No. 09-

IN THE

Supreme Court of the United States

CHASE BANK USA, N.A.,

Petitioner,

v.

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

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Reserve Board's Regulation Z, which implements the Truth in Lending Act, requires creditors to provide an initial disclosure statement, before any transaction on an open-end credit plan takes place, containing "each periodic rate that may be used to compute the finance charge." 12 C.F.R. § 226.6(a)(2). Regulation Z also requires that when a creditor later changes any term that it was required to disclose in the initial disclosure statement, the creditor must "mail or deliver written notice" of that change in terms before the effective date of the change. 12 C.F.R. § 226.9(c).

Credit card issuing banks generally provide the requisite initial disclosures in or with the contract document that governs the credit card account. Such cardholder agreements commonly specify a standard periodic rate of interest and also that, if the cardholder defaults in a certain manner, then the creditor may increase the periodic rate on the account up to an identified default rate.

The question presented is:

When a creditor increases the periodic rate on a credit card account in response to a cardholder default, pursuant to a default rate term that was disclosed in the contract governing the account, does Regulation Z, 12 C.F.R. § 226.9(c), require the creditor to provide the cardholder with a change-in-terms notice even though the contractual terms governing the account have not changed?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The caption of the case contains the names of all the parties to the proceedings before the court of appeals.

Petitioner Chase Bank USA, N.A., f/k/a Chase Manhattan Bank USA, N.A., is a wholly owned indirect subsidiary of JPMorgan Chase & Co. No publicly held corporation owns 10% or more of the stock of JPMorgan Chase & Co.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Chase Bank USA, N.A. ("Chase"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-33a) is reported at 559 F.3d 963. The court of appeals order denying the petition for rehearing and rehearing *en banc* (App. 49a-50a) and the district court opinion (App. 37a-47a) were not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 2009, and a timely petition for rehearing and rehearing *en banc* was denied on June 16, 2009. The district court had jurisdiction under 28 U.S.C. § 1331, and the court of appeals had jurisdiction to review the district court decision under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

REGULATIONS INVOLVED

This case involves the following regulations issued by the Federal Reserve Board:

> 12 C.F.R. § 226.6. Initial disclosure statement.
>
> The creditor shall disclose to the consumer, in terminology consistent with that to be used on the periodic statement, each of the following items, to the extent applicable:
>
> (a) *Finance charge*. The circumstances under which a finance charge will be imposed and an explanation of how it will be determined, as follows:
>
> * * *
>
> (2) A disclosure of each periodic rate that may be used to compute the finance charge, the range of balances to which it is applicable, and the corresponding annual percentage rate. When different periodic rates apply to different types of transactions, the types of transactions to which the periodic rates apply shall also be disclosed.

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

> 12 C.F.R. § 226.9. Subsequent disclosure requirements.
>
> (c) *Change in terms—(1) Written notice required.* Whenever any term required to be disclosed under § 226.6 is changed or the required minimum periodic payment is increased, the creditor shall mail or deliver written notice of the change to each consumer who may be affected. The notice shall be mailed or delivered at least 15 days prior to the effective date of the change. The 15-day timing requirement does not apply if the change has been agreed to by the consumer, or if a periodic rate or other finance charge is increased because of the consumer's delinquency or default; the notice shall be given, however, before the effective date of the change.

12 C.F.R. § 226.9(c)(1).

STATEMENT OF THE CASE

The Federal Reserve Board's Regulation Z, implementing the Truth in Lending Act, requires credit card issuers to state, in "initial disclosures," terms that may result in increased interest rates such as floating rate terms or default rate terms. 12 C.F.R. § 226.6(a)(2). Regulation Z separately requires that credit card issuers provide "subsequent disclosures," in an appropriate form, when "any term required to be disclosed under § 226.6 is changed." 12 C.F.R. § 226.9(c)(1). Confusing the two provisions, by mistakenly considering the *implementation* of an already-disclosed term regarding rate increases to constitute a *change* in terms, a divided panel of the Ninth Circuit held that credit card issuers must provide "subsequent disclosures" under § 226.9(c) for rate increases, even when the increase is merely an implementation of prior default terms already disclosed in accordance with § 226.6. In so holding, the Ninth Circuit failed to follow the Board's Official Staff Commentary to Regulation Z, which prescribes that "No 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, and disregarded explanations published by the Board in the Federal Register detailing the operation of its regulations. In doing so, the Ninth Circuit panel majority departed from every other federal court (indeed, every other federal judge) to have considered the same issue, including a prior Ninth Circuit panel in an unreported decision, resulting in an irreconcilable split with the Seventh Circuit. The court of appeals decision is incorrect and should be reversed.

A. Industry Practices Regarding Increases In Rates Relating To Customer Defaults

This case concerns the applicability of Truth In Lending Act disclosures to the common practice in the credit card industry of applying an increased periodic interest rate to an account after a customer's late payment or other default, under a contractual default rate provision (also referred to as a penalty rate provision). Credit card issuers often consider such rate increases necessary to compensate for the increased risk revealed by such borrower behavior.

A credit card account relationship between a bank and its customer may endure for many years, during which circumstances can change. Two principal ways exist by which credit card issuers customarily are authorized to adjust their rates over the course of an account relationship in response to changed circumstances. The first is by terms in the original cardholder agreement under which the parties agree, *ex ante*, that different periodic rates may be applied in the future in specified circumstances (*e.g.*, a floating rate tied to an index, or default rates specified in the event of a cardholder default). For example, a credit card agreement may provide as follows:

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

Furletti, *Credit Card Pricing Developments and Their Disclosure* 8-9 (Federal Reserve Bank of Philadelphia Jan. 2003) (ellipsis in original; emphasis omitted; internal quotation marks omitted). The major credit card issuers include such provisions in their contracts in one form or another.[1] If the cardholder defaults, the issuer

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[1] Citibank (South Dakota) N.A. Complete Terms Page, *available at* https://www.accountonline.com/ACQ/DisplayTerms?sc=4DNZ1ST98000MDK730W&app=UNSOL&siteId=CB&langId=EN&BUS_TYP_CD=CONSUMER&DOWNSELL_LEVEL=2&BALCON_SC=&B=M&DOWNSELL_BRANDS=M,M,&DownsellSourceCode1=4DNZ2SV98000MDK730W&B1=M&DownsellSourceCode2=4DNZ3SU98000MDK730W&B2=M&t=t&d=&uc=3KP&AMEX_PID_AF_CODE=&AAPID=&productConId=BM4DNZ1 (last visited Sept. 14, 2009); Chase Bank USA, N.A. Pricing & Terms, *available at* https://www.firstusa.com/cgi-bin/webcgi/webserve.cgi?pdn=pt_chase_con_2009_1&card=CKD3&page_type=appterms (last visited Sept. 14, 2009); HSBC Bank Nevada, N.A., *available at* http://www.disclosure.hsbccreditcard.com/1/2/media/disclosure?cmd_lpage=&indicator=HS039&media=H5IM112JAX0803000458XXTHX&WT.ac=CRS_IM000458 (last visited Sept. 14, 2009); FIA Card Services, N.A. Terms and Conditions, *available at*

increases the rate *pursuant to* these initially disclosed terms of the contract.

An alternative method is for the card issuer to amend the existing terms of its contract with the cardholder to apply new price terms. Credit card accounts are at-will lending arrangements, and credit card agreements invariably include a provision (commonly referred to as a change-in-terms or reservation-of-rights provision) allowing the card issuer to amend the price and other terms of the arrangement as a condition of continuing to extend credit. *See, e.g.*, n.1, *supra*. States frequently address such change-in-terms practices explicitly under banking statutes, *e.g.*, 5 Del. Code § 952, and courts routinely enforce them under accepted principles of contract, *e.g.*, *Grasso* v. *First USA Bank*, 713 A.2d 304 (Del. Super. Ct. 1998).

When changes in circumstances render it appropriate—whether those changes are specific to the cardholder (*e.g.*, indications that the cardholder is less creditworthy) or not (*e.g.*, changes in the general economy)—banks may exercise their change-in-terms authority. For example, if a credit card issuer decides to change the index on which a floating rate is based, it may utilize its change-in-terms authority to raise the allowable periodic rates on the account. Issuers may also use their change-in-terms authority to increase a rate based on a default if, for example, the agreement contains no default rate term or the agreement does, but the bank concludes that the maximum authorized

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http://www.bankofamerica.com/creditcards/eproducts/view/context/tc_ccpopup.cfm?cid=2007331&aolnEnv=disclosures.bankofamerica.com&card_name=BankAmericard%20Cash%20Rewards"%20Visa%20Signature%20Card&lc=en_US (last visited on Sept. 14, 2009).

default rate is inadequate to cover the additional lending risk from a particular cardholder's default.

The two different ways in which rates may be increased have different substantive legal effects and practical ramifications. When a card issuer increases rates pursuant to an *existing contractual term*—whether a floating rate term, default rate term, or other similar term—the card issuer's legal right to increase the rate when the triggering event occurs is already established and no new agreement by the cardholder is required. In light of the cardholder's existing contractual agreement to the rate increase, there is no contractual obligation on the card issuer to delay implementation of the new rate, so the increase may be immediately applied. Typically, the increased rate has been effective, under the parties' contract, as of the first day of the billing period during which the triggering event occurs, and applies to all existing balances.

By contrast, when a card issuer seeks to increase rates by *changing the terms* of the existing cardholder agreement, principles of contract law require some kind of actual or legally implied agreement by the cardholder to the new terms. Under Delaware banking law, for example, the bank must first provide 15 days' written notice to the cardholder of any amendment to increase the periodic rate, notifying the cardholder of the proposed amendment and his right to opt out of it, and the bank may not apply the increased rate to the existing account balances of any cardholder who opts out of the amendment and abstains from use of the account for new transactions. *See* 5 Del. Code § 952. Other state banking laws are similar. *See, e.g.*, Nev. Rev. Stat. § 97A.140; S.D. Codified Laws §§ 54-11-10, -11.

B. Truth In Lending Act Disclosure Requirements

The Truth In Lending Act ("TILA"), 15 U.S.C. §§ 1601 *et seq.*, imposes, as a matter of federal law, a regime of standardized disclosure obligations on creditors relating to credit transactions with consumers. Rulemaking authority is vested in the Federal Reserve Board, which has implemented the statute through Regulation Z, 12 C.F.R. part 226. Regulation Z is supplemented by an Official Staff Commentary, *id.* supp. I, good faith compliance with which is a defense in a suit asserting liability based on a violation of the Act or Regulation. 15 U.S.C. § 1640(f). The disclosure practices governed by Regulation Z are both broad and intricate, with the result that this single Regulation and Commentary alone take up more than 240 pages in the Code of Federal Regulations. The Board also frequently publishes revisions, together with explanations, of both the Regulation and Commentary, in order to address new developments, uncovered ambiguities, and changes in law or policy. *See, e.g.*, 74 Fed. Reg. 5,244 (Jan. 29, 2009). From 2004 to the date of this petition, for example, notices concerning revisions to Regulation Z and the Commentary, including explanatory material, have consumed some 1039 pages in the Federal Register. This Court has accorded substantial deference to the Board's expertise in Regulation Z matters. *See generally Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980).

Two provisions of Regulation Z are of primary relevance to this case. The first, 12 C.F.R. § 226.6, governs the "initial disclosures" that credit card issuers are required to provide at the outset of the credit relationship, before any transaction on the account has occurred. In relevant part, § 226.6 requires creditors to disclose "each periodic rate that *may* be used to compute the finance charge." 12 C.F.R. § 226.6(a)(2) (emphasis added). This disclosure obligation includes default rates: "If the initial rate may increase upon the occurrence of one or more specific events, such as a late payment or an extension of credit that exceeds the credit limit, the creditor must disclose the initial rate and the increased penalty rate that may apply." Comment ¶ 6(a)(2)-11. As with all disclosures, this disclosure of the periodic rates that may be used under the contract must "reflect the terms of the legal obligation between the parties." 12 C.F.R. § 226.5(c); *see also* Comment ¶ 5(c)-1 ("The disclosures should reflect the credit terms to which the parties are legally bound at the time of giving the disclosures.").

The second provision at issue concerns "changes in terms." 12 C.F.R. § 226.9(c). It generally mandates that "[w]henever any term required to be disclosed under § 226.6 is changed or the required minimum periodic payment is increased, the creditor shall mail or deliver written notice of the change to each consumer who may be affected." *Id.* § 226.9(c)(1). Section 226.9(c) disclosures, which are required when there is a *change* in one or more of the terms that § 226.6 requires creditors to disclose initially, effectively operate as a new round of "initial disclosures" for the changed term. Thus, a § 226.9(c) change-in-terms notice has not been required for rate increases that are provided for in the cardholder's "initial" terms—such as implementation of floating rate terms, or application of a default rate for failing to keep a required balance—but a change-in-terms notice is required if the card issuer invokes its unbound discretion under a reservation-of-rights provision to amend the contract to adopt rates different from the existing contract terms:

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

Comment ¶ 9(c)-1.

Ordinarily, where Regulation Z required the creditor to send a change-in-terms notice, the creditor was required to send it 15 days in advance of the effective date of the change. 12 C.F.R. § 226.9(c)(1). (Under amendments to the Regulation, that time is now 45 days, as discussed below.) If, however, the creditor initiated a contractual change in terms because of a cardholder's default or delinquency (again, as distinct from implementation of existing default rate terms), then so far as Regulation Z was concerned the 15-day advance notice period was inapplicable and the creditor needed only to send the notice before the effective date of the change. *Id.* Thus, in the event of a default, if the bank were to *amend* the cardholder agreement to provide for a rate *not already authorized* by the initial cardmember agreement, then notice would be required but the creditor need not send it 15 days in advance. As stated by Comment ¶ 9(c)(1)-3:

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

Comment ¶ 9(c)(1)-3.

A credit card issuer's "initial disclosures"—and, for that matter, any change-in-terms disclosure—do not necessarily identify the particular rates that will be applicable to a card account at a particular time. Regulation Z requires these disclosures to identify all rates that "may" apply under the terms of the parties' agreement, whereas the rate that does apply in any instance may depend on which credit features a cardholder utilizes, external events (*e.g.*, on a floating rate plan), cardholder behavior, or other account circumstances. Under Regulation Z, the ongoing disclosure to the cardholder of which of the applicable rates (or the rate within the applicable range of rates) is being applied to the account, pursuant to the cardholder agreement, is performed by "periodic statements," typically rendered monthly. 12 C.F.R. § 226.7(d). The periodic statement identifies transactions on the account and discloses each rate "in effect during the billing cycle reflected on the periodic statement." Comment ¶ 7(d)-2.

C. Industry Disclosure Practices And Recent Revisions To Regulation Z

Based on substantive contract and banking law, and in accordance with Regulation Z requirements, it has long been industry practice for credit card issuers to apply default pricing terms that are set forth in the cardholder agreement and initial disclosures without providing a change-in-terms notice when the default rates become applicable. Because the cardholder already has agreed to an increase up to the default rate as part of the original contract, there is no need to obtain further assent or update the § 226.6 initial disclosures. In contrast, where a card issuer changes the terms of the underlying agreement, notice is needed both to secure the cardholder's agreement to the contract modification and to update the underlying documents, including the § 226.6 initial disclosures.

This case is governed by the provisions of Regulation Z described above. Earlier this year, the Federal Reserve Board revised the Regulation twice, first to implement certain changes in its regulatory policy, and second to implement certain statutory changes enacted by Congress this year. Following these 2009 changes, Regulation Z now requires advance notice when a card issuer is implementing an increased periodic rate pursuant to a default rate term, even where the term had already been the subject of "initial disclosures" at the time of contract formation.

The first of the changes to Regulation Z was initiated by the Board through a rulemaking process begun in late 2004. This amendment of Regulation Z was a product of a change in policy by the Board. In the course of explaining its change, the Board stated that, under the regulation as it existed at the time pertinent to this case, Regulation Z authorized the longstanding industry practice—that is, implementation of a contractual default rate term without a change-in-terms notification. In a 2007 Advance Notice of Proposed Rulemaking ("ANPR"), for instance, the Board stated:

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

72 Fed. Reg. 32,948, 33,009 (June 14, 2007).

The Board stated that it changed its policy because consumer testing and comments revealed that advance notice of default rate implementation would benefit consumers and prevent undue surprise. The new regulation, adopted in January 2009 and due to become effective in mid-2010, changed the timing requirement in § 226.9(c) to require that notices of *changes in terms* involving rate increases due to default be provided 45 days in advance, and also promulgated an entirely new subsection, § 226.9(g), to require 45 days' advance notice of *implementations of existing default rate terms* of the cardholder agreement. *See* 74 Fed. Reg. at 5,414-5,415.

Before the Board's amended regulation took effect, Congress passed the Credit Card Accountability Responsibility and Disclosure Act ("Credit CARD Act"), which requires 45 days' advance notice before any increase in the annual percentage rate except where the increase occurs because of the expiration of an introductory period, the operation of an index, or a failure to comply with a workout arrangement. Pub. L. No. 111-24, § 101(a), (b) 123 Stat. 1734, 1735, 1736 (2009). In July 2009, the Board adopted new regulations to implement the Credit CARD Act, but retained separate provisions, as in the January 2009 rule, applicable to (1) changes in rate terms and (2) implementations of previously disclosed default rate terms. *See* 74 Fed. Reg. 36,077, 36,095 (July 22, 2009) (promulgating new versions of 12 C.F.R. § 226.9(c), (g), effective Aug. 20, 2009).

These regulatory amendments do not themselves apply to this case, or to the other cases presently pending in the lower courts (*see* n.4, *infra*), and accordingly do not moot the issues presented here or their legal significance. For simplicity, all citations to Regulation Z and the Commentary in this petition are to the versions that were in force until August 20, 2009, unless specifically noted.

D. Proceedings Below

Respondent's complaint. Respondent James McCoy ("respondent") filed this putative class action in California state court to challenge Chase's practice of applying its default pricing terms after a cardholder's default under the terms of the cardholder agreement, without providing a § 226.9(c) change-in-terms notice. The cardholder agreement governing respondent's account provided that his entitlement to "Preferred" rates was contingent on his avoidance of specified events of default. App. 20a-21a, n.1 (Cudahy, J., dissenting). In the event of such a default, Chase was authorized to impose different rates "up to the maximum Non-Preferred rate described in the Pricing Schedule." *Id.* Following respondent's default, Chase increased his interest rate in accordance with the contract. App. 2a.

Respondent sued, alleging that Chase violated Regulation Z by "failing to notify its customers of increases in interest rates on or before the effective date of the change." App. 41a (citing the Second Amended Complaint). Petitioner also advanced state law claims not pertinent here. *See* App. 38a.

The district court decision. Chase removed the action to the United States District Court for the Central District of California, and subsequently moved pursuant to Rule 12(b)(6) to dismiss all claims. App. 37a. As to the Regulation Z claim, Chase contended that the increased rate constituted an implementation of—not a change to—the contractual terms governing the account and set forth in Chase's "initial disclosures," and that the Commentary specifically provided that "[n]o notice of a change in terms need be given if the specific change is set forth initially." Comment ¶ 9(c)-1.

The district court granted Chase's motion to dismiss, agreeing with every other court to have considered the TILA issue at that time, and concluding that no change-in-terms notice was required in connection with "the implementation of terms [that had previously been] explicitly disclosed." App. 42a; *see also Evans* v. *Chase Bank USA, N.A.*, No. C-05-3968 SC, 2006 WL 213740 (N.D. Cal. Jan. 30, 2006); *Penner* v. *Chase Bank USA, N.A.*, No. C-06-5092 FDB, 2006 WL 2192435 (W.D. Wash. Aug. 1, 2006). Respondent appealed.

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

Approximately one year later, after having stayed this case pending a decision in *Evans*, a different panel of the Ninth Circuit decided the appeal herein. The two-judge majority explicitly rejected the *Evans* decision, and reached a contrary result. *See* App. 12a-14a. Judge Cudahy of the United States Court of Appeals for the Seventh Circuit, sitting by designation, dissented. App. 18a-33a.

In reaching its decision, the panel majority acknowledged that Chase had disclosed its default rate terms in its operative "initial disclosures," as 12 C.F.R. § 226.6(a)(2) requires. App. 7a-8a. It also acknowledged that § 226.9(c) requires a change-in-terms disclosure only "[w]henever any term required to be disclosed under § 226.6 is changed." App. 3a. But the panel majority declined to discuss how Regulation Z's language could be read to apply to the implementation, rather than a change, of the rate terms provided in the initial disclosures. The opinion did not conclude that the application of a default rate was occasioned by, or signaled, any change in the terms of the credit agreement between the parties.

The panel majority also gave short shrift to the initial section of the Commentary relating to change-in-terms notices, Comment ¶ 9(c)-1, titled "Change in Terms," whose first sentence states: "No notice of a change in terms need be given if the specific change is set forth initially …." Instead, the panel majority focused on a provision of the Commentary, noted above, that by its terms concerns the timing of change-in-terms notices—Comment ¶ 9(c)(1)-3, titled "*Timing—advance notice not required*." App. 4a-5a. Chase had argued that this provision was not relevant because it dealt only with timing matters, and that Comment ¶ 9(c)-1 made clear that no notice was required to begin with. However, the panel majority held that any increase in a periodic rate resulting from a default, even if implemented pursuant to the terms of the cardholder agreement, requires a "change-in-terms" notice, on the ground that "[t]he plain-meaning of Comment 3 is to require notice when a cardholder's interest rates increase because of a default." App. 4a.

In reaching its conclusion, the panel majority dismissed the fact that, in part based on the Federal Reserve Board's statements in the 2007 ANPR quoted above and other Federal Register notices related to the recent rulemakings, the *Evans* panel and every district court to have decided the issue had reached the opposite conclusion. App. 11a-12a. The panel majority declined to defer to the Board's explanations of its regulation, on the ground that they were "tersely worded 'interpretations' of existing law [that were] incidental to the purpose of the agency action, … stated in conclusory fashion, … themselves ambiguous, and have now been superseded." App. 13a, n.5.

In dissent, Judge Cudahy criticized the majority for failing to defer to the Board's clear explanation of 12 C.F.R. § 226.9(c) in its 2007 rulemaking, and concluded that under existing Supreme Court precedent the Board's opinion regarding the correct interpretation of Regulation Z is entitled to deference, "even if that opinion appears in an ANPR rather than Official Staff Commentary." App. 27a (Cudahy, J., dissenting). Moreover, the dissent would have found that the contractual default rate provision alone gave respondent sufficient notice of the default conditions and rates that could be applied, and that "[t]he interpretation of Regulation Z shared by Chase and the Board … [is] consistent with the purpose of TILA." App. 32a (Cudahy, J., dissenting).

Chase petitioned for panel rehearing and rehearing *en banc*, noting that the Seventh Circuit had issued a decision directly rejecting the panel majority's analysis. *See Swanson* v. *Bank of America, N.A.*, 559 F.3d 653 (7th Cir. 2009), *reh'g denied*, 563 F.3d 634 (7th Cir. 2009). The Ninth Circuit denied the petition. App. 49a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit decision creates an irreconcilable circuit split that undermines the uniform operation of the Truth in Lending Act by threatening to impose substantial liabilities on credit card issuers who have long followed industry practice as authorized by Regulation Z and the Official Staff Commentary. The panel majority misconstrued the Regulation, Commentary, and repeated Federal Reserve Board statements made during a rulemaking on the precise practice at issue in this case. By refusing to accord the Board proper deference, the Ninth Circuit decision injects substantial uncertainty into a highly technical regulatory regime, the very point of which is to standardize disclosure practices, to the detriment of the entire credit card industry.

I. THERE IS AN IRRECONCILABLE CIRCUIT SPLIT

The petition for certiorari should be granted because there is a concrete and irreconcilable split between the Seventh and Ninth Circuits that undermines the uniform application of the Truth in Lending Act.

The Seventh Circuit handed down its *Swanson* decision three days after the Ninth Circuit released *McCoy*, and reached the exact opposite conclusion about Regulation Z's requirements for implementation of default rate provisions specified in the parties' cardholder agreement and initial disclosures. Relying on Comment ¶ 9(c)-1, *Swanson* held that "lenders need not give separate notice before applying pre-authorized rate increases." *Swanson*, 559 F.3d at 656. When the plaintiff in *Swanson* alerted that court to the Ninth Circuit's decision in a petition for rehearing, the Seventh Circuit explicitly and flatly rejected the Ninth Circuit's view that the Comment concerning the *timing* of change-in-terms notices—Comment ¶ 9(c)(1)-3—is somehow relevant to the question of *whether* a change-in-terms notice is required:

> [C]omment 3 addresses when notices that are required by the regulation [as understood in Comment ¶ 9(c)-1] must be sent. Nothing in comment 3, which says that notice need not be 'advance' in defined circumstances, provides that notice is required in the first place.

Swanson, 563 F.3d at 635. The Seventh Circuit also concluded that it was bound by Supreme Court precedent to "honor the [Federal Reserve] Board's commentary on its rules … by taking the Board at its word that [the 2009 rulemaking] makes a real change" when it requires credit card issuers in the future to provide notice of the implementation of default rates. *Id.* at 657.

The decision below directly conflicts with the Seventh Circuit's *Swanson* decision, and the conflict is irreconcilable. Petitions for rehearing were filed by the losing party in each case, alerting each court of the other's decision, and each court has stuck to its original decision. Indeed, in response to the plaintiff's petition for rehearing, the Seventh Circuit issued its second opinion specifically elaborating its grounds, refuting the Ninth Circuit's reasoning in *McCoy*, and pointedly noting agreement with the Ninth Circuit's earlier decision in *Evans*. *Swanson*, 559 F.3d at 635. For its part, the Ninth Circuit, although made aware of both Seventh Circuit opinions in *Swanson*, denied rehearing and rehearing *en banc* in *McCoy*. App. 49a.

This conflict concerns the legality of a significant and universal practice, followed in the industry based on guidance from its statutorily designated regulator, the Federal Reserve Board, and thus potentially affects every credit card account in the nation. The conflict presents a serious problem in the administration of the Truth in Lending Act. The statute was enacted to establish standardized disclosure rules for a nationwide consumer credit market. As this Court noted in *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555 (1980), TILA is a "'highly technical'" regime under which creditors need "sure" rules in order to avoid potentially significant liabilities. *Id.* at 566-567 (quoting S. Rep. No. 93-278, at 13 (1973)). In recognition of this need, the statute itself, and its legislative history, mark a "decided preference" by Congress for resolving interpretive issues arising under the Act and Regulation Z by uniform administrative decision, rather than "piecemeal through litigation," in order to assure "a coherent and predictable body of technical rules" under the statute. *Id.* at 568-569 & n.10.

The circuit split, and the Ninth Circuit's decision to disregard the Federal Reserve Board's 2007 explanation of the existing regulatory requirements, leaves the lower federal courts outside the Ninth and Seventh Circuit uncertain of what standard to apply,[2] and creates important inconsistencies in the treatment of cardholders depending on the federal venue in which a particular suit proceeds. Credit card issuers accounting for the vast bulk of the market operate nationwide programs and are susceptible to suit in any location—potentially leading to the anomaly, for example, that the *McCoy* case, if certified as a nationwide class action, could result in application of the Ninth Circuit rule to Seventh Circuit cardholders.[3]

Further percolation in the lower courts would serve no salutary purpose. No further development of the legal issues by the lower courts is necessary in order to illuminate the controversy, in light of the detailed opinions issued by the Ninth and Seventh Circuits and the clear-cut nature of the matter. Moreover, it is unlikely that, in view of the *McCoy* result, further suits will be initiated outside the Ninth Circuit. In the

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[2] The First Circuit is currently weighing the same TILA issues in a similar litigation against Chase filed by respondent's counsel. That court asked the Federal Reserve Board to submit an amicus brief stating its views, and the Board has stated its intent to file such a brief. Order of Court 2, *Shaner* v. *Chase Bank, USA, N.A.*, No. 09-1157 (1st Cir. filed Aug. 4, 2009); Ltr. from S. Alvarez to Clerk of Court, *Shaner* v. *Chase Bank USA, N.A.*, No. 09-1157 (1st Cir. filed Aug. 25, 2009). Following the *McCoy* panel's refusal to defer to the Board's explanation in its 2007 Federal Register notice, Chase urged the Ninth Circuit likewise to request the Board's views in connection with rehearing but the court denied the rehearing petition without comment. App. 49a.

[3] National banks are federally authorized to charge uniform interest rates to customers across the nation. *Marquette Nat'l Bank* v. *First of Omaha Serv. Corp.*, 439 U.S. 299 (1978).

six months since the Ninth Circuit's decision was issued, similar suits have been filed against credit card issuers representing an estimated 50 percent of the credit card industry—all in the Ninth Circuit.[4]

Moreover, the recent rulemaking that has changed notification procedures going forward as of August 20, 2009, does not moot the legal question whether card issuers should be held liable for damages for conforming to the industry practice that prevailed under the prior regulation. Nor does that rulemaking solve the conflict between the courts of appeals: indeed, the Ninth Circuit refused to defer to the Board's 2007 explanation of the regulatory requirements at issue here, precisely (and wrongly) because it was set forth in the context of explaining that the Board was *changing* the rules.

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[4] *See Anderson* v. *HSBC Bank Nevada*, N.A., No. 09-cv-04271 (C.D. Cal.); *Curran* v. *Chase Bank USA, N.A.*, No. 09-cv-03417 (C.D. Cal.); *Frederick* v. *FIA Card Services, N.A.*, No. 09-cv-03419 (C.D. Cal.); *Grimes* v. *Chase Bank USA, N.A.*, No. 06-cv-00742 (C.D. Cal.); *Kapelner* v. *U.S. Bank Nat'l Ass'n ND*, No. 09-cv-04061 (C.D. Cal.). Before the Ninth Circuit's decision in *McCoy*, counsel for respondent had filed similar suits in the First and Seventh Circuits, as well as the Ninth Circuit, against a number of credit card issuers. In every other case in which there has been a decision on the merits of the Regulation Z issue on dispositive motions, the court has dismissed the case. *See Swanson* v. *Bank of America, N.A.*, 566 F. Supp. 2d 821 (N.D. Ill. 2008), *aff'd*, 559 F.3d 653 (7th Cir. 2009); *Evans* v. *Chase Manhattan Bank USA, N.A.*, No. 05-3968, 2006 WL 213740 (N.D. Cal. Jan. 27, 2006), *aff'd*, 267 Fed. Appx. 692 (9th Cir. 2008); *Shaner* v. *Chase Bank USA, N.A.*, 570 F. Supp. 2d 195 (D. Mass. 2008), *appeal pending*, No. 09-1157 (1st Cir.); *Williams* v. *Washington Mut. Bank*, No. 07-2418, 2008 WL 115097 (E.D. Cal. Jan. 10, 2008), *appeal pending*, No. 08-15296 (9th Cir.); *Penner* v. *Chase Bank USA, N.A.*, No. C06-5092, 2006 WL 2192435 (W.D. Wash. Aug. 1, 2006), *appeal pending*, No. 06-35726 (9th Cir.). *McCoy* is the sole exception.

App. 13a, n.5. Given the universality of the industry practice under challenge, the potential availability of substantial damages under TILA, 15 U.S.C. § 1640(a), and the scope of credit card commerce, extensive litigation over the matter here in conflict is certain to continue absent intervention by this Court. Indeed, in light of the number of accounts at issue in the pending class actions against industry members, and the amount of the finance charges at issue, the damages sought by plaintiffs if the *McCoy* rule is allowed to become the *de facto* standard despite the circuit conflict, are sure to be very substantial.

II. THE DECISION BELOW IS WRONG

The petition should also be granted because the panel majority below fundamentally misinterpreted Regulation Z and the Commentary on an important matter and refused to accord the Board's own statements their proper meaning and deference.

A. The Ninth Circuit Ignored The Text Of The Regulation And Accompanying Official Staff Commentary

The Ninth Circuit panel majority ignored the plain text of the regulation at issue, which requires a change-in-terms notice when the parties' contract obligations are *changed*, not when they are *implemented* in accordance with their existing disclosed terms. Section 226.9(c) requires a change-in-terms notice "[w]henever any term required to be disclosed under § 226.6 is changed." 12 C.F.R. § 226.9(c)(1). Section 226.6 in turn requires disclosure of "each periodic rate that may be used to compute the finance charge." *Id.* § 226.6(a)(2). For example, it requires disclosure of all floating rate terms (*see* Comment ¶ 6(a)(2)-2) and default rate terms (*id.* ¶ 6(a)(2)-11), that *may* be applied to the account, including rates not being applied to account balances in present circumstances. When circumstances change—for example, market index rates increase, or the cardholder defaults—implementation of the floating or default rates "initially disclosed" under § 226.6(a)(2) may bring different rates to bear on unpaid balances carried on the account, without any change of the contractual terms governing the account. Because the circumstances bringing these rates to bear do not constitute a change in the already disclosed contractual terms of the account, but rather an implementation of those terms, there is no "change in terms" to disclose. Nothing in § 226.9(c) states that a new disclosure notice is due when "term[s] required to be disclosed under § 226.6" are implemented in accordance with the "initial disclosures" of the parties' agreement.

On the contrary, as the Regulation and Commentary state, § 226.6 "initial disclosures" are to "reflect the terms of the legal obligation between the parties," 12 C.F.R. § 226.5(c), which "is presumed to be contained in the contract," Comment ¶ 5(c)-1—that is, the cardholder agreement. The implementation of the default rate provision contained in the cardholder agreement, and already set forth in the "initial disclosures" of all rates that "may" apply to the account, as § 226.6(a)(2) requires, does not constitute an amendment of "the terms of the legal obligation between the parties" as set forth in the cardholder agreement. Accordingly, no change-in-terms notice was required by § 226.9(c).

The key Commentary provision addressing change-in-terms notices itself states that "No notice of a change in terms need be given if the specific change is set forth initially"—that is, in the "initial disclosures." Comment ¶ 9(c)-1. Chase did set forth its default rate terms initially, just as the Commentary envisions. The cardholder agreement "disclose[d] the specific event or events" of default "that may result in the increased rate," and also disclosed the specific "increased penalty rate that may apply" in the event of such defaults. Comment ¶ 6(a)-11.[5] The Commentary says, as an illustrative example, that no change-in-terms notice is required for "an increase that occurs when the consumer has been under an agreement to maintain a certain balance in a savings account in order to keep a particular rate and the account balance falls below the specified minimum." *Id.* Similarly here, in the case of a default rate term, where an increase occurs because the consumer has been under an agreement to pay on time in order to keep what Chase refers to as "Preferred Rates," and the consumer fails to do so, no change-in-

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[5] The panel majority concluded that Chase's default rate provision was "like" a general reservation of rights to amend the cardholder agreement in the sense that Chase retained a certain degree of discretion to charge *less* than the rate specified by the agreement. App. 8a-9a. But respondent himself acknowledged that he "did receive a rate increase to the maximum." Appellant's Opening Br. 30, *McCoy* v. *Chase Manhattan Bank USA, N.A.*, No. 06-56278 (9th Cir. filed May 30, 2008). Regardless, Chase did not have the power to increase rates as a matter of discretion, because the invocation of default rates was limited to specific circumstances, and the maximum default rate was specified. The panel did not conclude that Chase's implementation of its default rate terms involved any modification to the cardholder agreement, or that any exercise of grace by the bank to charge rates lower than allowed would constitute the equivalent of a contract amendment under the state statutes and contract principles applicable to credit card agreements. Finally, § 226.9(c)(2) is explicit that no change-in-terms notice is required for "a reduction of any component of a finance or any other charge."

terms notice is required because the rates applicable in the case of such defaults have been "set forth initially."

The panel majority's holding was, for these reasons, contrary to the plain language of the Regulation and Commentary that prescribes when change-in-terms notifications are required by TILA. Comment ¶ 9(c)(1)-3, on which the panel majority relied for its contrary conclusion (App. 4a-5a), is off point: It addresses timing of a change-in-terms notice, if one is due; it does not address whether a change-in-terms notice is required in the first place. Comment ¶ 9(c)(1)-3 is subordinate in the structure of the Commentary to Comment ¶ 9(c)-1, discussed above, which states that no change-in-terms notice is required for matters covered in the "initial disclosures." The subject of Comment ¶ 9(c)(1)-3 is expressly limited to matters of timing, as reflected by its title: "*3. Timing—advance notice not required*." The Comment thus says that if a change-in-terms notice is due as a result of "an increased periodic rate … attributable to the consumer's delinquency or default"—*i.e.*, if the card issuer has invoked its general reservation of rights to amend the existing terms of the card agreement as a response to a consumer's delinquency—then the requisite change-in-terms notice can be provided contemporaneously with the effective date of the contract modification rather than the normal 15 days in advance. Nothing in the title, text, or structure of Comment ¶ 9(c)(1)-3 indicates that its meaning is any more than this. Nothing in the provision states specifically, or implies, that it should be read to supersede the general directive of the regulation itself, or of Comment ¶ 9(c)-1, that a change-in-terms notice is required only when the terms of the contractual obligations already disclosed in the "initial disclosures" have changed.

B. The Ninth Circuit Improperly Discarded The Federal Reserve Board's Statements That Change-In-Terms Notices Were Not Required For Implementation Of Default Rates

The *McCoy* panel majority forthrightly—and wrongly—refused to defer to the Federal Reserve Board's explanations of its regulatory requirements, set forth in Federal Register rulemaking statements. *See* App. 13a, n.5. The Board's statements addressed the precise issue in controversy here, saying that, under existing regulatory requirements, a credit card issuer "need not provide a change in terms notice" upon the implementation of a default rate "[b]ecause the circumstances of the increase are specified in advance in the account agreement." 72 Fed. Reg. at 33,009. Nevertheless, the panel majority discarded the Board's interpretations, saying that "we defer to the FRB's Official Staff Commentary, not incidental descriptions of current law contained in an [Advance Notice of Proposed Rulemaking]." App. 13a n.5. The panel majority's refusal to defer to the Board's officially published interpretation of its own regulatory requirements, in the course of its rulemakings, was a profound departure from established principles, undermining the Board's continuing authority and ability to carry out its regulatory mission. This Court should grant certiorari to correct that departure.

That the Board's Federal Register notices were specifically directed to the issue at hand, and that they stated the Board's considered views, are not seriously in question. Beginning in 2004, the Board addressed whether, as a matter of policy, it should require credit card issuers to provide notice to cardholders advising them when a default rate term is implemented. The consideration and adoption of such a disclosure obligation obviously begins with the question whether such a disclosure was already required by the existing change-in-terms requirements. The Board's Advance Notice of Proposed Rulemaking, issued in 2007, addressed this starting point. The Board stated that a new regulation would be necessary in order to require such a disclosure, because no notice was required under Regulation Z as it existed:

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

72 Fed. Reg. at 33,009.[6] Instead, as the Board continued, "under current § 226.7(d) the new rate will appear on the periodic statement for the cycle in which the increase occurs."

The Board was concerned, as a policy matter, however, that disclosure of the implementation of a default rate solely through billing statements should be supplemented, since billing statement disclosure was in-

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[6] In parallel rulemaking under Regulation AA concerning unfair and deceptive practices, the Federal Reserve Board similarly stated: "Prior to the Regulation Z amendments published elsewhere … no change-in-terms notice was required if the creditor set forth the specific change in the account-opening disclosures." 74 Fed. Reg. 5,498, 5,520-5,521 (Jan. 29, 2009).

herently retrospective in nature. *See* 72 Fed. Reg. at 32,957 (explaining that because under current rules "creditors need not inform consumers in advance if the rate applicable to their account increases due to default or delinquency," cardholders may not realize "until they receive their monthly statement for a billing cycle that their late payment triggered application of the higher default rate, effective the first day of the month's statement"); 74 Fed. Reg. 5,244, 5,253 (Jan. 29, 2009) (same). Ultimately, the Board did decide to adopt a new regulatory requirement, to apply prospectively, beginning with an effective date 18 months later in 2010, obligating card issuers to provide a new notice in advance of implementing default rates. 74 Fed. Reg. at 5253. Notably, the disclosure obligation is lodged in a new subsection—12 C.F.R. § 226.9(g)—because, as explained above, the implementation of a default rate does not come within the "change-in-terms" rule, *id.* § 226.9(c).[7]

[7] The Board's Federal Register statements in connection with the Credit CARD Act regulations following the Ninth Circuit's decision, reiterate the point. *E.g.*, 74 Fed. Reg. at 36,082-36,083 n.13 ("The distinction between these types of changes is that § 226.9(g) addresses changes in a rate being applied to a consumer's account consistent with the existing terms of the cardholder agreement, while § 226.9(c) addresses changes in the underlying terms of the agreement."); *id.* at 36,083 (noting that in the January 2009 amendments, the Federal Reserve had intended § 226.9(g) "to complement § 226.9(c)" by imposing parallel disclosure requirements concerning implementation of default rates pursuant to existing contract even though they did not involve "changes in the terms of the consumer's account agreement"); *id.* at 36,084 (emphasizing that "increases in applicable annual percentage rates due to application of existing provisions in the cardholder agreement" are covered by the new provision, § 226.9(g), while § 226.9(c) applies only to "changes in contract terms").

The panel majority's refusal to respect the Board's interpretation of its own regulatory requirements was wrong. An agency's ability to render authoritative interpretations of its own regulations is a necessary adjunct of its delegated authority to promulgate applicable regulations in the first instance. *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991) ("Because applying an agency regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, [the courts] presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." (citing *Milhollin*, 444 U.S. at 567-568)). Where an agency has interpreted its regulation, a court's responsibility is not to decide *de novo* "which among several competing interpretations best serves the regulatory purpose," but rather to defer to the agency's judgment unless it is plainly erroneous or inconsistent with the regulation. *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (citing *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)). In TILA cases specifically, this Court has accorded weight to a proposed interpretation of Regulation Z and comments made by the Board in Federal Register preambles in interpreting statutory terms. *See Anderson Bros. Ford* v. *Valencia*, 452 U.S. 205 (1981).

The panel majority did not identify any reason that could justify its refusal to respect the Board's interpretation of its own regulation. The panel majority did not contend that there was any regard in which the Board's interpretation was inconsistent with the regulation itself, such that it should be denied deference on "plain language" grounds. The opinion refers to the Board's statements as "tersely worded" (App. 13a, n.5), but that characterization, if intended as a criticism, was misaimed. The Board's interpretive statements, as quoted above, were explicit; directly on point; covered the question at issue; and were more extensive, focused, and definitive, in addressing that issue, than the Official Staff Commentary itself. Nor did the Ninth Circuit have any reason to "suspect," despite an insinuation that it did (*see id.*), that the Board's (repeatedly) stated interpretation of § 226.9(c) failed to represent its "considered" views. *See Auer* v. *Robbins*, 519 U.S. 452, 462 (1997). To the contrary, the Board's interpretations were issued as explanations, repeated over several years, in formal, notice-and-comment rulemaking preambles published in the Federal Register, and specifically advanced by the Board as a significant part of the required justification for its decision to adopt the new regulatory provision § 226.9(g).[8]

Finally there is nothing ambiguous about what the Board meant in its interpretation, when it said that under § 226.9(c) "no change in terms is required" when a card issuer raises the applicable rates based on default rate "agreements [that] permit the card issuer to increase the periodic rate if the cardholder makes a late payment." 72 Fed. Reg. at 33,009. The Board's words, and its reasoning that it would need to add new § 226.9(g) if it chose to impose a disclosure obligation

[8] Providing such an explanation was an official, appropriate and necessary aspect of its rulemaking. This Court previously has explained that when an agency is changing a previously announced rule, "the requirement that an agency provide reasoned explanation for its action … ordinarily demand[s] that it display awareness that it is changing position … . And of course the agency must show that there are good reasons for the new policy." *FCC* v. *Fox Tel. Stations, Inc.*, 129 S. Ct. 1800, 1810-1811 (2009).

for implementation of a default rate, are, as Judge Cudahy's dissent put it, "more than clear." App. 26a (Cudahy, J., dissenting).[9] The panel majority's opinion cites a different passage from the same Federal Register notice, but it is neither inconsistent nor ambiguity-creating. *See* App. 10a-11a. The cited passage said that the Board was proposing to:

> Add § 226.9(g)(1) to require creditors to provide 45 days advance notice when a rate is increased due to a consumer's delinquency or default, or if a rate is increased as a penalty for one or more events specified in the account agreement, such as a late payment or an extension of credit that exceeds the credit limit. This notice would be required even if, as is currently the case, the creditor specifies the penalty rate and the specific events that may trigger the penalty rate in the account-opening disclosures.

72 Fed. Reg. at 33,012. The panel opinion conceived that the phrase "currently the case" in this passage

[9] The panel majority opinion, referring to the Board's interpretation at 72 Fed. Reg. 33,009 (quoted in text above), says that "the term 'change-in-terms notice' could, as Chase argues, refer to contemporaneous notice required for changes in interest rates, but might instead refer only to the fifteen days' advance notice required for changes in contractual terms." App. 10a. It is difficult to understand this passage from the opinion, but the panel majority may have thought that § 226.9(c) established two different kinds of change-in-terms notices, and that the Board's interpretation applied only to a § 226.9(c) change-in-terms notice of the kind due 15 days in advance of a change in the cardholder agreement. In fact, § 226.9(c) only provides for one kind of change-in-terms notice, and the panel majority's statement makes no sense of either the regulation or the Board's interpretation of it.

could be a reference to disclosure requirements "currently the case" under § 226.9(c). But that is very plainly wrong: the passage is explicit that it is discussing proposed § 226.9(g), and the reference to what is "currently the case" is a reference to the card issuer practice of including a default rate provision in cardholder agreements and initial disclosures, *not* current regulatory requirements under § 226.9(c).

Whether or not the court of appeals agreed with the Board's pre-2009 policy choices, it was obligated to defer to them. *Milhollin*, 444 U.S. at 567-569. Its refusal to do so in *McCoy* seriously undermines the Board's role and creditors' ability to rely on the Board's pronouncements. Creditors depend on every piece of published guidance from the Board because, in order to lend, they must make the necessary disclosures, and in order to make those disclosures they must have "a coherent and predictable body of technical rules" on which to rely. *Id.* at 568-569 & n.10. It is the prerogative of the Board (and Congress) to change Regulation Z when policy judgments based on empirical investigations and other developments suggest that a different disclosure rule may provide more "meaningful disclosures" to consumers in order to effectuate the overall goals of TILA. *Id.* at 568-569. That is precisely what happened in the 2009 statutory and regulatory amendments. But it is not appropriate for the lower courts to mandate such changes by retrospectively interpreting the Regulation to conflict with the Board's own definitive interpretations. *See id.* at 568 ("[J]udges ought to refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter's lawmaking is not irrational.").

The Ninth Circuit's decision is not only palpably wrong as a matter of substance, and importantly in conflict with the Seventh Circuit; it also threatens the Board's authority and, as a result, the needed certainty of uniform administrative guidance under TILA. The decision should not be allowed to stand in light of this Court's clear directive that Board interpretations of Regulation Z should be dispositive unless demonstrably irrational. *Milhollin*, 444 U.S. at 566.

CONCLUSION

For the foregoing reasons, the petition should be granted and the Ninth Circuit decision reversed.

Respectfully submitted.

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SEPTEMBER 2009

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES A. MCCOY, on behalf of himself
and all others similarly situated,
Plaintiff-Appellant,
v.

CHASE MANHATTAN BANK, USA,
National Association,
Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Argued and Submitted
November 21, 2008—Pasadena, California
Filed March 16, 2009

No. 06-56278
D.C. No. CV-06-00107-JVS

OPINION

Before: RICHARD D. CUDAHY,* HARRY PREGERSON, and HAWKINS, Circuit Judges.

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* The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

Opinion by Judge HAWKINS; Dissent by Judge CUDAHY.

HAWKINS, Circuit Judge:

This case presents the question of whether the notice requirements of the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1615 and Regulation Z, 12 C.F.R. § 226, as interpreted by the Federal Reserve Board's Official Staff Commentary, apply to discretionary interest rate increases that occur because of consumer default. We hold that Regulation Z requires a creditor to provide contemporaneous notice of such rate increases.

FACTUAL AND PROCEDURAL BACKGROUND

James A. McCoy ("McCoy") brought this action on behalf of himself and others similarly situated against Chase Manhattan Bank, USA, N.A. ("Chase"), a national bank located in Delaware. McCoy alleges that Chase increased his interest rates retroactively to the beginning of his payment cycle after his account was closed to new transactions as a result of a late payment to Chase or another creditor. McCoy claims that the rate increase violated TILA and Delaware law because Chase gave no notice of the increase until the following periodic statement, after it had already taken effect. The district court dismissed McCoy's complaint with prejudice, holding that because Chase discloses the highest rate that could apply due to McCoy's default in its cardmember agreement with McCoy ("Cardmember Agreement"), no notice was required.

JURISDICTION AND STANDARD OF REVIEW

We have appellate jurisdiction pursuant to 28 U.S.C. § 1291 and review dismissals for failure to state a claim de novo. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

DISCUSSION

Federal TILA Claim

Congress enacted 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 to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. § 1601(a). Regulation Z, adopted by the Federal Reserve Board to implement TILA, addresses when and how notice of changes in terms must be given:

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

12 C.F.R. § 226.9(c)(1). Section 226.6 requires that a creditor disclose *inter alia* "each periodic rate that may be used to compute the finance charge." 12 C.F.R. § 226.9(a)(2).

The parties dispute the meaning of the phrase "any term required to be disclosed under § 226.6." Chase argues that the phrase applies only to the contractual terms of Chase's Card-member Agreement. McCoy suggests the phrase also applies to the list of specific "items" § 226.6(a)(2) requires be disclosed, which includes the interest rate that may be used.

Although we find McCoy's interpretation more natural, we acknowledge that the text of Regulation Z is ambiguous.

We defer to an agency interpretation of its own ambiguous regulation provided it is not "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)). We do not "permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation." *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

Chase argues that the Federal Reserve Board ("FRB")'s Official Staff Commentary interprets Regulation Z to require no notice in this case. We disagree.

Comment 3 is the most salient Official Staff Commentary to § 226.9(c)(1) and, when describing the amount of notice required for different kinds of changes, provides that "a notice of change in terms is required, but 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." § 226.9(c)(1), cmt. 3. The plain-meaning of Comment 3 is 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. Under Comment 3, McCoy has stated a claim.

Chase argues that because Comment 3 repeats language from Regulation Z, a different portion of the Official Staff Commentary, Comment 1, should govern instead. Comment 3's specific reference to interest rate increases attributable to the consumer's delinquency or default is directly on point and therefore governs. Even if we decided that Comment 1, despite preceding Comment 3, could somehow be interpreted as an exception to it, we would still hold that Comment 1 does not dispel Chase's obligation to notify its account holders of discretionary rate increases.

Comment 1 to § 226.9(c)(1) describes the circumstances in which Regulation Z requires no notice of a change in terms:

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

12 C.F.R. § 226.9(c), cmt. 1 (emphasis added).

The effect of Comment 1, assuming arguendo it applies, depends on how the phrase "specific" is defined. McCoy argues that the "specific change is set forth initially" and the "specific terms for an increase" are included in a contract when the contract gives consumers the information they need in order to know what interest rate they will be charged and under what conditions. Chase argues that any agreement that specifies the *possibility* of an interest rate increase if the cardholder defaults and establishes any boundaries on the potential amount of the increase adequately "sets forth" a "specific change."

McCoy's reading of Comment 1's use of the word "specific" is reinforced by the three examples Comment 1 includes of rate increases for which notice is *not* required. The first example is "rate increases under a properly disclosed variable-rate plan." *Id.* Variable rate plans specify that the interest rate will fluctuate in direct correspondence with an externally determined variable rate such as, for example, the Federal Prime rate. Providing additional notice of the interest rate charged under a variable rate plan would be redundant because variations in the interest rate are not discretionary, and the method for computing the interest rate based on the Federal Prime rate is fully specified in advance. Creditors in that circumstance need not provide additional notice because consumers can predict their precise interest rate according to a formula.

The second example in Comment 1 is "a rate increase that occurs when an employee has been under a preferential rate agreement and terminates employment." *Id.* Again, the notice of such a rate increase would be redundant because it "occurs" whenever the employee terminates employment. Nothing suggests the creditor possesses any discretion over whether to increase the rates or by how much to do so once the event triggering a higher rate occurs.

The third example is "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." *Id.* Again, the use of the word "occurs" rather than the phrase "may occur" suggests that additional notice would be redundant because the increase is non-discretionary.[10] All three examples pertain to rate increases that are spelled out in cardmember agreements and ascertainable by the consumer without additional notice.

In contrast to these examples, the increase here occurs at Chase's discretion and the most pertinent "specific terms for an increase"-the actual amount of the increase and whether it will occur-are not disclosed in advance. The Cardmember Agreement states that Chase "may" change McCoy's interest rate and impose a non-preferred rate "up to" the maximum rate described in the pricing schedule. The agreement further states that McCoy's account "may" lose its preferred rates if he defaults. Although the agreement defines what constitutes a "default" triggering Chase's ability to exercise this discretion, a default is only one of the conditions required for an increase; it may be neces-

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[10] Although the dissent argues for an alternative view of these examples, we do not believe it is reading too much into the Board's description of "an increase that occurs" when specified criteria are met to conclude that the phrase refers to automatic increases. By declining to read the word "may" into the Board's language, we choose the more natural reading of the examples, if not the only conceivable one.

sary, but apparently it is not sufficient. Chase outlines several other criteria it "may" obtain and use to review McCoy's account "for the purposes of determining its eligibility for Preferred rates," including McCoy's consumer credit reports, his payment history and level of utilization over the life of his account, and his other relationships with Chase and its affiliates.

Chase does not disclose to McCoy how it may use this information and provides McCoy with no basis for predicting in advance what retroactive interest rate Chase will choose to charge him if he defaults. Under the agreement, when McCoy defaults, he will not know whether his rate will stay the same, increase slightly, or rise to the maximum default rate until he receives his next periodic statement listing the new rate. Worse yet, this new rate would then apply retroactively.

Chase argues that the terms for an increase are adequately specified because the concept of a "default" is defined and because consumers are aware of the maximum rate they might pay in the "worst case scenario." It further argues that the discretionary increase that may occur when a consumer defaults can be reconceptualized as an automatic increase, followed by a discretionary reduction in rates. The district court accepted this line of reasoning, concluding that a "decision not to increase a rate is analytically indistinct from a decision to lower a rate."

This argument proves too much because it would apply equally to Comment 1's example of when contemporaneous notice *is* required. Comment 1 specifically explains 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. § 226.9(c), cmt. 1. Like a "reservation right to increase the periodic rate," the contract provision authorizing Chase to increase a defaulted consumer's interest rate up to the maximum default rate at its discretion does not give the cardholder sufficient information to know what rate will apply and therefore requires the creditor to provide notice. Chase's "contract allows the creditor to increase the rate at its discretion," § 226.9(c), cmt. 1, and does not specify the relevant terms, including the conditions that are necessary and sufficient for an increase to occur and the actual amount of the increase that will occur. Chase's agreement not to increase the interest rate higher than a preset, double-digit maximum does not materially distinguish its Cardmember Agreement from a contract reservation right to increase the periodic rate. An interpretation of Comment 1 as eliminating Regulation Z's notice requirement even where consumers do not have sufficient information to determine whether their interest rate will be raised, or by how much, dilutes the meaning of the word "specific" beyond recognition.

Chase argues that we must nevertheless interpret Regulation Z to require no notice in this case because we must defer to a now-superceded Advance Notice of Proposed Rule-making,[11] promulgated for public comment by the Federal Reserve in 2007, which briefly characterizes existing law in the process of explaining a proposal to amend Regulation Z to increase the amount of notice for interest rate increases to forty-five days in

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[11] This 2007 ANPR has been superceded by a final rule amending Regulation Z to require forty-five days' notice for rate increases effective July 1, 2010. Truth in Lending, 74 Fed. Reg. 5244 (Jan. 29, 2009) (to be codified at 12 C.F.R. § 226.9(g)(1)).

most cases. Truth in Lending, 72 Fed. Reg. 32948-01, 33009 (proposed June 14, 2007) ("2007 ANPR").

Consideration of the 2007 ANPR does not lead us to change our interpretation of the FRB's Official Staff Commentary. Chase observes that the 2007 ANPR includes as an example of when a "change-in-terms notice" is not required, "some credit card account agreements [that] permit the card issuer to increase the periodic rate if the consumer makes a late payment," noting that "[b]ecause the circumstances of the increase are specified in advance in the account agreement, the creditor currently need not provide a change-in-terms notice; under current § 226.7(d) the new rate will appear on the periodic statement for the cycle in which the increase occurs." 72 Fed. Reg. 33009. The effect of this language is ambiguous, however, because the term "change-in-terms notice" could, as Chase argues, refer to contemporaneous notice required for changes in interest rates, but might instead refer only to the fifteen days' advance notice required for changes in contractual terms.[12]

The 2007 ANPR also contains language suggesting it "is currently the case" that notice *is* required even if "the creditor specifies the penalty rate and the specific events that may trigger the penalty rate in the account-

[12] A slightly less terse, but substantively identical, provision in a 2004 ANPR suggests that the latter is more likely, stating that where the circumstances of an increase are specified in advance, "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. 70925-01, 70931-32 (proposed Dec. 8, 2004) (emphasis added).

opening disclosures." 72 Fed. Reg. 33012. The FRB reaffirmed this view in the "Supplementary Information" published by the FRB along with the final rule amending Regulation Z. In any case, FRB chose to remove the ambiguous language entirely when it issued a Final Rule and Supplementary Information amending Regulation Z in 2009. Truth in Lending, 74 Fed. Reg. 5244, 5350-03 (Jan. 29, 2009). Both the older ANPR and the recently approved statement of the FRB's views clearly state it "is currently the case" under Comments 1 and 3 that contemporaneous notice of default-based rate increases is required even where the "creditor specifies the penalty rate and the specific events that may trigger the penalty rate in the account-opening disclosures." *Id.*

Therefore, while language scattered throughout the 2007 ANPR offers some support for each view of the Official Commentary, the ANPR does not clearly weigh in favor of either interpretation of Regulation Z. This ambiguity is not surprising because the primary purpose of the 2007 ANPR (and the 2004 ANPR that preceded it) was to announce proposed amendments to Regulation Z and solicit comment, not to offer additional staff commentary on Regulation Z's current requirements.

As the dissent notes, although no binding authority has addressed this question,[13] several district court

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[13] This case is not governed by *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114 (9th Cir. 2009), which interpreted 12 C.F.R. § 226.6(a) to allow a promotional interest rate to be discontinued due to a late payment made prior to undertaking a balance transfer agreement. The plaintiff in *Hauk* did not appear to allege that the interest rate increase violated TILA because it was a discretionary interest rate increase undertaken without contempora-

opinions and one unpublished memorandum disposition in this circuit have accepted Chase's view. *See, e.g.*, *Evans v. Chase Bank USA, N.A.*, 267 Fed. Appx. 692, 693 (9th Cir. 2008) (unpublished disposition); *Swanson v. Bank of America*, 566 F. Supp. 2d 821 (N.D. Ill. 2008); *Williams v. Wash. Mut. Bank*, 2008 WL 115097, 2008 U.S. Dist. LEXIS 5325 (E.D. Cal. Jan. 10, 2008); *Shaner v. Chase Bank, USA, N.A.*, 570 F. Supp. 2d 195, 200 (D. Mass. 2008); *Evans v. Chase Manhattan Bank USA, N.A.*, 2006 U.S. Dist. LEXIS 5259 (N.D. Cal. Jan. 27, 2006). Most of these decisions cite the district court's analysis in *Evans*, which held that Chase set out the "specific terms for an increase" because "Chase gives the reasons for its rate changes." *Evans*, 2006 U.S. Dist. LEXIS 5259, at *7-8. In *Evans*, the district court apparently labored under the misconception that Comment 3 precedes Comment 1 and therefore did not apply where the conditions specified in Comment 1 are met. *See id.* at *6 (citing Comment 3 and then asserting that "[t]he Commentary goes on to state, however, that '[n]o notice of a change in terms need be given if the specific change is set forth initially,' ") (quoting Comment 1). Possibly for the same reason, most of these courts did not even discuss Comment 3 and none attended to the 2007 ANPR's internal ambiguities or considered what kind of deference, if any, is owed to an agency's characterizations of existing law when they

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neous notice. Consequently, *Hauk* rested its holding on the irrelevance under TILA of a creditor's "undisclosed intent to act inconsistent with its disclosures," *id.* at 1122, and did not address whether § 226.9, as interpreted by Comment 1 or Comment 3, requires contemporaneous notice for such increases.

are incidental to the purpose of an agency publication.[14] Our own consideration of the FRB's Official Staff Commentary, unofficial ANPRs, and the Supplementary Information accompanying its recent amendment of Regulation Z leaves us firmly convinced of the FRB's

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[14] The relevance of the 2007 ANPR was limited even before it was superceded because we defer to the FRB's Official Staff Commentary, not incidental descriptions of current law contained in an ANPR. The FRB has prescribed the Official Staff Commentary as "the vehicle by which the staff of the [FRB] issues official staff interpretations of Regulation Z." 12 C.F.R. Part 226, Supp. I, para. 1; *see also Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566, 568 (1980) (distinguishing the deference owed to Board and official staff interpretations from that owed to unofficial interpretations). Although Chase may, at a later stage of litigation, assert a statutory "good-faith" defense under 15 U.S.C. § 1640(f) for acting in conformity with an FRB interpretation promulgated "under such procedures as the Board may prescribe," the defense is only available for actions based on the Official Staff Commentary, not on such incidental interpretations appearing in an ANPR, particularly one that was promulgated after this suit was filed and could not have been relied upon when Chase acted.

Auer, 519 U.S. at 462, would not require any greater showing of deference. In *Auer*, the court deferred to an interpretation of a rule contained in an agency's legal brief that was directed specifically to the "matter in question." *Id.* at 462; *see also Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 213, 217 (1981) (characterizing a proposed ruling merely as "persuasive authority" not "wholly without significance," even though it was directly on the matter in question).

Here, the 2007 ANPR's tersely worded "interpretations" of existing law are incidental to the purpose of the agency action, are stated in conclusory fashion, are themselves ambiguous, and have now been superceded. Therefore, unlike in *Auer*, we do have "reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462. Consequently, we interpret the FRB's Official Staff Commentary directly.

intent to require contemporaneous notice when rates are raised because of a consumer's delinquency or default, as McCoy alleges occurred in this case.

State Law Claims

In his second, third, and fourth causes of action, McCoy claims that Chase's practice of retroactively raising interest rates after a consumer defaults is unconscionable and that he is therefore entitled to declaratory relief, reformation, and damages for imposing an illegal penalty. The district court correctly noted that these causes of action are foreclosed *if* Delaware law specifically authorizes the practice because, pursuant to the National Bank Act, 12 U.S.C. § 85, Delaware law governs what interest Chase may charge and the methodology used to determine that interest rate.

We reverse the dismissal of these claims, however, because the Delaware Banking Act authorizes rates of interest that "vary in accordance with a schedule or formula." 5 Del. C. § 944. As the district court noted, a permissible schedule or formula may include a provision for a change in the "rates of interest applicable to all or any part of outstanding unpaid indebtedness ... contingent upon the happening of any event or circumstance specified in the plan," including a default. *Id.* Section 944 therefore would clearly authorize a "schedule or formula" that specified a higher interest rate that would automatically apply in the event of default. However, the language of § 944 does not appear to authorize rate increases that are discretionary and vary according to criteria in addition to the consumer's default where those criteria are not specified in a schedule or formula contained in the agreement.

Absent binding Delaware court decisions construing the terms "schedule," "formula," or "contingent upon" in § 944, our task is to "predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance." *Arizona Elec. Power Coop., Inc. v. Berkeley*, 59 F.3d 988, 991 (9th Cir. 1995) (quoting *In re Kirkland*, 915 F.2d 1236, 1239 (9th Cir. 1990)). In this case, however, only federal district courts have construed § 944 and not one has adequately addressed the importance of the discretionary nature of the increases or whether such increases are really "in accordance with a schedule or formula." *See, e.g.*, *Swanson v. Bank of Am., N.A.*, 566 F. Supp. 2d 821, 829 (N.D. Ill. 2008) ("By describing the events which cause the rate increase to occur, Defendant has complied with Section 944."); *Evans v. Chase Manhattan Bank USA, N.A.*, 2006 U.S. Dist. LEXIS 5259, at *12 (N.D. Cal. Jan. 27, 2006) (concluding an agreement complied with § 944 because it described "what events will cause default rates to go into effect").

These interpretations of § 944 neglect to consider fully whether rate increases truly are "contingent upon" a default and in "accordance with a schedule or formula" where they are discretionary and can result in a range of interest rates depending on undisclosed criteria beyond the occurrence of a default. A close analysis of the Cardmember Agreement reveals that it does not describe the specific events that "*will* cause default rates to go into effect," *Evans*, 2006 U.S. Dist. LEXIS 5259, at *12 (emphasis added), but only those that *may* do so. It also fails to disclose how much Chase will actually increase rates should it choose to do so. As a result, we hold that the rate increases McCoy faced under the Cardmember Agreement were not authorized by § 944 because no "schedule or formula" contained in the agreement revealed whether the increases would occur or how large they would actually be.

Having held that the contract provision authorizing discretionary interest rate increases is not authorized by § 944, we conclude that McCoy has made out a colorable claim that the provision may also be "unconscionable" under Delaware law and he should "be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making its determination." 6 Del. C. § 2-302; *see also Evans*, 2006 U.S. Dist. LEXIS 5259, at *12 (noting that absent authorization under § 944, "Plaintiffs' unconscionability contention may have had some weight").

Any increased interest charge stemming from a default that occurs retroactively functions as "damages paid in the event of a breach," not compensation for the increased risk of non-collection, because McCoy would still owe that retroactively imposed additional charge even if he paid Chase his entire balance the moment after he defaulted. For these reasons, we reverse the dismissal of McCoy's second, third, and fourth causes of action.

McCoy's fifth cause of action alleges Chase committed consumer fraud by failing to provide notice of an increase in interest. Delaware's consumer fraud statute, 6 Del. C. § 2513(a), prohibits:

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person

> has in fact been misled, deceived or damaged thereby, is an unlawful practice.

This allegation fails to state a claim for consumer fraud under § 2513(a) because Chase openly and expressly notifies cardholders of the actions it reserves the right to take in the event of a default. Although Chase may have failed to fulfill its obligations under federal and Delaware law, McCoy has not alleged facts to support a finding that it concealed or misrepresented the possibility that it might raise rates without notice when a consumer defaulted. We affirm the dismissal of McCoy's fifth claim for relief.

McCoy's sixth and seventh causes of action allege claims for breach of contract and tortious breach of the implied covenant of good faith and fair dealing. The Cardmember Agreement states that Chase would "notify [McCoy] of any change if required by applicable law." Given the requirements under TILA and Delaware law discussed above, while McCoy clearly has stated a claim that Chase breached this explicit contractual provision,[15] he cannot state an implied duty of good faith claim because "where the subject at issue is expressly covered by the contract, or where the contract is intentionally silent as to that subject, the implied duty to perform in good faith does not come into play." *Dave Greytak Enters., Inc. v. Mazda Motors of Am., Inc.*, 622 A.2d 14, 23 (Del. Ch. 1992). Conse-

[15] Chase's citation to the pre-existing legal duty doctrine is inapposite because a contractual promise to comply with preexisting federal legal obligation is enforceable, *Island Ins. Co. v. Hawaiian Foliage & Landscape, Inc.*, 288 F.3d 1161, 1167 (9th Cir. 2002), provided the contract is supported by independent consideration, *Rossdeutscher v. Viacom, Inc.*, 768 A.2d 8, 21 (Del. 2001).

quently, we reverse the dismissal of the sixth cause of action and affirm the dismissal of the seventh.

CONCLUSION

Under Regulation Z as interpreted by its Official Staff Commentary, McCoy has stated a TILA claim if Chase failed to give him notice of an interest rate increase "because of the consumer's delinquency or default" or if his contract with Chase "allows the creditor to increase the rate at its discretion but does not include the specific terms for an increase." 12 C.F.R. § 226.9(c)(1); *Id.*, cmt. 3; *Id.*, cmt. 1. Having concluded that McCoy has stated a claim under either standard, we reverse and remand to the district court. We affirm the dismissal of McCoy's fifth and seventh causes of action, but reverse the dismissal of McCoy's other state law claims.

AFFIRMED IN PART AND REVERSED IN PART. Costs on appeal to Appellant.

CUDAHY, Circuit Judge, dissenting:

Before addressing the myriad arguments made by the majority, I think it would be helpful to put matters in context—view the "big picture." The claims made by Mr. McCoy have been raised in many other forums, usually by the same attorneys who represent him here. *See Evans v. Chase Bank USA, N.A.*, 267 Fed. Appx. 692 (9th Cir. Feb. 22, 2008); *Swanson v. Bank of Am.*, 566 F. Supp. 2d 821 (N.D. Ill. 2008); *Williams v. Wash. Mut. Bank*, 2008 WL 115097 (E.D. Cal. Jan. 11, 2008); *Augustine v. FIA Card Servs., N.A.*, 485 F. Supp. 2d 1172 (E.D. Cal. 2007); *Penner v. Chase Bank USA, N.A.*, 2006 WL 2192435 (W.D. Wash. Aug. 1, 2006); *Evans v. Chase Manhattan Bank USA, N.A.*, 2006 WL 213740 (N.D. Cal. Jan. 27, 2006). In all of those cases the result was the opposite of the one reached here. In one case the court did at first indicate that it was inclined to rule in favor of the plaintiffs but reversed course when it was made aware of the Advance Notice of Proposed Rulemaking (ANPR) issued by the expert agency, the Federal Reserve Board (FRB or the Board), which quite clearly showed that the Board disagreed with their interpretation. *Shaner v. Chase Bank USA, N.A.*, 570 F. Supp. 2d 195, 199-200 (D. Mass. 2008) (citing 69 Fed. Reg. 70925-01, 70931-32 (Dec. 8, 2004)). The majority concedes, as it must given the unanimity of results on the other side, that the regulation is ambiguous. But the majority then departs from those holdings, and from established Supreme Court precedent, by refusing to defer to the Board's interpretation in the face of that ambiguity, and by suggesting, somewhat misleadingly, that the Board's interpretation is less than clear.

The provision of Regulation Z at issue here provides that "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." 12 C.F.R. § 226.9(c)(1) (emphasis added). This refers back to Section 226.6(a)(2), which says, "[t]he creditor shall disclose to the consumer ... each of the following items, to the extent applicable: ... each periodic rate that may be used to compute the finance charge ... and the corresponding annual percentage rate." 12 C.F.R. § 226.6(a)(2) (emphasis added). So the question becomes the following: did Section 226.9(c)(1) require Chase to provide contemporaneous notice to McCoy of an increase in his interest rate due to his default when that increase was an implementation of the existing terms of his agreement with Chase?[1] The majority says that although the re-

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[1] The relevant portions of McCoy's Cardmember Agreement were the following:

CHANGE IN TERMS NOTICE

We are making certain changes to the terms of your Account as described below....

The following are changes to the existing terms of your Account.

- **Preferred Customer Pricing Eligibility....** The section will be revised to read as follows:

  Preferred Customer Pricing Eligibility.... Your Ac-count 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 gulation is ambiguous, the FRB's Official Staff Commentary to § 226.9(c)(1) makes the answer a clear "yes." The majority feels no need to give any deference to the Board's views expressed in its ANPRs, which lead to the opposite conclusion and which are reinforced by every other court that has considered the question. *See supra.*

The Supreme Court has instructed us to give respect and deference to the Board when interpreting the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* ("TILA"). *Ford Motor Credit Co. v. Milhollin*, 444 U.S.

> 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 bu-reaus 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.

Appellant's Excerpts of Record, Tab 14, at Chase 00026.

555, 565-69 (1980) ("Unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive...."); *see also Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 212-13, 217 (1981). I would find that the Supreme Court requires deference to Board interpretations found in ANPRs. This required deference, of course, reflects universally applicable Supreme Court jurisprudence in keying statutory and regulatory interpretation on deference to the views of the responsible executive agencies. *See, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

On December 19, 2008, as the majority notes, the Board issued a final rule amending Section 226.9 to require 45 days' notice for rate increases because of defaults, irrespective of whether the possibility of those increases was disclosed in a cardmember agreement. This new rule becomes effective in 2010. Truth in Lending, 74 Fed. Reg. 5244-01 (Jan. 29, 2009) (to be codified at 12 C.F.R. pt. 226). It comes after at least two ANPRs, 69 Fed. Reg. 70925-01, 70931-32 (Dec. 8, 2004); 72 Fed. Reg. 32948-01, 33009 (June 14, 2007), both of which recognized that requiring additional notice in these circumstances is a change from what is currently required. The 2007 ANPR explains:

> Advance notice is not required in all cases. For example, 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. See current § 226.9(c)(1); comment 9(c)(1)-3. Furthermore, no change-in-terms notice is required if the specific change is set forth initially by the creditor in the account-opening disclosures. See current comment 9(c)-

> 1. *For example, some account agreements permit the card issuer to increase the periodic rate if the consumer makes a late payment. Because the circumstances of the increase are specified in advance in the account agreement, the creditor currently need not provide a change-in-terms notice*; under current § 226.7(d) the new rate will appear on the periodic statement for the cycle in which the increase occurs.

72 Fed. Reg. 33009 (emphasis added).[2]

The majority says that the relevance of the Board's statements is limited and we need not defer to them because they are not official comments, but merely "incidental descriptions of current law contained in an ANPR." Despite the majority's assertion to the contrary, its position conflicts starkly with that of the Supreme Court, which in *Anderson Bros. Ford* gave significant weight to a nearly identical publication. *See id.*, 452 U.S. at 212-13, 217 (calling a proposed official staff

[2] The distinction between "change-in-terms" notice and "advance notice" suggested by McCoy in his reply and by the majority is a weak attempt to escape the direct and explicit statements by the Board that contradict their position. Additionally, I disagree with the majority's interpretation of the Board's statement in its December 2008 "Supplementary Information" regarding what is "currently the case" as recognizing that contemporaneous notice is currently required by existing law. A near-verbatim statement appeared in the 2007 ANPR. 72 Fed. Reg. 33012. Elsewhere in that ANPR, as has already been discussed, the Board explicitly rejected the majority's view that Official Staff Commentary requires contemporaneous notice in a case like this one. I would not interpret a repetition of any portion of the 2007 ANPR as a sudden change of the Board's opinion.

interpretation "persuasive authority" and concluding that "we cannot agree that the staff's views expressed in the proposed ruling are wholly without significance"). In *Anderson Bros. Ford*, the Board published for comment an Official Staff Interpretation that was directly contrary to the view taken by three out of four courts of appeals. The Board said that while a "technical reading" of Regulation Z might support the three courts of appeals, it was the Board's opinion that the disclosure was not the type of thing "meant to be" required by Regulation Z (and was therefore not in fact required). *Id.* at 212-13. The Court said that the Board's interpretation did not conclusively establish the meaning of the words used in TILA, but that "absent some obvious repugnance to the statute, the Board's regulation implementing this legislation should be accepted by the courts, as should the Board's interpretation of its own regulation." *Id.* at 219. The Court strongly implied that this was so even if the text of the provision at issue suggested a contrary result, saying,

> Unaided by an administrative construction of the TILA and Regulation Z, a court could easily conclude, based on the language of the statute and of Regulation Z, that the interest in unearned insurance premiums acquired by the creditor in this case should be characterized as a "security interest" that must be disclosed. *But, in light of the proposed official staff interpretation of Regulation Z* [and the legislative history of TILA and related statutes], it is evident that the Board [disagrees].

Id. at 222 (emphasis added). The Court noted that it "has frequently relied on the principle that 'a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' " *Id.* at 222 n.20.[3]

An ANPR does not meaningfully differ from a "proposed official staff interpretation" for purposes of the deference we ought to accord it. The Supreme Court's decision in *Milhollin*, 444 U.S. 555, also supports this view. Although, as the majority points out, *Milhollin* distinguishes between "official" and "unofficial" staff interpretations in specifying which of the FRB's views may be relied on for a good-faith defense under 15 U.S.C. § 1640(f), *Milhollin*'s description of what makes an official interpretation "official" would apply equally to an ANPR: "[o]fficial interpretations are published in the Federal Register, and opportunity for public comment may be requested." *Milhollin*, 444 U.S. at 567 n.10. The same is true of ANPRs. *See* 72 Fed. Reg. 32948 ("The proposed revisions take into consideration comments from the public on an initial advance notice of proposed rulemaking (ANPR) published in December 2004 on a variety of issues relating to the format and content of open-end credit disclosures and the substantive protections provided under the regulation."). Moreover, the Court in *Milhollin* did not restrict itself to consideration of "official interpretations." It also considered FRB Public Information Let-

[3] *Cf. Milhollin*, 444 U.S. at 560 ("At the threshold ... interpretation of TILA and Regulation Z demands an examination of their express language; absent a clear expression, it becomes necessary to consider the implicit character of the statutory scheme. For the reasons following, we conclude that the issue [here] is not governed by clear expression in the statute or regulation, and that it is 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.").

ters and CCH Consumer Credit Guides in divining the agency's views on the matter in question. *See Milhollin*, 444 U.S. at 563 & n.8. Nothing in *Milhollin* suggests that similar deference would not be appropriate here. To the contrary, *Milhollin* emphasized that the "traditional acquiescence in administrative expertise is particularly apt under TILA, because the Federal Reserve Board has played a pivotal role in 'setting [the statutory] machinery in motion.'" 444 U.S. at 566 (quoting *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933)). In short, *Milhollin* encourages more deference, not less, to the Board's stated views.

The majority also marshals *Auer v. Robbins*, 519 U.S. 452 (1997) in support of its argument that ANPRs deserve no deference, but *Auer*, too, cuts the other way. *Auer* accords "controlling" deference to an agency interpretation found in a legal brief. 519 U.S. at 461, 462. Briefs drafted in litigation necessarily carry less weight than proposed rules subject to notice and comment, yet the *Auer* Court deferred because there was "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id.* at 462. *See also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 417-18 (1945) ("Any doubts concerning this interpretation of [the regulation] are removed by reference to the administrative construction of [the rule]," including in bulletins issued with the regulation, the Administrator's First Quarterly Report to Congress, and the Administrator's statement that this position had uniformly been taken "in countless explanations and interpretations" given to those affected by the regulation.).

It follows that, even if we somehow owe less deference to statements of the Board contained in an ANPR than we would to an official comment, that does not mean we owe no deference at all, or less than controlling deference in the present case. *See United States Freightways Corp. v. C.I.R.*, 270 F.3d 1137, 1141 (7th Cir. 2001) ("[D]eference to agency positions is not an all-or-nothing proposition; more informal agency statements and positions receive a more flexible respect ..."). As a practical matter, the Board has made its opinion regarding the correct interpretation of its own regulation more than clear, and for the various reasons explained by the Supreme Court on many occasions, *see, e.g.*, *Milhollin*, 444 U.S. at 565-69, we owe that opinion deference. Therefore, it is abundantly clear that the Supreme Court would not countenance disregard for the Board's opinion regarding the correct interpretation of Regulation Z, even if that opinion appears in an ANPR rather than Official Staff Commentary.

The majority, however, provides its own analysis based on its own interpretation of the FRB's Official Staff Commentary regarding Regulation Z, brushing aside the Board's views found in ANPRs. The potentially relevant comments are Comment 1 to Section 226.9(c) and Comment 3 to Section 226.9(c)(1):

> 9(c) Change in Terms
>
> 1. *Changes* initially disclosed. No notice of a change in terms need be given if the specific change is set forth initially, such as: Rate increases under a properly disclosed variable-rate plan, a rate increase that occurs when an employee has been under a preferential rate agreement and terminates employment, or an increase that occurs when the consumer has been under an agreement to maintain a certain balance in a savings account in order to keep a

> particular rate and the account balance falls below the specified minimum. In contrast, notice must be given if the contract allows the creditor to increase the rate at its discretion but does not include specific terms for an increase (for example, when an increase may occur under the creditor's contract reservation right to increase the periodic rate)....
>
> ...
>
> 9(c)(1) Written Notice Required

3. *Timing-advance notice not required.* Advance notice of 15 days is not necessary—that is, a notice of change in terms is required, but it may be mailed or delivered as late as the effective date of the change—in two circumstances:

- If there is an increased periodic rate or any other finance charge attributable to the consumer's delinquency or default....

12 C.F.R. § 226.9(c), cmt. 1; 12 C.F.R. § 226.9(c)(1), cmt. 3.

The majority concludes that "Comment 3's specific reference to interest rate increases attributable to the consumer's delinquency or default is directly on point and therefore governs." But these two comments are not a case of the specific versus the general or of one being an exception to the other. Instead, they are independent and each governs a distinct issue: Comment 1, whether a change-in-terms notice is required, and Comment 3, in cases where a change-in-terms notice is required, whether it must be issued 15 days in advance or not. Comment 3 does not purport to govern the question whether notice is required. Neither does it specifically govern default situations.[4] Instead, it is entitled "Timing," and it specifically governs timing issues. In contrast, as the majority generally recognizes, "Comment 1 ... describes the circumstances in which Regulation Z requires no notice of a change in terms." *Accord Swanson*, 566 F. Supp. 2d at 827 ("Comment 3 applies only to the timing of a notice of 'change of terms.' As discussed above, Defendants' practice at issue here does not involve a 'change of terms' as contemplated by Section 226.9(c)(1).").[5] The majority does not recognize this distinction and therefore fails to account for the fact that, because Comment 3 assumes situations where notice is required and controls only timing, it does not address the question at issue here.

The majority says that even if Comment 1 applies, Chase did not satisfy its requirements and Comment 1 does not excuse Chase from providing contemporaneous notice of discretionary rate increases to account holders. The majority interprets Comment 1's use of the word "specific" ("No notice of a change in terms need be given if the *specific change* is set forth ini-

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[4] In fact, the third example of Comment 1 is arguably a default situation: 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.

[5] There are no doubt many instances where, unlike here, a creditor changes a consumer's interest rate upon his default and is required to provide a change-in-terms notice. There, Comment 3 would apply to determine the timing of the requisite change-in-terms notice. Here, however, we need not consider the issue of proper timing under Comment 3 because Chase is exempted from the requirement of additional notice by Comment 1.

tially.... [N]otice 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 ...," 12 C.F.R. § 226.9(c), cmt. 1 (emphasis added)) to cover only circumstances in which the creditor has disclosed the exact change and the precise terms, so that additional notice would be redundant. I cannot interpret the comment so narrowly. It is certainly more than reasonable to find that Chase has satisfied it here.

In the Cardmember Agreement, Chase disclosed the three conditions that McCoy had to comply with in order to remain eligible for his Preferred rate. Violation of these conditions was necessary (even if not sufficient) for Chase to take away McCoy's Preferred rate. The Agreement disclosed the maximum interest rate that could apply: the maximum Non-Preferred rate described in the Pricing Schedule. It also disclosed the time at which the new rate would become effective: it would "apply to existing as well as new balances and [would] be effective with the billing cycle ending on the review date." Finally, Chase disclosed that it might take certain steps to investigate McCoy's compliance with the required conditions, including obtaining credit reports on him from consumer credit bureaus. Semantic contortions aside, I believe that these statements set forth a specific change and disclosed the specific terms for that change. *Accord Swanson*, 566 F. Supp. 2d at 825.[6] Chase's disclosure thus fulfills the obvious purposes of Comment 1.

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[6] The fact that Chase did not disclose the precise factors it might use to determine not to exercise its discretion to impose the maximum increase should not offend Comment 1. The Board has indicated that contemporaneous notice is not required when a

The majority buttresses its conclusion to the contrary by reference to Comment 1's examples, saying that "[a]ll three examples pertain to rate increases that are spelled out in cardmember agreements and ascertainable by the consumer without additional notice." In contrast, it says, "the increase here occurs at Chase's discretion and the most pertinent' specific terms for an increase'—the actual amount of the increase and whether it will occur—are not disclosed in advance."

At the outset, the majority is wrong in assuming that the three examples do not involve any discretion on the creditor's part regarding whether to apply an increase and if so, how much of one. For instance, when analyzing the third example, the majority reads much into the Board's use of the phrase "an increase that occurs" instead of one that "may occur," concluding that the Board thereby meant that the increase would be automatic and non-discretionary. The Board does not specify in any of the examples that the increase must be of a definite amount that is ascertainable by the consumer without additional notice. This might be a valid assumption with regard to the first example (the vari-

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creditor decides to reduce interest rates. *See* 12 C.F.R. § 226.9(c)(2). A creditor's decision to decline to impose the maximum increase has the same effect on a consumer as deciding to reduce interest rates, and a similar rationale would apply to justify the position that the creditor need not disclose in advance the exact circumstances in which it would decide not to impose the maximum increase. The majority says this argument proves too much because it would apply equally to an example in which Comment 1 specifically requires notice ("when an increase may occur under the creditor's contract reservation right to increase the periodic rate"). I disagree that this argument would apply equally to that example because in that example, there does not appear to be a specified maximum rate.

able-rate plan), but such ascertainability is not an essential element of the second and third examples. Neither states one way or the other whether they involve a precise and automatic increase.

Further, I am not persuaded, as the majority is, that the Board had in mind a standard of complete redundancy when specifying examples of situations where additional notice would not be required. To the contrary, the Board specifically recognized that there may be situations in which the creditor retains some discretion (as long as "specific [']terms['] for an increase" are disclosed, 12 C.F.R. § 226.9(c), cmt. 1) and additional notice is not required.[7] If discretion is sometimes permissible, then precise rates certainly may not always be ascertainable by the consumer before the fact.

As a final matter, I would just note that the interpretation of Regulation Z shared by Chase and the Board seems to me to be consistent with the purpose of TILA. *See Anderson Brothers*, 452 U.S. at 219-20 ("The purpose of the TILA is to promote the 'informed use of credit' by consumers.") (quoting 15 U.S.C. § 1601), 222 ("The Board's position is supported by the legislative history of both the TILA and the 1980 Act, and we hold that it is a permissible interpretation of the term 'security interest' as used in the TILA."); 15 U.S.C. § 1604 ("The Board shall prescribe regulations to carry out the purposes of this subchapter."). McCoy had all the information he needed in order to enjoy the informed use of his credit. He knew the conditions in

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[7] For example, as here, where there is a warning of the range and potential extent of an increase.

which Chase could increase his interest rate and those conditions were under his control. He also knew the highest possible interest rate that could apply in the event of his default. I find it difficult to believe that McCoy, or any other cardmember, would have been better off had he known the precise formula that Chase uses to determine whether or how much to raise his interest rate. It seems extremely doubtful that in deciding whether to pay his bills on time, McCoy might have attempted to use that formula to determine what his chances were of keeping the same interest rate. Unlimited discretion to increase consumers' interest rates is something that TILA was intended to protect them against. I do not believe that discretion to decline to increase a consumer's rate all the way up to the permissible maximum, such as Chase had in this case, poses a similar danger. There is nothing irrational or oppressive in allowing a creditor a degree of discretion in dispensing mercy.

Because I would find that McCoy has not stated a claim for a violation of TILA, I would not reach his state law claims.

For all of these reasons, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

CHASE MANHATTAN BANK, USA, National Association; and DOES 1 through 100, inclusive,

Defendants.

Case No. SACV-06-107 JVS (RNBx)
[Hon. James V. Selna]

[STAMP: LODGED: 2006 JUL 24 PM 2:25]
[STAMP: FILED AUG 11, 2006]
[STAMP: ENTERED AUG 14 2006]
[STAMP: THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)]

Date: August 14, 2006
Time: 1:30 p.m.
Dept.: 10C
Action Filed: March 23, 2004
Trial Date: None Set

~~[PROPOSED]~~ ORDER GRANTING DEFENDANT CHASE BANK USA, N.A.'S MOTION TO DISMISS

The motion of Defendant Chase Manhattan Bank USA, N.A. n/k/a Chase Bank USA, N.A. for an order dismissing the Second Amended Complaint for failure to state a claim pursuant to Rule 12(b)(6) came for hearing before this Court on August 14, 2006.

Having considered the briefs and oral argument of the parties, this Court finds that the First Amended Complaint fails to state a claim on which relief may be granted. Accordingly

IT IS HEREBY ORDERED THAT Defendant's Motion to Dismiss the Complaint is GRANTED. This action is DISMISSED WITH PREJUDICE.

Dated: 8.10, 2006

/s/ James V. Selna
Hon. James V. Selna
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. SACV-06-107 JVS (RNBx)

Date August 10, 2006

Title James A. McCoy v. Chase Manhattan Bank USA

Present: The Honorable James V. Selna

Karla J. Tunis	Not Present
Deputy Clerk	Court Reporter

[STAMP: DOCKETED ON CM AUG 11 2006]

Attorneys Present for Plaintffs	Attorneys Present for Defendant
Not Present	Not Present

Proceedings: (In Chambers) **Order Granting Defendant's Motion to Dismiss Plaintiff's Complaint. (Fld 7-24-06)**

III. BACKGROUND

Defendant Chase Manhattan Bank USA ("Chase") moves the Court to dismiss plaintiff James A. McCoy's ("McCoy") Second Amended Compliant [sic] ("SAC") pursuant to Fed. R. Civ. P. 12(b)(6). For the following reasons, the Court grants Chase's motion.

IV. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a motion to dismiss will not be granted unless it appears that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In resolving a Rule 12(b)(6) motion, the Court must construe the complaint in the light most favorable to the plaintiff and must accept all well-pleaded factual allegations as true. *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The Court must also accept as true all reasonable inferences to be drawn from the material allegations in the Complaint. *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998).

V. Discussion

A. Allegations Contained the SAC

Chase is a national banking association organized under the National Bank Act, with its home in the State of Delaware. (SAC, ¶ 3). McCoy purports to represent all Chase credit card holders "whose interest rates were increased, without advance notice of such increase, after their accounts were closed to new transactions, where such increases were triggered on the basis of a 'default' that consisted of either a late payment to Chase, or a reported late payment to some other creditor." (*Id.*, ¶ 23.) McCoy's SAC alleges claims for: (1) violation of the Truth in Lending Act ("TILA"); (2) declaratory relief; (3) severance of unconscionable contract terms; (4) imposing and enforcing an illegal penalty; (5) consumer fraud; (6) breach of contract; (7) tortious breach of the implied covenant of good faith and fair dealing and consumer fraud. (SAC, p. 1.)

McCoy's SAC therefore challenges Chase's practice of raising a cardholder's interest rate after a delinquency with Chase or another creditor. As Chase contends, McCoy concedes that the Cardmember Agreement ("Agreement") specifically authorizes Chase to raise a cardholder's interest rate if the cardholder is delinquent with Chase or another creditor. (SAC, ¶ 16.) Further, Chase avers that this practice is expressly authorized by state and federal law. (Mot., p. 4.) The Court agrees with both of Chase's contentions.

McCoy further alleges that Chase does not provide notice of an increase in interest rates triggered by the cardholder's default with another creditor and that Chase applies the increase to the start of the billing cycle. (SAC, ¶¶ 5, 6, 19.) However, as Chase avers, the Agreement specifically provides notice of this practice, providing:

> Your account will be reviewed every month on your Statement Closing Date to determine continued eligibility for the Preferred or Non-Preferred rates. … Any changes in your interest rates as a result of the monthly reviews for Preferred or Non-Preferred rates will be effective with the billing cycle ending on the review date.

(RJN, Ex. 4.)[23]

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[23] McCoy alleges that "Chase's assertion that it provides advance notice of the 'specific terms' for a rate increase is demonstrable false … [because] Chase's month-end determination whether or not to increase rates is based on a well hidden, entirely secret, and strictly confidential methodology that is never given to

McCoy additionally alleges that the interest rate charged by Chase upon default is unlawful, referring to the higher rates as "dramatic and overreaching," "illegal penalties," and "punitive." (SAC, ¶¶ 15, 22.) However, as Chase points out, McCoy does not allege that the higher rates is [sic] higher than the default rate authorized by his agreement or applicable usury laws. (Mot., p. 5.)

B. Prior Similar Cases

As Chase asserts, McCoy seeks to assert claims previously asserted by other plaintiffs which have previously been dismissed by Judge Cormac Carney and Judge Samuel Conti, with prejudice. (Mot., p. 1.) On March 23, 2005, McCoy's counsel filed a similar case against Chase in Orange County Superior Court, *Faith Dugan et al. v. Chase Manhattan Bank*, No.SACV 05-484 CJC (ANx) (C.D. Cal. July 20, 2005), alleging claims of breach of contract, breach of the implied covenant of good faith and fair dealing, and consumer fraud. That case was subsequently removed. On July 26, 2005, Judge Carney granted Chase's motion to dismiss. (Request for Judicial Notice ("RJN"), Ex. 1.) McCoy's counsel filed an amended complaint, but voluntarily dismissed the action before any rulings were based on the amended complaint.

McCoy's counsel then filed a case against Chase in the Northern District of California, *Robyn Evans, et al. v. Chase Bank USA., N.A.*, No. C-05-3968 SC, 2006 WL 213740 (N.D. Cal., Jan. 2006). As Chase avers, other than two additional causes of action, the substitution of

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its customers." (Opp'n, pp. 5-6; Decl. Haider Zaidi.) In light of the terms of the Agreement, the Court disagrees. (RJN, Ex. 4.)

new plaintiffs, and other minor changes, the *Evans* action was exactly the same as the amended complaint in *Dugan* which McCoy's counsel voluntarily dismissed from Judge Carney's court. On January 30, 2006, Judge Conti, of the Northern District of California, dismissed with prejudice all of the causes of action brought in *Evans*. *Evans v. Chase,* 2006 WL 213740 (N.D. Cal., Jan. 30, 2006).[24] In doing so, Judge Conti rejected the same causes of action which are asserted in this case.

McCoy argues in his Opposition that while "there is overlap between some of the issues in this case and those ruled on by Judge Conti, [McCoy] respectfully disagrees with the ruling of Judge Conti, and such ruling is currently under appeal." (Opp'n , p. 24.)

The Court agrees with Chase's characterization of the Evans action. The instant case and the Evans action contain the same seven causes of action, and the same allegations underlying those causes of action. Judge Conti has written an in-depth and well-reasoned opinion. At the very least, Judge Conti's opinion provides the Court with the significant guidance in its analysis.

C. First Claim: Violations of the Truth in Lending Act

McCoy avers that Chase violates Regulation Z of the TILA by "failing to notify its customers of increases in interest rates on or before the effective date of the change." (SAC, ¶ 26, citing 12 C.F.R.

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[24] Chase informs the Court that Evans appealed Judge Conti's ruling and the case is currently being briefed before the Ninth Circuit.

§ 226.9(c)(1).) TILA requires written notice "[w]henever any term required to be disclosed under Sec. 26.6 is changed." 12 C.F.R. § 226.9(c)(1).

As Chase points out, McCoy does not point to any change in Chase's terms, but rather the increases complained of are the implementation of terms explicitly disclosed to McCoy. Chase points to a section of the Official Staff Commentary to Regulation Z ("Commentary"):

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

12 C.F.R. pt. 226, Supp. I, § 226.9(c)(1), cmt. 1.[25] As Chase avers, the last sentence does not provide any support for McCoy because Chase does "include specific terms for an increase" by identifying the maximum

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[25] As Judge Conti noted, the Commentary, which is put forth by the Board of Governors of the Federal Reserve System is entitled to a great deal of deference. *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981)

possible rate and the specific acts that might resulted in such higher interest rate, such as a late payment to Chase or another creditor. (Mot., p. 6, n.4, *see* RJN, Ex. 4.)

Chase concludes that an increase in interest rates based on delinquency with another creditor and credit history is not a "change in terms" under TILA because Chase discloses in the Agreement that it may increase interest rates based on such a delinquency. (Mot., p. 6; *see* RJN, Ex. 4.) Judge Conti dismissed this identical cause of action for the same reason: "The Commentary … states that creditors need not give notice if the specific change is set forth initially, such as in a variable rate plan. [Chase] gives cardmembers notice of these changes." *Evans v. Chase*, 2006 WL 213740 at *2.

As Chase notes, a change in terms occurs if the lender increases interest rates without any prior disclosure of the basis for the increase. For instance if the lender exercises its discretion to raise a cardmember's rate because of rising market rate, but does not initially disclose the specific circumstance under which an increase will occur. 12. C.F.R. pt. 26, Supp. I, § 226.9(c), cmt. 1. As Chase avers, because it discloses the basis on which it will increase interest rates due to default, and discloses the highest rate that could apply,[26] an in-

[26] Chase notes that, as stated in the Agreements, there may be circumstances in which Chase chooses not to increase the rate to the highest possible disclosed rate after a default. Chase avers that the fact that it does so does not require any additional disclosure. Section 26.9(c)(2) provides that "[n]o notice … is required when the change involves … a reduction of any component of a finance or other charge." 12 C.F.R. § 226.9(c)(2). A decision not to increase the interest the interest rate has the same effect as a reduction in the maximum interest rate from the higher, default rate

crease in the interest rate based on these specific circumstances is not a change in terms within the meaning of Regulation Z, and no additional notice to the cardmember is required. (Mot., p. 7.) Chase concludes that the TILA provisions and commentary quoted by McCoy in paragraphs 27 through 20 of the SAC are inapposite, because they concern the kind of written notice required after a change in terms. The Court agrees and dismisses McCoy's first claim.

D. Second, Third and Fourth Claims: Declaratory Relief, Severance of Terms, Illegal Penalty

McCoy contends that Chase's practice of increasing interest rates based on a delinquency is unconscionable, and therefore that he is entitled to declaratory relief, reformation and damages for imposing and enforcing an illegal penalty. (SAC, ¶¶ 35-46.)

Judge Conti dismissed identical causes of action brought by McCoy's counsel against Chase. *Evans*, 2006 WL 213740 at *3. Further, the Agreement identifies the actions by a borrower that authorize Chase to increase McCoy's interest rate to the Non-Preferred rate:

> Any promotional rate or regular preferred Pricing rate may change to your Non-Preferred/Default APR rate if any loan or ac-

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to the lower, promotional rate. Chase avers that consistent with section 226.9(c)(2) this circumstance does not require a change in terms notice, so this discretion given to Chase in the agreements does not change the analysis. (Mot., p. 7, n.5.) The Court agrees. A decision not to increase a rate is analytically indistinct from a decision to lower a rate: in both cases the consumer benefits.

> count of yours with us *or your other creditors was past due,* your Account was overlimit, any payment on your Account was returned unpaid or if your Account was closed for any reason.

(SAC, ¶ 16; emphasis added by McCoy.) Chase argues here, as it did successfully before Judge Conti, that this provision, which permits Chase to raise a cardholder's interest rate after certain occurrences, is specifically authorized by the law of Chase's home state, Delaware. Pursuant to section 85 of the National Bank Act, 12 U.S.C. § 85, Delaware law governs the interest rate charged by Chase and the methodology used to determine that rate. Section 994 of the Delaware Banking Act provides:

> If the agreement governing the revolving credit plan so provides, the periodic percentage rate or rates of interest under such plan may vary in accordance with a schedule or formula.... Without limitation, a permissible schedule or formula hereunder may include provision in the agreement governing the plan for a change in the periodic percentage rate or rates of interest applicable to all or any part of outstanding unpaid indebtedness ... contingent upon the happening of any event or circumstances specified in the plan, which event or circumstance may include the failure of the borrower to perform in accordance with the terms of the plan.

5 Del. C. § 994. As Judge Conti noted, the "statute declares that a permissible formula or schedule can be based on the occurrence or non-occurrence of an event or circumstance described in the agreement, such as we see in the Cardmember Agreement." *Evans*, 2006 WL

213740 at *3. Judge Conti further noted, "[t]he Cardmember Agreement, by describing what events will cause default rates to go into effect, complies with these requirements." *Id.* Judge Conti therefore concluded, and this Court agrees, that the terms of the Agreement are not unconscionable, but rather the [sic] are specifically authorized by statute. *Id.* The Court therefore dismisses McCoy's second, third, and fourth claims for relief.

E. Fifth Claim: Consumer Fraud

McCoy also alleges that Chase committed consumer fraud by filing to provide notice of an increase in interest triggered by the cardholder's default with another creditor, and that Chase applies the increase to the start of the billing cycle. (SAC, ¶ 54-55.)

The specific statute, 6 Del. C. § 2513(a) (2005) prohibits:

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact, with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice.

McCoy has failed to state a claim for consumer fraud. Chase expressly notifies cardmembers of the actions that it may take in the event of a default, rather than practicing concealment or making false promises. *See Evans*, 2006 WL 213740 at *5. McCoy's fifth claim for relief is dismissed.

F. Sixth Claim: Breach of Contract

McCoy claims that because the Agreement is governed by federal law it "incorporate[s] federal law" and hence "Chase is contractually bound to comply with federal law," making any violation thereof a breach of contract. (SAC, ¶ 66.)

As Judge Conti noted, based on identical claims, this claim is a reiteration of McCoy's first claim. *Evans*, 2006 WL 213740 at *4. The Agreement provides notice that Chase may vary a cardmember's rates. Regulation Z does not require any more notice from Chase. *Id.* As Judge Conti noted, "even if federal law applies, Chase has not, under the fact alleged, infracted it." *Id.* Therefore McCoy's fifth [sic] claim for relief is dismissed.

G. Seventh Claim: Brfeach of Covenant of Good Faith and Fair Dealing

McCoy alleges that by taking the alleged actions, Chase breached the implied covenant of good faith and fair dealing. However, as noted, Chase's actions are explicitly authorized by the Agreement. Hence McCoy's seventh claim for relief is dismissed.

VI. CONCLUSION

For the foregoing reasons, the Court dismisses McCoy's SAC with prejudice.

Pursuant to Federal Rule of Civil Procedure 78 and Local Rule 7-15, the Court deems the matter submitted without oral argument, and removes the August 14, 2006 hearing from its calendar.

Initials of Preparer /s/ [illegible]

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES A. MCCOY, on behalf of himself
and all others similarly situated,
Plaintiff-Appellant,
v.

CHASE MANHATTAN BANK, USA,
National Association,
Defendant-Appellee.

[STAMP: FILED JUN 16 2009
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS]

No. 06-56278
D.C. No. CV-06-00107-JVS
Central District of California
Los Angeles

ORDER

Before: CUDAHY,* PREGERSON, and HAWKINS, Circuit Judges.

A majority of the panel has voted to deny the Petition for Rehearing and the Petition for Rehearing En Banc.

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* The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Petition for Rehearing and Petition for Rehearing En Banc are **DENIED**.