No. 09-329

In the Supreme Court of the United States

CHASE BANK USA, N.A., PETITIONER

v.

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

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Federal Reserve Board's Regulation Z, 12 C.F.R. Pt. 226 (2008), amended by 74 Fed. Reg. 36,077 (2009), implements the Truth in Lending Act, 15 U.S.C. 1601 *et seq.* Because the events that gave rise to this suit occurred before Regulation Z was amended in 2009, this case is governed by the pre-amendment version of the regulation. The question presented is as follows:

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

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of the Federal Reserve Board's authoritative interpretation of the relevant regulations.

STATEMENT

1. The Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.*, is designed to promote the "informed use of credit" by requiring "meaningful disclosure of credit terms." 15 U.S.C. 1601(a). The statute confers broad authority

on the Board of Governors of the Federal Reserve System (Board) to issue regulations to carry out the Act. See 15 U.S.C. 1604(a). Creditors that act in good-faith reliance on a rule, regulation, or interpretation by the Board or its staff are protected from civil liability under TILA. 15 U.S.C. 1640(f).

The Board's Regulation Z, adopted pursuant to Section 1604(a), requires credit card issuers to disclose certain information to consumers. At the time of the transactions at issue in this case, Regulation Z required credit card issuers to provide an "initial disclosure statement" specifying, *inter alia*, "each periodic rate that may be used to compute the finance charge." 12 C.F.R. 226.6(a)(2).[1] The regulation also required credit card issuers to provide a "periodic statement" notifying the consumer of the rates imposed during the previous billing cycle. 12 C.F.R. 226.7. Finally, the regulation imposed certain "subsequent disclosure requirements," 12 C.F.R. 226.9, including a requirement to provide notice "[w]henever any term required to be disclosed under § 226.6 is changed," 12 C.F.R. 226.9(c)(1).

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

[1] As detailed pp. 5-6 & n.2, *infra*, in 2009, the Board amended Regulation Z's provisions relating to disclosure of changes in credit card finance charges, and Congress amended the TILA to address the same subject.

changes pursuant to such pre-existing contract terms. The Board's Official Staff Commentary to the pre-2009 change-in-terms provision explained that the notice requirement did not apply "if the specific change is set forth initially, such as * * * an increase that occurs when the consumer has been under an agreement to maintain a certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum." 12 C.F.R. Pt. 226, Supp. I, Official Staff Interpretations, cmt. 9(c)-1 (Official Staff Commentary). On the other hand, the commentary explained, "notice must be given if the contract allows the creditor to increase the rate at its discretion but does not include specific terms for an increase." *Ibid.*

Regulation Z generally mandated that any required change-in-terms notice be provided 15 days in advance of the effective date of the change. 12 C.F.R. 226.9(c)(1). But when an interest rate increase resulted from the consumer's delinquency or default, the regulation permitted creditors to increase the rate with less than 15 days' notice, as long as notice was provided "before the effective date of the change." *Ibid.* The Official Staff Commentary explained:

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

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

2. In 2004, the Board began an initial inquiry into whether to amend the disclosure requirements govern-

ing the implementation of contractual default-rate provisions. The Board explained:

> Under Regulation Z, some changes to the terms of an open-end plan require additional notice. * * * However, advance notice is not required in all cases. For example, if the interest rate or other finance charge increases due to a consumer's default or delinquency, notice is required, but need not be given in advance. 12 C.F.R. 226.9(c)(1); comment 9(c)(1)-3. And no change-in-terms notice is required if the creditor specifies in advance the circumstances under which an increase to the finance charge or an annual fee will occur. Comment 9(c)-1. For example, some credit card account agreements permit the card issuer to increase the interest rate if the consumer pays late, or if [the] card issuer learns the consumer paid late on another credit account, even if the consumer has always paid the card issuer on time. Under Regulation Z, because the circumstances are specified in advance in the account agreement, the creditor need not provide a change-in-terms notice 15 days in advance of the increase; the new rate will appear on the periodic statement for the cycle in which the increase occurs.

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

sions about how to manage their accounts." *Id.* at 70,932.

In 2007, the Board published proposed amendments to Regulation Z and to the Official Staff Commentary. *Truth in Lending*, 72 Fed. Reg. 32,948 (proposed rule). Describing Regulation Z in its then-current form, *id.* at 33,009, the Board proposed an amendment that would require 45 days' advance written notice when "(i) A rate is increased due to the consumer's delinquency or default; or (ii) A rate is increased as a penalty for one or more events specified in the account agreement, such as making a late payment or obtaining an extension of credit that exceeds the credit limit." *Id.* at 33,058. The Board explained that "[t]he proposed rule would impose a de facto limitation on the implementation of contractual terms between a consumer and creditor, in that creditors would no longer be permitted to provide for the immediate application of penalty pricing upon the occurrence of certain events specified in the contract." *Id.* at 33,012.

In 2009, the Board promulgated a final rule implementing the proposed changes. *Truth in Lending*, 74 Fed. Reg. 5244, 5254 (final rule). The Board amended Section 226.9(c) to require 45 days' prior notice of contractual changes, including changes in the terms governing computation of finance charges. *Id.* at 5413. The Board also adopted new Section 226.9(g), which requires 45 days' advance notice of increases in rates due to delinquency, default, or as a penalty, including penalties for "events specified in the account agreement, such as

making a late payment or obtaining an extension of credit that exceeds the credit limit." *Id.* at 5414.[2]

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

The district court granted petitioner's motion to dismiss. Pet. App. 37a-47a. The court noted that petitioner's Cardmember Agreement "specifically authorizes [petitioner] to raise a cardholder's interest rate if the cardholder is delinquent with [petitioner] or another creditor." *Id.* at 39a. Citing the Official Staff Commentary to Regulation Z, Comment 9(c)-1, the court concluded that petitioner had not violated TILA or Regulation Z by failing to provide advance notice of the rate increase. The court explained that, "because [petitioner] discloses the basis on which it will increase interest rates due to default, and discloses the highest rate that could apply, an increase in the interest rate based on these specific circumstances is not a change in terms within the meaning of Regulation Z, and no additional

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

notice to the cardmember is required." Pet. App. 43a-44a (footnote omitted).

4. The court of appeals reversed and remanded. Pet. App. 1a-33a.[3] The court "acknowledge[d] that the text of Regulation Z is ambiguous" with respect to the question presented here, and it recognized that a reviewing court must "defer to an agency interpretation of its own ambiguous regulation provided it is not 'plainly erroneous or inconsistent with the regulation.'" *Id.* at 4a (quoting *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997)). The court of appeals rejected petitioner's contention that the Board's "Official Staff Commentary interprets Regulation Z to require no notice in this case." *Ibid.* The court concluded that the "most salient Official Staff Commentary" was Comment 9(c)(1)-3, which the court read "to require notice when a cardholder's interest rates increase because of a default, but to specify that the notice may be contemporaneous, rather than fifteen days in advance of the change." *Ibid.*

The court of appeals further concluded that Comment 9(c)-1, which provides that "[n]o notice of a change in terms need be given if the specific change is set forth initially," did not "dispel [petitioner's] obligation" under Comment 9(c)(1)-3 "to notify its account holders of discretionary rate increases." Pet. App. 5a (emphasis and citation omitted). The court assumed arguendo that Comment 9(c)-1 applied to interest-rate changes. *Id.* at 6a. The court concluded, however, that petitioner's

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

Cardmember Agreement had not set forth a "specific" change within the meaning of the provision, since the Agreement did not state precisely what rate would apply in the event of a default, but instead permitted petitioner to increase the rate up to a stated maximum. *Id.* at 6a-9a.

Petitioner also contended that the 2007 notice of the Board's proposed rule, which described the Board's understanding of the regulatory regime in effect before the 2009 amendments, supported petitioner's interpretation of Regulation Z in its pre-amendment form. Pet. App. 9a. The court of appeals rejected that argument. The court found the 2007 proposed rule and accompanying explanation to be "ambiguous" as to whether notice was required under the circumstances of this case. *Id.* at 10a-11a. The court also stated that the 2007 notice of the Board's proposed rule would be of limited relevance in any event because the court would "defer to the [Board's] Official Staff Commentary, not incidental descriptions of current law contained in an [advance notice of proposed rulemaking]." *Id.* at 13a n.14. The court of appeals concluded that the various explanatory materials issued by the agency left the court "firmly convinced of the [Board's] intent to require contemporaneous notice when rates are raised because of a consumer's delinquency or default, as [respondent] alleges occurred in this case." *Id.* at 13a-14a.

Judge Cudahy dissented. Pet. App. 19a-33a. In his view, the court of appeals should have deferred to the Board's explanation, expressed in both the 2004 advance notice of proposed rulemaking and the 2007 notice of the Board's proposed rule, that "requiring additional notice" before implementing contractual default-rate terms "is a change from" the requirements imposed by Regulation

Z in its pre-amendment form. *Id.* at 22a. Judge Cudahy also found the court's reliance on Comment 9(c)(1)-3 to be misplaced. *Id.* at 28a-29a. He expressed the understanding that Comment 9(c)(1)-3 "does not purport to govern the question whether notice is required," but instead "specifically governs timing issues." *Id.* at 29a. Judge Cudahy would instead have held that, under Comment 9(c)-1, no notice was required under the circumstances presented here because the Cardmember Agreement had set forth the "*specific change*" at issue. *Ibid.* (quoting Official Staff Commentary, cmt. 9(c)-1); see *id.* at 29a-32a.

5. After the court of appeals issued its decision in this case, the First Circuit confronted the same question as is presented here. See *Shaner* v. *Chase Bank USA, N.A.*, 587 F.3d 488 (2009). In order to ascertain the Board's understanding of Regulation Z in its pre-2009 form, the First Circuit "asked the Board for its views on its own pre-amendment regulations," and the Board submitted an amicus brief addressing the question. See *id.* at 491. That amicus brief explained:

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

> occurs, so long as the contingency is identified and the maximum rate is disclosed in the initial card member agreement.

Federal Reserve Board Br. at 1, *Shaner*, *supra* (No. 09-1157) (filed Oct. 22, 2009).

Consistent with the interpretation advanced in the Board's amicus brief, the First Circuit in *Shaner* held that the credit card issuer in that case was not required to provide advance notice before raising card holders' interest rates pursuant to a provision of the member agreement that authorized such increases upon the occurrence of a late payment. 587 F.3d at 492-493. The First Circuit explained that the Board's brief "was solicited [by the court] to supply the Board's view of its own regulations and as such it is entitled to due respect as the agency's 'fair and considered judgment on the matter in question.'" *Id.* at 493 (quoting *Auer*, 519 U.S. at 462). The First Circuit found Regulation Z in its pre-amendment form to be "less than crystal clear on the issue before" the court. *Ibid.* Based on the agency's authoritative interpretation as set forth in the Board's amicus brief, the court concluded that the card issuer's "position must prevail for the transactions in [*Shaner*], which took place prior to August 2009 when the statutory changes and the revised regulations took effect." *Ibid.*; see note 2, *supra* (discussing statutory and regulatory effective-date provisions).

DISCUSSION

At the time of the transactions at issue in this case, Regulation Z did not require credit card issuers to provide cardholders with a change-of-terms notice before implementing a default-rate provision contained in the pre-existing credit card account agreements. The court

of appeals' decision is inconsistent with the Board's longstanding interpretation of its own pre-2009 regulations, and it conflicts with the decisions of other courts of appeals. Although the court below recognized that the Board's interpretation of its own regulation was entitled to substantial deference, the court misunderstood the agency's position. In particular, the court of appeals misconstrued the pertinent provisions of the Official Staff Commentary. Moreover, the court did not have the benefit of the authoritative agency interpretation that the Board subsequently provided to the First Circuit at that court's request. This Court should grant the petition for a writ of certiorari, vacate the judgment below, and remand the case to the court of appeals for further consideration in light of the amicus brief filed by the Board in *Shaner* v. *Chase Bank USA, N.A.*, 587 F.3d 488 (1st Cir. 2009).

A. The Court Of Appeals Erred In Holding That Regulation Z Required Petitioner To Provide A Change-In-Terms Notice Before Implementing A Contractual Default-Rate Provision

1. At the time of the transactions at issue in this case, Regulation Z required that a creditor provide notice before changing any contractual term that must be disclosed in an initial disclosure statement. 12 C.F.R. 226.9(c). That notice requirement applied to changes in the cardholder's periodic interest rate. 12 C.F.R. 226.6(a)(2). As the Official Staff Commentary addressing Section 226.9 explained, however, "[n]o notice of a change in terms need be given if the specific change is set forth initially." Official Staff Commentary, cmt. 9(c)-1. The commentary provided as an example "a rate increase that occurs * * * when the consumer has been

under an agreement to maintain a certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum." *Ibid.* The same rule applied when a cardholder agreement authorized the issuer to increase a consumer's interest rate if the consumer failed to make timely payments to his creditors. If a cardholder who had agreed to that contractual term made a late payment, any resulting rate increase did not represent a "change in terms," but rather the implementation of terms already set forth in the initial disclosure statement.

In 2009, the Board amended Section 226.9 to require credit card issuers to give 45 days' advance notice before implementing a contractual default-rate term. Both before and after that regulatory amendment took effect, however, the Board has repeatedly confirmed its understanding that Regulation Z in its pre-amendment form imposed no similar requirement. In its 2004 advance notice of proposed rulemaking, the Board stated that "no change-in-terms notice is required" for a rate increase pursuant to an agreement that "permit[s] the card issuer to increase the interest rate if the consumer pays late." 69 Fed. Reg. at 70,931-70,932. The Board explained that, "[u]nder Regulation Z, because the circumstances are specified in advance in the account agreement, the creditor need not provide a change-in-terms notice 15 days in advance of the increase; the new rate will appear on the periodic statement for the cycle in which the increase occurs." *Id.* at 70,932. When it proposed changing the rule in 2007, the Board explained that its "proposed rule would impose a de facto limitation on the implementation of contractual terms between a consumer and creditor, in that creditors would no longer be permitted to provide for the immediate applica-

tion of penalty pricing upon the occurrence of certain events specified in the contract." 72 Fed. Reg. at 33,012.

When the Board ultimately amended Section 226.9 in 2009, the Board described the amendment as a "Major Change[]" to the existing rule. 74 Fed. Reg. at 5244. The Board further explained that, "[e]ven though the final rule contain[s] provisions intended to improve disclosure of penalty pricing at account opening, the Board believes that consumers will be more likely to notice and be motivated to act if they receive a specific notice alerting them of an imminent rate increase, rather than a general disclosure stating the circumstances when a rate might increase." *Id.* at 5254. And in October 2009, after the amendment to Regulation Z had taken effect, the Board confirmed its understanding that the pre-amendment version of the rule had not required a change-in-terms notice under the circumstances presented here. In response to the First Circuit's request for clarification of the Board's view on that question, the Board submitted an amicus brief explaining that, under the pre-amendment rule, a credit card issuer could implement a default-rate provision contained in the account agreement without providing advance notice of the increase. See pp. 9-10, *supra*; pp. 17-21, *infra*.

2. In reaching its contrary conclusion, the court of appeals erred in at least three respects.

a. The court of appeals misinterpreted Comment 9(c)(1)-3 of the Official Staff Commentary. Comment 9(c)(1)-3 stated that "a notice of change in terms is required, but may be mailed or delivered as late as the effective date of the change," in the event "there is an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default." See Pet. App. 4a-5a (quoting Official Staff Commentary,

cmt. 9(c)(1)-3). The court of appeals construed Comment 9(c)(1)-3 "to require notice when a cardholder's interest rates increase because of a default, but to specify that the notice may be contemporaneous, rather than fifteen days in advance of the change." *Id.* at 4a. The court viewed Comment 9(c)(1)-3 as applicable even when, as in this case, a cardholder's interest rate is increased pursuant to a pre-existing term of the cardholder agreement that authorizes such a change upon the occurrence of specified contingencies. See *id.* at 5a.

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

Rather than establishing a freestanding disclosure requirement, Comment 9(c)(1)-3 specified the time at which such disclosures must be made—*i.e.*, "as late as the effective date of the change" rather than the usual 15 days in advance. Comment 9(c)(1)-3's status as a timing requirement was made clear by its heading ("*Timing—advance notice not required*") and location (under the general heading "9(c)(1) Written Notice Required"). Comment 9(c)(1)-3 did not create substantive

disclosure requirements where Regulation Z itself and Comment 9(c)-1 did not demand them. See Pet. App. 28a-29a (Cudahy, J., dissenting) (explaining that Comment 9(c)(1)-3 "does not purport to govern the question whether notice is required," but rather "assumes situations where notice is required and controls only timing"); *Shaner*, 587 F.3d at 492 (explaining that "comment 3 merely describes *when* notice must be given where it is otherwise required, whereas comment 1 explains *whether* changes specified in advance constitute changes in terms necessitating notice").

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

When a cardholder agreement identifies a contingency that triggers a rate increase, and the maximum possible rate that the issuer may charge if that contingency occurs, the agreement does not lack the requisite specificity merely because it allows the issuer to exercise discretion in the consumer's favor. If a provision of a cardholder agreement that mandated a particular increased rate under specified circumstances could be implemented without notice to the consumer, there is no reason to require such notice when a particular agreement authorizes the issuer to choose whether and by how much to increase the rate in the event of delinquency or default. Under either type of cardholder agreement, Regulation Z in its pre-amendment form did not require notice of a rate increase because the in-

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

c. Finally, the court of appeals erred in disregarding the Board's 2004 advance notice of proposed rulemaking and 2007 notice of the Board's proposed rule, which contained detailed explanations of the change-in-terms requirements in Section 226.9(c)(1) and accompanying commentary. The court dismissed the Board's statements in those documents as purely "incidental descriptions of current law." Pet. App. 13a n.14. In fact, the 2004 and 2007 descriptions of then-current law were authoritative summaries of the Board's interpretation of the existing change-in-terms requirements, published in the *Federal Register*, and provided to explain the Board's proposal to change the very rule it was describing. As such, they warranted the court's deference. See, *e.g.*, *Anderson Bros. Ford* v. *Valencia*, 452 U.S. 205, 219 (1981) (deferring to a proposed official staff interpretation of Regulation Z published in the *Federal Register*, and noting that, "absent some obvious repugnance to the statute, the Board's regulation * * * should be accepted by the courts, as should the Board's interpretation of its own regulation").

The court of appeals (Pet. App. 10a-11a) also misread the 2004 and 2007 notices, finding ambiguity in their descriptions of then-existing law where no ambiguity existed. In particular, the court misread the 2007 notice's statement that "the creditor currently need not provide a change-in-terms notice" before implementing a contractual default-rate provision. *Id.* at 10a (quoting 72 Fed. Reg. at 33,009). Hypothesizing that "the term 'change-in-terms notice'" might "refer only to the fifteen days' advance notice required for changes in contractual terms," the court suggested that language was consis-

tent with a rule requiring issuers to give *contemporaneous* notice of a rate increase. *Ibid.* The court's approach reflects an unnaturally circumscribed understanding of the phrase "change-in-terms notice," even if that phrase is considered in isolation. And as the court itself recognized, the relevant sentence of the 2007 notice went on to state that, under Regulation Z in its pre-amendment form, "the new rate will appear on the periodic statement for the cycle in which the increase occurs." *Ibid.* (quoting 72 Fed. Reg. at 33,009). That statement makes clear that the Board did not construe its pre-amendment regulation to require even contemporaneous notice when an interest rate is increased pursuant to a contractual default-rate provision.

B. The Courts Of Appeals Are Divided On The Question Presented

1. The court of appeals' decision in this case conflicts with the decisions of the two other courts of appeals that have considered the issue.

a. Like the respondent in this case, the plaintiff in *Swanson* v. *Bank of America, N.A.*, 559 F.3d 653 (7th Cir. 2009), contended that the issuer of her credit card was required to provide separate notice before implementing a default-rate provision contained in the pre-existing cardholder agreement. See *id.* at 655. The court of appeals rejected that argument. See *id.* at 655-657. The court explained that "there is no good reason to override * * * a contract that unambiguously authorizes" a rate increase in the event of a default, *id.* at 656, and that it was bound to "honor the Board's commentary on its rules" by "taking the Board at its word" that the 2009 amendments "make[] a real change," *id.* at 657.

b. In *Shaner*, *supra*, the First Circuit confronted the same question and found Regulation Z in its pre-amendment form to be "less than crystal clear on the issue." 587 F.3d at 493. In light of the conflict between the Ninth Circuit's decision in this case and the Seventh Circuit's ruling in *Swanson*, the First Circuit "asked the Board for its views on its own pre-amendment regulations," and the Board submitted an amicus brief addressing the question presented here. *Id.* at 491; see pp. 9-10, *supra*. That brief stated "the Board's position that, at the time of the transactions at issue in [*Shaner*], Regulation Z did not require a change-in-terms notice to be provided when a creditor increased a rate to a figure at or below the maximum allowed by the contract in the event of default." *Shaner*, 587 F.3d at 493. The First Circuit recognized that the interpretation of Regulation Z set forth in the Board's amicus brief was "entitled to due respect as the agency's 'fair and considered judgment on the matter in question,'" *ibid.* (quoting *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997)), and that "an agency's interpretation of a regulation it promulgated [is] 'controlling' unless it is 'plainly erroneous,'" *ibid.* (quoting *Auer*, 519 U.S. at 461, and *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 872 (2009)). The court accordingly rejected Shaner's contention that the credit card issuer in that case had violated Regulation Z "by failing to provide notice of a rate increase on or before the effective date of the increase." *Id.* at 490; see *id.* at 493.

2. As respondent notes (Br. in Opp. 4-6), the division among the courts of appeals is of limited prospective significance in light of the 2009 amendments. The question is potentially outcome-determinative, however, in a number of pending cases challenging rate increases that

occurred before the 2009 amendments became effective. See Pet. 22-23 & n.4. If the decision below is allowed to stand, creditors will be exposed to needless litigation expenses and potential liability simply for complying with the Board's longstanding interpretation of its own regulations.

C. Further Consideration Is Warranted In Light Of The Board's Recent Authoritative Interpretation Of Its Regulations

The court of appeals in this case correctly observed that an agency's considered judgment about the meaning of its own regulation is entitled to deference unless the agency's construction is "plainly erroneous or inconsistent with the regulation." Pet. App. 4a (quoting *Auer*, 519 U.S. at 461). And while the court of appeals dismissed the Board's 2007 notice of its proposed rule on the ground that the notice's "tersely worded 'interpretations' of existing law are incidental to the purpose of the agency action," *id.* at 13a n.14, the court recognized that "[i]n *Auer*, [this Court] deferred to an interpretation of a rule contained in an agency's legal brief that was directed specifically to the 'matter in question,'" *ibid.* (quoting *Auer*, 519 U.S. at 462). The Board's amicus brief in *Shaner* was filed approximately seven months after the Ninth Circuit issued its decision in this case. That brief represents the agency's considered judgment, and it was drafted and filed for the specific purpose of clarifying the agency's interpretation of its own pre-amendment regulation with respect to the precise question that is presented here. See *Shaner*, 587 F.3d at 493. That amicus brief details why the central premise of the decision below—that the Board interprets its own pre-

amendment regulation to require disclosure in these circumstances—is incorrect.[4]

Under these circumstances, and given the continuing importance of the issue in this and other pending cases, the Court should vacate the court of appeals' judgment and remand the case to allow the court below to revisit its conclusion in light of the Board's authoritative construction of its pre-2009 regulations. See Pet. Reply Br. 10-11.[5] Such an order is appropriate "[w]here intervening developments * * * reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). In *Long Island Care at Home, Ltd.* v. *Coke*, 546 U.S. 1147 (2006), the Court granted, vacated, and remanded to allow the Second Circuit to consider a Department of Labor advisory memorandum, issued after the court of appeals had rendered its initial decision, clarifying the agency's interpretation of the

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[4] Petitioner has submitted a letter requesting permission to lodge with this Court the Board's amicus brief in *Shaner*. See Pet. Reply Br. 2 n.1.

[5] Respondent acknowledges (Br. in Opp. 6-7) the significance of the Board's amicus brief in *Shaner*, but suggests that the appropriate course would be to deny further review and instead to permit petitioner to raise the *Shaner* brief in support of a good-faith defense to liability under 15 U.S.C. 1640(f). It is not clear, however, that the decision below would permit petitioner to raise such an argument. See Pet. App. 13a n.14 (stating that the good-faith defense "is only available for actions based on the Official Staff Commentary," and suggesting that the defense is not available for actions based on other interpretations "promulgated after this suit was filed" and that "could not have been relied upon when [petitioner] acted").

regulation at issue in the case. See Pet. Reply Br. 11. Because the Board interpretation of pre-amendment Regulation Z set forth in the *Shaner* amicus brief is similarly entitled to judicial deference, see *Auer*, 519 U.S. at 462, the same disposition is appropriate here.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings in light of the position expressed in the Board's amicus brief in *Shaner* v. *Chase Bank USA, N.A.*, 587 F.3d 488 (1st Cir. 2009).

Respectfully submitted.

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