1. a variable-rate plan;

2. a preferential rate agreement under which the preferred rate will increase to a higher rate upon termination of the cardholder's employment; and
3. a preferential rate agreement under which the preferred rate will increase to a higher rate when the cardholder's balance on a related bank account drops below a minimum amount.

Id.

The common thread among these examples is that, in stark contrast to the example involving a "contract reservation right to increase the periodic rate," each involves circumstances where the cardholder can identify whether the higher rate applies and, if so, what that rate actually is. A variable rate plan, listed as the first example, is "tied to an index or formula" that a borrower can use to determine the applicable interest rate at any time. *Id.*, cmt. 5a(b)(1)-2; *see also id.* cmt. 6(a)(2)-2 (providing that "a plan that simply provides that the creditor reserves the right to raise its rates … would not be considered a variable-rate plan for Truth in Lending disclosure purposes"). Similarly, the Board's staff has explained that the second example (where a preferred rate increases upon termination of the cardholder's employment) involves a situation where "a *specified* higher rate … will apply if the borrower's employment with the creditor ends." 54 Fed. Reg. at 24,680 (emphasis added). In that case, as in the other examples, the creditor can determine both the "specified higher rate" and whether the circumstance that triggers that rate (termination of employment) has been satisfied. Unlike here, cardholders need not resort to guesswork to know the applicable rate.

The government (at 13) makes a weak attempt to reconcile the agency's position with 9(c)-1 by analogizing the third example (a preferential rate tied to the cardholder's balance on a related bank account) to a default-rate provision like the one at issue here. But allowing a bank account balance to fall below a certain amount is not a "default," and nothing in the example suggests that the lender's decision to raise rates would be discretionary. Rather, § 226.6 makes clear that disclosure of rates that depend on a bank account balance requires "disclosure of *each* periodic rate that may be used to compute the finance charge, the range of balances to which it is applicable, and the corresponding annual percentage rate." 12 C.F.R. § 226.6(a)(2) (emphasis added). Both the bank account balance and the particular rate that applies to that balance are thus objective, external facts that a cardholder can use to determine what rate applies at a particular time.

B. The Board Staff's Statements During Rulemaking Proceedings, Although Not Representing the Staff's Official Views, Also Support § 226.9(c)'s Express Notice Requirement.

Unlike the Official Staff Commentary, staff comments made in the course of rulemaking do not set forth the staff's official interpretation of the regulation. *See Ford Motor Credit Co.*, 444 U.S. at 567 n.10. Whereas the Official Staff Commentary is the result of the agency's considered determination following public notice and comment, a proposed rule is by definition a preliminary document designed to be superseded by a final rule after the notice-and-comment period is complete. Therefore, the staff's unofficial comments during rulemaking are not entitled to any deference beyond whatever persuasive value they may contain.

In any event, the portions of the 2004-2009 rulemaking on which Chase relies do not contain the "interpretation" of Regulation Z that Chase reads into them. From the "more than 1,000 pages," Pet's Br. 8, of the rulemaking record, Chase fails to identify a single instance where the agency staff interpreted the phrase "change in terms required to be disclosed" to refer to the text of a contractual provision rather than to the terms of credit listed in § 226.6. Instead, as in Regulation Z and the Official Staff Commentary, the rulemaking record uses the word "terms" in a way that can refer only to the terms of credit rather than to the text of a cardholder agreement. In the section of the proposed rule on which Chase primarily relies, for example, the Board's staff states the "general rule … that creditors must provide 15 days' advance notice of changes in *terms required to be included in the account-opening disclosures*." 72 Fed. Reg. at 33,009 (emphasis added). Similarly, Chase fails to point to any instances where the agency distinguished between "implementation" of terms and "changes" in those terms, or where it has read the phrase "specific change" to encompass discretionary rate increases or a contract reservation right to increase APR.

Chase also suggests (at 25) that the very fact that the Board adopted the 2009 amendments supports its position because the "major proposed change" in the amendments would not have been necessary if Regulation Z already required notice in these circumstances. Chase's argument, however, rests on a fundamental misunderstanding of the nature of Regulation Z's notice requirements and of the amendments under the agency's consideration. As previously explained (at pp. 5-6), the pre-amendment version of § 226.9(c) imposed two separate notice requirements: (1) 15-day advance notice for most changes in "term[s] required to be disclosed under § 226.6," and (2) contemporaneous notice for rate increases resulting from a default. The portions of the record on which Chase relies, and the rulemaking record as a whole, make clear that the "major proposed change" in the amendments was not the addition of a new notice requirement where none existed before, but the merging of the previously separate contemporaneous and 15-day advance-notice requirements into a single 45-day advance-notice rule. Even the portions of the record that Chase quotes in its brief make that clear. *See* Pet.'s Br. 24-25 (noting that the pre-amendment rules "permit[ted] *immediate* application of penalty pricing") (emphasis added). The Board's conclusion that contemporaneous notice provided insufficient protection to consumers flies in the face of Chase's contention that not even contemporaneous notice was required. Indeed, the premise of the rulemaking was that contemporaneous notice did not provide sufficient protection to consumers and that a longer time period between notice of a rate increase and its effective date was needed. *See supra*, pp. 5-6.[5]

In the remaining portions of the rulemaking on which it relies, Chase simply takes the agency's statements out of context to suggest conclusions that the agency never made. For example, Chase relies (at 32) on a section of the 2007 proposed rule stating that no notice is required when "credit card account agreements permit the card issuer to increase the periodic rate if the consumer

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[5] *See* 74 Fed. Reg. at 5,253 (noting that, under the pre-amendment rule, "creditors need not inform consumers *in advance* if the rate applicable to their account increases due to default or delinquency") (emphasis added); *Truth in Lending*, 74 Fed. Reg. 43,428, 43,436 (Aug. 26, 2009) (proposed rule) ("*Advance* notice is not required in all cases … .") (emphasis added); see also 72 Fed. Reg. at 33,012 (stating that the proposed amendments "seek[] to *improve the effectiveness of the disclosures* given to consumers regarding the conditions in which penalty pricing will apply") (emphasis added); *id.* (proposing that "*disclosures be provided prior to the application of penalty pricing* to [cardholders'] accounts") (emphasis added).

makes a late payment" because, in that case, "the circumstances of the increase are specified in advance in the account agreement." 72 Fed. Reg. at 33,009. Even taken in isolation, the statement is, at most, ambiguous, because it does not indicate whether the hypothetical account agreement provides a specific rate that 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. In context, however, there is no ambiguity. The example is part of the proposed rule's discussion of Comment 9(c)-1, which provides that "no change-in-terms notice is required if the *specific* change is set forth initially by the creditor in the account-opening disclosures." 12 C.F.R. pt. 226, supp. I, cmt. 9(c)-1 (emphasis added). The example thus necessarily sets forth an example of a disclosure where the *specific* default rate is provided in advance. Indeed, far from reading Regulation Z as requiring no notice, the staff's rulemaking record again reiterates that notice is required under the pre-amendment rule, stating that "if an 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." 72 Fed. Reg. at 33,009.

III. The Views of Agency Counsel, as Expressed in Legal Briefs, Are Not Worthy of Deference in This Case.

Despite the clarity of the requirement in the rules and supporting commentary that lenders notify cardholders of a change in "any term required to be disclosed" unless the "specific change" has been disclosed previously, agency counsel in two recent briefs have taken the position that lenders are required to disclose an APR increase only when they amend the text of the underlying cardholder agreements and, even then, only when the original agreements did not disclose the possibility that such an amendment might occur. Agency counsel proposes that the possibility of reading of Regulation Z in this way demonstrates an ambiguity in the regulation's language, and therefore that this Court's decision in *Auer*, 519 U.S. 452, requires the Court to adopt the position taken in the briefs. But although this Court in *Auer* deferred to an agency's brief "in the circumstances of [that] case," *Id.* at 462, it did not create a blanket rule requiring deference to every agency brief that interprets a regulation. Rather, the Court in *Auer* deferred only after determining that there was reason to believe that the views in the agency's brief were reliable—in other words, that the brief gave "no reason to suspect that the interpretation [did] not reflect the agency's fair and considered judgment on the matter in question." *Id.*

Although the circumstances in *Auer* counseled for deference to the agency's views, the same cannot be said about this case for three reasons. First, unlike *Auer*, in which the Court held that the agency's interpretation "comfortably bears" the language of the regulation, *Id.* at 461, the agency counsel's argument here flies in the face of Regulation Z's clear requirement that, "if 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." 12 C.F.R. § 226.9(c)(1) (emphasis added). Second, the Board has itself made the policy judgment that the staff's official views should be expressed in a centralized and deliberative way through the Official Staff Commentary rather than through litigation briefs, and deference to agency counsel's ad hoc policy views would directly contravene the Board's considered judgment on that point. Third, agency counsel's position demonstrates that it did not rely on the kinds of special expertise or knowledge about the purposes of Regulation Z to which this Court would be justified in deferring. On the contrary, the Board has itself concluded that the result it argues for in its briefs would undermine the purposes of Regulation Z by misleading consumers about the interest rate that applies to their loans. This Court's decisions do not require it to defer to agency counsel's simple textual interpretation of regulatory language, especially where to do so would compel a result contrary to the plain meaning of that language and to the regulation's policy objectives.

A. The Agency's Interpretation Is Inconsistent with Regulation Z's Plain Language.

As an initial step, "interpretation of TILA and Regulation Z demands an examination of their express language." *Ford Motor Credit Co.*, 444 U.S. at 560. Only "absent a clear expression" in the statutory and regulatory language is it "appropriate to defer to the Federal Reserve Board and staff in determining what resolution of that issue is implied by the truth-in-lending enactments." *Id.*; *see Christensen*, 529 U.S. at 588 ("*Auer* deference is warranted only when the language of the regulation is ambiguous."). As explained above, Regulation Z is clear that notice is required when a lender raises a loan's APR as a result of default. There is thus no reason to defer to agency counsel's opinion about the meaning of the regulatory language. *See Christensen*, 529 U.S. at 588; *cf. Consol. Bank v. U.S. Dept. of Treasury*, 118 F.3d 1461, 1465 (11th Cir. 1997) (rejecting Federal Reserve's interpretation of TILA where the statute was clear).

B. Under the Board's Own Rules, Legal Briefs Are Not Entitled to Deference.

Unlike the agency in *Auer*, the Board here has set forth by regulation the circumstances under which the views of its staff should be considered official expressions of agency policy. Under the Board's own standards, the briefs on which Chase relies do not constitute official expressions of the staff's views and, by the terms of Regulation Z itself, are not entitled to any deference.

The Board has defined its Official Staff Commentary, enacted through notice and comment rulemaking, as the mechanism through which it issues "official staff interpretations" of Regulation Z. 12 C.F.R. pt. 226, app. C; *see* 12 C.F.R. § 226.1(d)(8). That the commentary is the exclusive source of authorized staff opinion is reinforced by the commentary itself, which specifies that it "is the vehicle by which the staff of the Division of Consumer and Community Affairs of the Federal Reserve Board issues official staff interpretations of Regulation Z." 12 C.F.R. pt. 226, supp. I, cmt. I-1. The commentary provides that new interpretations "will be incorporated in this commentary following publication in the Federal Register" and that "[n]o official staff interpretations are expected to be issued other than by means of this commentary." *Id.*, cmt. I-2.

The Board's designation of the commentary as the sole source of official staff interpretations was a deliberate policy choice. Before the commentary was established, the Board's staff formulated policy in the form of letters issued in response to specific questions by regulated entities. That approach yielded "more than 1,500 separate opinions," each of which was "limited to [specific] facts." *Truth in Lending*, 46 Fed. Reg. 50,288, 50,288 (Oct. 9, 1981); *see* Elizabeth Renuart & Diane E. Thompson, *The Truth, The Whole Truth, And Nothing But The Truth*, 25 Yale J. on Reg. 181, 204 n.117 (2008). The accumulation of opinions subjected the banking industry to divergent and sometimes conflicting interpretations of law, and required regulated entities to divine their legal responsibilities by sifting through unpublished sources of information that were often not readily available. *See Truth in Lending*, 45 Fed. Reg. 80,648, 80,648-80,650 (Dec. 5, 1980).

In direct response to that problem, the Board in 1981 amended Regulation Z to establish the Official Staff Commentary. 46 Fed. Reg. 50,288. The purpose of the commentary was to centralize and codify the staff's interpretation of Regulation Z, so that its guidance might be available "for use by the widest possible audience" and would not "overburden[] the industry with excessive detail and multiple research sources." *Id.* Because the Commentary was created to be the exclusive source for "official" interpretations, its adoption "entirely superseded" all previous interpretations. 12 C.F.R. pt. 226, supp. I, cmt. I-1. Moreover, to avoid reoccurrence of the problem, the Board specified that responses to "new questions" and "any additional staff interpretations" would be issued solely through "[p]eriodic updates" to the commentary. 46 Fed. Reg. at 50,288.

Deference to agency counsel's ad hoc interpretations, despite Regulation Z's provision to the contrary, would reinstitute the problems that the Board intended the Official Staff Commentary to address, subjecting Chase and other lenders to interpretations filed in unpublished briefs in courthouses across the country and undermining TILA's "preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation." *Ford Motor Credit*, 444 U.S. at 568. Moreover, deference to unofficial agency opinions could not easily be cabined to litigation briefs. Indeed, Chase also asks this Court to defer to fragmentary statements contained in the "more than 1,000 pages" (Pet Br. 8) of material that the agency has published during six years of rulemaking. If this Court accepts that position, it would force both the agency and litigants in future cases to comb through those and countless additional pages contained in correspondence, publications, and the agency's website to determine the agency's position, and would thus threaten to again "overburden[]" the industry with the excessive detail and multiple, inaccessible research sources that led the Board to adopt the Official Staff Commentary in the first place.

Deference to agency legal briefs would also contravene the Board's policy judgment in another way, by circumventing the process of notice-and-comment rulemaking that the Board has chosen to require for the development of official staff opinions. 12 C.F.R. pt. 226, supp. I, cmt. I-2 ("Interpretations that are adopted will be incorporated in this commentary following publication in the Federal Register."). To be sure, this Court has not required agencies to use notice-and-comment rulemaking as a means to comment on their own regulations, and has held in the context of agency interpretation of statutes that the absence of such rulemaking "does not automatically deprive that interpretation of the judicial deference otherwise its due." *Barnhart*, 535 U.S. at 221. But the Court also customarily gives greater weight to agency views that have been subjected to the reasoned consideration of the notice-and-comment process. *See United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001). This Court in *Christensen*, for example, declined to defer to an agency's opinion and amicus brief, on the ground that informal interpretations—that is, those interpretations (like those contained in legal briefs) made outside the strictures of the Administrative Procedure Act, *see* 5 U.S.C. § 553 (mandating notice, comment, and consideration in agency rulemaking)—"lack the force of law." *Christensen*, 529 U.S. at 587.

The Board's considered policy judgment to subject its staff's official policy views to the rigors of notice and comment is entitled to respect. Indeed, the Board's decision to require formal rulemaking was itself adopted through the notice-and-comment rulemaking process.

See 46 Fed. Reg. 50,288. To accept the agency's legal briefs as authoritative expressions of agency opinion would paradoxically allow agency counsel to usurp the Board's own judgment about the level of deliberation necessary for official decisions regarding agency policy. As this Court has made clear, however, agencies cannot, "under the guise of interpreting a regulation, … create a de facto new regulation" that circumvents or contradicts a rule enacted through notice and comment rulemaking. *Christensen*, 529 U.S. at 588.

C. The Agency's Briefs Do Not Reflect a "Considered Judgment on the Matter in Question."

1. The question in *Auer* involved interpretation of a rule providing that an employee is exempt from overtime pay under the Fair Labor Standards Act only when the employee's salary "is not subject to reduction because of variations in the quality or quantity of the work performed." 519 U.S. at 455 (internal quotation marks omitted). The plaintiff police sergeants argued that an employee's salary should be considered "subject to reduction"—and thus that the employee should be entitled to overtime pay—"whenever there exists a theoretical possibility of such deductions." *Id.* at 459. In an amicus brief requested by the Court, however, the Secretary of Labor interpreted the rule as providing that a salary should be considered "subject to reduction" only when the policy permits reductions in salary "as a practical matter." *Id.* at 461. This Court gave substantial weight to the agency's views. The Court held that, "[b]ecause the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Id.* The Court concluded that this deferential standard was "easily met," noting that the phrase "'subject to' comfortably bears the meaning the Secretary assigns" and had the additional common-sense effect of "avoid[ing] the imposition of massive and unanticipated overtime liability … in situations in which a vague or broadly worded policy is nominally applicable to a whole range of personnel but is not 'significantly likely' to be invoked against salaried employees." *Id.*

As this Court explained in *Gonzalez v. Oregon*, the critical consideration in *Auer* was that the Secretary's position "reflected the considerable experience and expertise the Department of Labor had acquired over time with respect to the complexities of the Fair Labor Standards Act." 546 U.S. 243, 256-57 (2006). Accordingly, this Court has applied *Auer* deference in cases where the agency relied on expertise that renders it "uniquely qualified" to interpret the regulatory question and therefore the agency's position appears to "reflect the agency's fair and considered judgment" on that question. *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 883-84 (2000); *see also Mead*, 533 U.S. at 228 n.7 (2001) ("[C]ourts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position … ."); *Barnhart*, 535 U.S. at 222 (affording deference to an Agency's interpretation of a statute in light of "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time"). Conversely, this Court has declined to extend deference when an agency's acknowledged areas of "expertise and experience" do not inform "how to decide [an] issue." *Gonzalez*, 546 U.S. at 257.

Nothing in the agency's briefs here suggests that the agency exercised its experience or expertise to make an informed policy decision that notice of an increased APR should be denied to consumers. The government does not dispute that its reading of § 226.9's notice requirement would subject cardholders to a rate of which they are unaware. And the government suggests no reason why reading the regulations to require such a result would further the policies behind TILA—a statute with the central purpose of requiring disclosure of a loan's APR. Because consideration of policy and the purpose of Regulation Z are conspicuously absent from agency counsel's brief, there is good "reason to suspect that the [agency's] interpretation" of §226.9 "does not reflect the agency's fair and considered judgment." *Auer*, 519 U.S. at 462. The brief is therefore unworthy of *Auer* deference.[6]

Indeed, far from endorsing the position in its brief as a matter of policy, the Board has itself taken the position that undisclosed APR increases harm consumers by preventing them from shopping around for a lower-priced loan. The rulemaking preceding the 2009 amendments is replete with the Board staff's conclusions that prior no-

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[6] The agency's omission is particularly glaring when compared to other Board amicus briefs submitted to the lower courts and this Court interpreting TILA and Regulation Z. *See, e.g.*, Brief for the United States as Amicus Curiae, *Household Credit Service v. Pfenning*, No. 02-857 (S. Ct. May 2003); Brief for the Board of Governors of the Federal Reserve System as Amicus Curie, *Consolidated Bank v. Office of the Comptroller of the Currency*, No. 95-4831 (11th Cir. Feb. 28, 1996); Brief for the Board of Governors of the Federal Reserve System as Amicus Curiae, *Aronson v. Peoples Natural Gas Co.*, No. 99-3000 (3d Cir. December 4, 1998). In those briefs, the Board's interpretations relied on textual analysis supplemented and informed by its particular expertise, including knowledge of TILA's statutory objectives, analysis of rulemaking history to establish regulatory intent, exploration of the practical implications of a rule on consumers and creditors, and considerations of ease and efficiency in regulatory administration.

tice is essential to achieving TILA's purpose. In the 2007 proposed rule, for example, the staff noted complaints by borrowers and consumer advocates that consumers "are surprised by changes to the terms of their accounts" because they "do not remember the information regarding those changes that was contained in the account opening disclosures." 72 Fed. Reg. at 33,009. The staff also noted comments that "consumers are not aware when they have triggered rate increases, for example by paying late, and thus are unaware that it might be in their best interest to shop for alternative financing before the rate increase takes effect." *Id.* These comments were supported by the staff's own consumer testing, which showed that many consumers did not notice the information about default rates in their initial disclosures, in part because the default rate was not required to be disclosed alongside the initial APR. *Id.*

Based on this evidence, the staff acknowledged the importance of notice to TILA's purpose of "improv[ing] consumers' awareness about changes in their account terms" and "consumers' ability to shop for alternative financing before such account terms become effective." *Id.* It concluded that "consumers should have sufficient time, following the notice and before the change becomes effective, to change the usage of their plan or to pursue alternative means of financing their purchases, such as using another credit card, utilizing a home-equity line or installment loan, or shopping for a new credit card," *id.* at 33,010—in other words, a policy view totally incompatible with the view of the rules in the government's briefs here. Based on this analysis, the agency proposed and adopted new rules increasing both the 15-day advance notice and contemporaneous notice requirements to 45 days, concluding that "30 days could be inadequate" for consumers who "want[] to shop for another credit card, apply for, open, and transfer a balance from an existing card to a new card." *Id.*

Neither Chase nor the agency's legal counsel give any contrary reason why allowing increases in APR without notice is consistent with, much less furthers, the purposes of TILA. Chase contends only that default-based rate increases are common in the credit card industry, but McCoy is not arguing that creditors are prohibited from using such pricing policies. Under McCoy's understanding of Regulation Z, creditors could still reserve the right to raise rates consistently with § 226.9(c) as long as they provided notice of the rate increase. There is no legitimate reason for the Board to give creditors the right to increase rates without providing notice. Indeed, the only interest a creditor has in denying borrowers this information is the hope that borrowers will accumulate debt that, had they known the applicable rate, they would have chosen not to incur either by refraining from making purchases or by switching to a lower-priced loan. The practice of misleading borrowers into unknowingly acquiring debt at a high interest rate is the precise practice that Congress designed TILA to prevent. *See* 15 U.S.C. § 1601(a).

2. Rather than basing its call for deference on the Board's expertise or policy judgments—the reasons for which Congress granted the Board interpretive authority in the first place—the agency's counsel ask the Court to defer based only on their reading of the ordinary English meaning of Regulation Z's language. In effect, the government reads *Auer* deference as based on a sort of ex post facto legislative history, in which, as the author of the regulation, the agency is the best one to ask what it had in mind at the time the regulation was written. Even if that form of deference were legitimate, it would make no sense here. The regulatory provisions at issue were adopted in 1981, 72 Fed. Reg. at 32,948, and it is therefore unrealistic to believe that the agency's counsel has any special knowledge of their meaning. *See Gonzalez*, 546 U.S. at 257-58 (rejecting *Auer* deference where the agency was interpreting a decades-old rule and its interpretation ran "counter to the intent at the time of the regulation's promulgation") (internal quotation omitted).

In any event, this Court does not defer to agency briefs about the meaning of a regulation because the agency has special knowledge about what it had in mind at the time the regulation was drafted. That view of the law would give agencies a perverse incentive to issue vague regulations, saving the more difficult policy decisions for interpretation in individual cases—where the agencies could make policy through amicus briefs that courts would apply retroactively. *See Mead*, 533 U.S. at 246 (Scalia, J., dissenting). Agencies would thus have "high incentive to rush out barebones, ambiguous rules construing statutory ambiguities, which they can then in turn further clarify through informal rulings entitled to judicial respect." *Id.* That result would "disserve[] the very purpose behind the delegation of lawmaking power to administrative agencies, which is to "resol[ve] … ambiguity in a statutory text." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) (citations omitted); *see also* John F. Manning, *Nonlegislative Rules*, 72 Geo. Wash. L. Rev. 893, 943 (2004) (arguing that a broad application of *Auer* deference permits agencies to "make an end run around the boundaries drawn by *Mead*"). To allow such broad interpretive power would also give greater deference to unofficial statements of agency opinions than to formal agency decisions (including here both regulations and official, contemporaneous explanations of them) adopted pursuant to notice-and-comment rulemaking. There is no reason, however, to assume that Congress in granting interpretive authority to the Board intended that result. *Cf. Christensen*, 529 U.S. at 591 (Scalia, J., concurring) ("What we said in a case involving an agency's interpretation of its own regulations applies equally … to an agency's interpretation of its governing statute[.]").[7]

This Court should not defer to a reading of Regulation Z that the agency has itself concluded is contrary to the purposes of the statute. Whether the agency's reading of Regulation Z is compelled by its text is a question that falls well within the Court's traditional "role as interpreter of the laws." *Gonzalez*, 546 U.S. at 255. In the absence of any contrary exercise of agency discretion or policy judgment that warrants deference, this Court should construe the rules in the way that accords best with the rules' language, context, and purpose. As explained above, the only reasonable reading of the rules under these criteria is that they prohibit creditors from raising a cardholder's APR without providing notice that the rate has increased.

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[7] In part for these reasons, lower courts have rejected agency arguments that *Auer* demands a higher level of deference to agency interpretations of regulations than to agency interpretations in other contexts. *See, e.g., Boose v. Tri-County Metro. Transp. Dist.*, 587 F.3d 997, 1005 (9th Cir. 2009) (cautioning that an overly broad reading of *Auer* would permit agencies to "engage in an end-run around notice-and-comment rulemaking"); *Keys v. Barnhart*, 347 F.3d 990, 993-94 (7th Cir. 2003) ("Briefs certainly don't have the 'force of law.'") (quoting *Christensen*, 529 U.S. at 587); *Eastman Kodak Co. v. STWB, Inc.*, 452 F.3d 215, 222 n.8 (2d Cir. 2006) (suggesting that *Skidmore* deference applies to an agency's amicus brief's interpretation of its regulation because *Auer* had been "seemingly undercut by *Christensen*"); *cf. Houston Police Officers' Union v. City of Houston*, 330 F.3d 298, 305 (5th Cir. 2003) (questioning whether an agency's amicus brief's interpretation is "sufficiently authoritative to merit *Chevron* deference").

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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