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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 09-329, Chase Bank v. McCoy. Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN  
ON BEHALF OF THE PETITIONER

MR. WAXMAN: Mr. Chief Justice, and may it please the Court:

The question presented is how to interpret a since-amended version of Regulation Z. In amicus briefs filed, solicited by the First Circuit and by this Court, the Federal Reserve Board has confirmed that it has long interpreted its regulation just as Chase Bank and the rest of the regulated credit card industry understood.

JUSTICE KAGAN: Mr. Waxman?

MR. WAXMAN: Yes, Justice Kagan?

JUSTICE KAGAN: Can I ask you about the deference that we should give to the briefs that have been filed in the First Circuit and the invitation brief in this case?

Auer deference seems pretty four-square with this. It's a brief that was filed to interpret an agency regulation. But I'm wondering whether Auer continues to remain good law after Christensen and Mead.

1 In Christensen, the Court held -- and I quote --  
2 "Interpretations such as those in opinion letters --  
3 like interpretations contained in policy statements,  
4 agency manuals, and enforcement guidelines, all of which  
5 lack the force of law -- do not warrant Chevron-style  
6 deference." And Mead said pretty much the same thing.

7 So it seems to me that there are three  
8 possibilities for why Auer remains good law. One is  
9 that briefs are somehow different from all those other  
10 things that we talked about in Christensen.

11 Another is that an agency gets more  
12 deference when interpreting regulations than when  
13 interpreting its own statutes -- something that I think  
14 I just don't quite understand, but maybe you could  
15 convince me of it.

16 And a third is, well, look, they're just  
17 basically inconsistent, but Auer was Auer, and we don't  
18 feel like overruling cases, and we're not so sure we got  
19 it right in Christensen and Mead anyway.

20 So, which is it?

21 MR. WAXMAN: A lot of the above.

22 (Laughter.)

23 MR. WAXMAN: First of all, Auer has been  
24 applied in the context of amicus briefs since  
25 Christensen and Mead, both -- unanimously both in

1 Kennedy and in Long Island Care at Home. And I must  
2 say, in both of those cases, the deference was to a  
3 brief that acknowledged a change in the agency's  
4 position, which is quite unlike what's going on here.

5 JUSTICE KAGAN: Absolutely right, Mr.  
6 Waxman, but in each of those cases it was basically a  
7 sentence or two. We never really addressed the possible  
8 conflict between Auer and Christensen and Mead.

9 MR. WAXMAN: Nonetheless, I think those  
10 cases stand for the proposition that Auer is alive and  
11 well. And, in any event, as your question pointed out,  
12 both Mead and Christensen and the passage in Christensen  
13 that you're referring to dealt with the question of  
14 Chevron deference to informal letters from the -- from,  
15 you know, a -- somebody who was employed by an  
16 administrative agency.

17 And the question in the case, the  
18 interpretive question in the case, in the Chevron  
19 context, is: What confidence can we have that Congress  
20 has, in fact, delegated to the agency interpretive or  
21 rulemaking authority in this context? And so, for  
22 example, in Mead, the Court distinguished between  
23 notice-and-comment regulations that Customs put out, as  
24 opposed to the kind of determinations that were made by  
25 46 different offices at the rate of something like

1 15,000 letters a year.

2           In the -- when Christensen dealt with the  
3 Auer question, because it did involve a -- an informal  
4 opinion of the Wage and Hour Administrator both  
5 interpreting the Fair Labor Standards Act and a  
6 regulation, when it came to interpreting the regulation  
7 what this Court said is: Our deference doesn't apply  
8 here because we read the regulation as clear. And Auer,  
9 of course, made clear that deference is due to an agency  
10 brief unless it is plainly erroneous or the regulation  
11 is clear.

12           Now, here we have a situation in which it is  
13 not an agency staff or whatever that is applied. The  
14 First Circuit asked the government for -- solicited the  
15 Federal Reserve Board itself to explain the meaning of  
16 its own regulation. And the brief that was filed  
17 represented that it was the longstanding and consistent  
18 interpretation of the Federal Reserve Board --

19           JUSTICE GINSBURG: Mr. Waxman, I take it  
20 from this whole discussion that you are recognizing that  
21 this is not a crystal-clear regulation; there is some  
22 ambiguity, and that's why we are talking about how much  
23 deference we owe to the agency.

24           MR. WAXMAN: That's correct. We think that  
25 the Federal Reserve Board's reading of the two

1 regulatory provisions is the better reading, but we  
2 acknowledge, as every court I think that has -- that has  
3 addressed this, that there is some ambiguity, just  
4 looking at the regulations.

5 But I think it's important to understand  
6 also that the views expressed in the amicus brief  
7 solicited by the First Circuit and by this Court are  
8 entirely consistent with explanations that the Board, as  
9 a Board, provided in the course of a 4-year rulemaking  
10 process about what these provisions mean.

11 JUSTICE SOTOMAYOR: So you think the same  
12 deference is owed to ANPRs as to the amicus briefs?  
13 What is your position on that?

14 MR. WAXMAN: I -- I think that if it weren't  
15 for the amicus briefs in this case, which are later in  
16 time and address the very specific question that is  
17 presented in this case, our deference would be  
18 appropriate.

19 And it's not just an ANPR. There was the  
20 Federal Reserve explanation accompanying the ANPR, a  
21 functionally identical explanation accompanying the  
22 proposed rule, and one also accompanying the final rule.  
23 And those explanations of the Board are entitled to Auer  
24 deference.

25 After all, in *Anderson Ford*, another case

1 involving the construction of Regulation Z, this Court  
2 acknowledged that deference was due to a proposed -- the  
3 commentary accompanying a proposed change in Regulation  
4 Z which had not in fact even been implemented. So --

5 JUSTICE SCALIA: Of course, I suppose --

6 JUSTICE KENNEDY: Judge Cudahy in dissent  
7 relied very much on the advance notice of proposed  
8 rulemaking.

9 MR. WAXMAN: I'm sorry? Judge --

10 JUSTICE KENNEDY: Judge Cudahy in dissent  
11 relied -- put considerable reliance on the ANPR.

12 MR. WAXMAN: Yes. And in fact,  
13 Justice Kennedy, I would say that both the majority and  
14 the dissent below referred to the ANPR when -- both when  
15 they were referring to the commentary to the ANPR and  
16 the commentary to the actual proposed rule in 2007.

17 Now, of course, Judge Cudahy was deciding  
18 this before the First Circuit had solicited the views.  
19 On rehearing, we urged the Ninth Circuit to solicit the  
20 views of the Federal Reserve Board if there were any  
21 doubt, because a split had been created, but it declined  
22 to do so. And --

23 JUSTICE SCALIA: I suppose, having done it  
24 twice before, we could in this case apply Auer without  
25 explaining why it is that Auer is not inconsistent with



1 Mead, right? We did it twice before; we could do it  
2 here.

3 MR. WAXMAN: Sure. Or --

4 JUSTICE SCALIA: Absolutely.

5 MR. WAXMAN: Or you could -- you could  
6 explain that it is not in any way inconsistent with  
7 Mead, because Mead --

8 JUSTICE SCALIA: That's a lot more trouble,  
9 though.

10 (Laughter.)

11 MR. WAXMAN: To be sure, but you granted  
12 plenary review in this case. And I do -- I just want to  
13 underscore -- I'm not trying --

14 JUSTICE BREYER: Why "to be sure"?

15 MR. WAXMAN: I'm not trying to be flip here.  
16 I don't think that there is any inconsistency between  
17 Auer and Mead. Mead involved the question of whether or  
18 not there was -- the Court could be confident that  
19 Congress had delegated some sort of lawmaking function  
20 to these letters that were written by Customs officers  
21 across the country to individual importers, when the  
22 letters themselves made clear that they couldn't be  
23 relied on by anybody other than that particular importer  
24 and only unless and until the Customs officer changed  
25 her mind.

1 JUSTICE KAGAN: But Mead did put a lot of  
2 emphasis on procedural formality. So, you know,  
3 Justice Scalia sort of snidely, but I think accurately,  
4 described Mead as saying: "Only when agencies act  
5 through 'adjudication[,] notice-and-comment rulemaking,  
6 or...some other [procedure] indicat[ing] comparable  
7 congressional intent [whatever that means]' is Chevron  
8 deference applicable." So, you know --

9 MR. WAXMAN: I don't --

10 JUSTICE KAGAN: This is -- this is not an  
11 adjudication. It's not a notice-and-comment rulemaking,  
12 and it's hard to see why there is some procedure here  
13 indicating comparable congressional intent, as Mead was  
14 -- would require.

15 MR. WAXMAN: Justice Kagan, with respect to  
16 the Mead question, which is a Chevron question, the --  
17 the Board's explanation in -- published in the Federal  
18 Register in 2004, and again in 2007, and again in 2009,  
19 is a formal explication of the Board's rules pursuant to  
20 its very, very broad rulemaking authority under the  
21 Truth in Lending Act.

22 JUSTICE BREYER: Of course, you can also  
23 read Mead and decide what it says. Being in the  
24 majority, I thought the dissent's characterization was  
25 not what it said. I mean, the dissent --

1 MR. WAXMAN: I -- I don't think there's --

2 JUSTICE BREYER: The dissent can write what  
3 it wants to write. But I don't think that that was what  
4 Mead said, but I guess there's disagreement about that.  
5 What did you think?

6 MR. WAXMAN: Given my chosen line of work,  
7 it may be meet for me not to inject myself into this  
8 debate, but --

9 (Laughter.)

10 JUSTICE BREYER: No, no. But I -- I'm  
11 sorry. You're an informed reader, and I -- I thought  
12 Mead definitely did not say that. That was the  
13 dissent's characterization of what it said.

14 MR. WAXMAN: Giving the dissent its full  
15 weight, I had understood both the majority and the  
16 dissent to explain that notice -- the existence of  
17 formal notice-and-comment rulemaking is an important  
18 indicator --

19 JUSTICE BREYER: That is one indicator.

20 MR. WAXMAN: -- one indicator of  
21 congressional delegation of rulemaking authority.

22 JUSTICE BREYER: But not exclusive.

23 MR. WAXMAN: But not exclusive.

24 JUSTICE GINSBURG: Mr. Waxman, why are we  
25 getting into all of this, because there's no question in

1 this case that the Federal Reserve Board had authority  
2 to issue Regulation Z? There's no question about what  
3 authority Congress gave to -- to the Board.

4 MR. WAXMAN: Correct.

5 JUSTICE GINSBURG: So -- and the only  
6 question is: So -- so the Board adopts Regulation Z,  
7 and then a question comes up, what does it mean? Well,  
8 surely the Board that wrote the rule is first and  
9 foremost the proper interpreter.

10 MR. WAXMAN: Right. As to -- I agree with  
11 that. And, as to why we're getting into all this, you  
12 know, I had a prepared statement that actually was going  
13 off in a different direction.

14 (Laughter.)

15 MR. WAXMAN: Not in the sense that I'm  
16 disagreeing with the Court, but the point that it seems  
17 to me --

18

19 CHIEF JUSTICE ROBERTS: This is not new to  
20 you, is it, this method of proceeding?

21 MR. WAXMAN: So I think the --

22 CHIEF JUSTICE ROBERTS: Do I understand --  
23 before you move in the direction you'd like to, I  
24 understand your view to be that Chevron and Auer apply,  
25 and it's consistent with Mead because you have more

1 indications that Congress delegated this authority to  
2 the Board than you -- than were present in Mead?

3 MR. WAXMAN: That's correct. And I think,  
4 you know, to the extent that there's anything more  
5 that's needed, it seems to me the icing on the cake here  
6 is that the rulemaking that I've been discussing during  
7 which over the course of several years the Board engaged  
8 in consumer testing, in surveys, in comments, and  
9 decided to change its regulation -- it produced as what  
10 it called a, quote, "major change," an entirely new  
11 section of Regulation Z, 226.9, that establishes as a  
12 new requirement what the Respondent in this case  
13 erroneously ascribes to the previously unamended text.  
14 And that is --

15 JUSTICE SOTOMAYOR: Well, I do think -- I do  
16 think, counsel, that that major change doesn't have to  
17 be the way you describe it. The difference between  
18 either contemporary notice and/or 15-day notice versus  
19 45 is a significant change.

20 MR. WAXMAN: That's correct, and it's --

21 JUSTICE SOTOMAYOR: And so it doesn't need  
22 to have been precipitated solely by a decision that the  
23 old rule, if it's as your adversary advocates it, didn't  
24 exist.

25 MR. WAXMAN: I -- I agree, Justice

1 Sotomayor, that that -- that one of the two changes that  
2 the Board made could be characterized and was, in fact,  
3 a major change. But if the Court will take note of the  
4 pages, the Federal Register record cites that we've  
5 provided on page 29, note 7, of our blue brief, and that  
6 the Federal Reserve Board's amicus brief in the First  
7 Circuit provided at page 12a of the Government's brief,  
8 I think you will see that what the Board -- the Board in  
9 2009 was very careful to explain, as it did in 2007,  
10 that it was making in this respect two major changes.

11 One is that in those instances in which the  
12 contract was being changed, that is a term of the  
13 contract was being changed, advance notice of 45 days  
14 would be required regardless of what kind of change it  
15 was, but that when there was an -- a rate increase,  
16 quote, "due to delinquency, deficiency, or penalty, not  
17 due to a change in contractual terms of the consumer's  
18 account," reference should be made to new subsection  
19 (g). And the Federal Reserve Board was very, very clear  
20 that it was making two different changes: one to extend  
21 the advance notice period with respect to changes in  
22 terms from what the original disclosure provided; and  
23 another to provide that if you are increasing the rate,  
24 even if it is entirely consistent with the initial  
25 disclosures, you are required by this new subsection to

1 provide advance notice.

2 JUSTICE ALITO: May I ask you a question  
3 about how the contract works in the situation in which a  
4 cardholder is found by -- was found by Chase to have  
5 defaulted by failing to make some payment other than  
6 payment on the Chase credit card? So you determine, I  
7 guess from information obtained from a credit agency,  
8 that the cardholder has failed to make payments to  
9 someone else on time, you conclude that the cardholder  
10 is in default, you increase the -- the interest rate.

11 How is the -- the cardholder, knowing,  
12 thinking that he or she has made all Chase payments on  
13 time, is not going to be alerted to the fact that there  
14 may be an increase in the rate. So how is that  
15 cardholder going to realize what has happened, just by  
16 scrutinizing the monthly statement and seeing that the  
17 little interest figure is different from what it was the  
18 last time?

19 MR. WAXMAN: Yes. And now, of course, we're  
20 talking about a rule that's -- it had been amended --

21 JUSTICE ALITO: Yes, I saw that.

22 MR. WAXMAN: -- amended 2 years ago, but  
23 under the old regime the cardholder was on notice -- I  
24 mean, there had to be -- and the Reg Z commentary was  
25 clear that in order for it to be a default rate, it had

1 to specify in the initial disclosures both the precise  
2 triggering event, that is, what constitutes a default --  
3 and here there's no doubt that it was specified that  
4 what constitutes a default is a default or failure to  
5 make a payment to any creditor -- and there also has to  
6 be a specification of the maximum rate that could be  
7 applied as a result.

8 Now, in this case, as the Board explained,  
9 the -- the consumer would be notified in the next  
10 monthly statement -- and it is pretty prominent -- that  
11 the interest rate applied to all balances for that month  
12 was as follows.

13 May I save the balance of my time?

14 JUSTICE SCALIA: Mr. Waxman, you refer to  
15 footnote 7 on page 29 of your blue brief? Is that what  
16 you said?

17 MR. WAXMAN: Oh, gosh, I hope I have this  
18 right.

19 Oh, no. I'm sorry. It's footnote 7 on page  
20 29 of our petition.

21 JUSTICE SCALIA: Oh, of the petition. All  
22 right.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Palmore.

25 ORAL ARGUMENT OF JOSEPH R. PALMORE,



1           ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,  
2                                   SUPPORTING THE PETITIONER

3                   MR. PALMORE: Mr. Chief Justice, and may it  
4 please the Court:

5                   During the relevant time period, the Federal  
6 Reserve Board's Regulation Z did not require provision  
7 of a change-in-terms notice when a credit card issuer  
8 merely implemented a contractual penalty rate provision  
9 that had already been disclosed. This is clear from the  
10 staff commentary to the rule, from the Board's own  
11 statements in the Federal Register when discussing  
12 changes to this very rule, and finally from the amicus  
13 briefs filed by the Board in the First Circuit and in  
14 this Court.

15                   I think it's important to put the particular  
16 regulatory provisions here in a larger context because  
17 the policy question at issue here, whether there should  
18 be advance notice under these circumstances, is not new.  
19 It did not arise with this litigation. It has been the  
20 subject of intense regulatory focus at the Board since  
21 2004. It has been the subject of two rounds of  
22 notice-and-comment rulemaking, of consumer testing, and  
23 finally of an amendment to the rule to provide notice  
24 under these circumstances, notice that in the court of  
25 appeals' view had always been required, unbeknownst to

1 the Board or anyone in the regulatory community.

2 CHIEF JUSTICE ROBERTS: I take it, apart  
3 from the amendment to the rule, you think those  
4 circumstances provide for Chevron/Auer deference.

5 MR. PALMORE: I do. This is, of course, not  
6 a Chevron case. There's no provision in the Truth in  
7 Lending Act that deals with subsequent disclosure. The  
8 subsequent disclosure --

9 CHIEF JUSTICE ROBERTS: Our Long Island  
10 health care case?

11 MR. PALMORE: It's an -- it's an Auer case,  
12 and we believe that all of these provisions, certainly  
13 the staff commentary deserves deference, and that was  
14 the holding of this Court in Milhollin, in the Milhollin  
15 case. But also the Board's own authoritative statements  
16 in rulemaking proceedings about what its old rules meant  
17 certainly deserve deference, and we believe the amicus  
18 briefs do as well.

19 In 2004, it was --

20 JUSTICE SCALIA: Well, you know, we don't --  
21 we don't do that with Congress. When -- when a later  
22 Congress says what a statute enacted by an earlier  
23 Congress meant, we don't -- we don't retroactively say,  
24 well, that must be what it meant. Are there other  
25 examples of where the Board says what a prior rule meant

1 that we deferred on?

2 MR. PALMORE: Well, this Board -- this  
3 Court, of course, in Long Island Care at Home deferred  
4 to an internal advisory memorandum that was -- that was  
5 provided after the court of appeals decision that was at  
6 issue. That was an after-the-fact reading, and it was a  
7 change in policy.

8 In the context of Auer deference, when  
9 you're looking to the author of the agency's regulation  
10 to elucidate what that regulation has meant -- means,  
11 the Court has looked at a broad range of material  
12 because it understands that, when Congress delegates  
13 rulemaking authority to an agency, that it also as an  
14 adjunct to that delegates authority to interpret those  
15 rules.

16 So, in 2004, the Board launched a proceeding  
17 because it was concerned with the very issue that  
18 underlies this litigation. And then, in 2007, it issued  
19 rules to address this situation. And in that rulemaking  
20 notice -- and this is at page 12 of the blue brief --  
21 the Board described what the old rules required. And it  
22 did so in a way that's irreconcilable with the court of  
23 appeals' view of what the old rules required. The Board  
24 noted that staff comment 9(c)-1 did not require  
25 provision of a change-in-terms notice when a specific

1 change had been previously disclosed.

2 JUSTICE KAGAN: Mr. Palmore, what would the  
3 Board's position be on the following hypothetical: That  
4 a card issuer says when any of 50 different things  
5 happen, so 50 different triggering events, the -- the  
6 issuer can raise the rate anywhere up to 300 percent, so  
7 has complete discretion if any of a quite large number  
8 of triggering events occurs. And then one of those 50  
9 triggering events occurs, and the card issuer says,  
10 okay, we'll raise the interest rate to 42 percent.  
11 Would there need to be notice for that?

12 MR. PALMORE: Under the old rule, no.

13 JUSTICE KAGAN: Under the old rule?

14 MR. PALMORE: Under the old rule, no.

15 There's a specific staff comment, 6(a)(2)-11, which  
16 deals with the initial disclosure of penalty rate  
17 provisions, and it said there are two requirements of  
18 specificity. The specific maximum rate that may be  
19 applied must be disclosed, and the specific event or  
20 events that could lead to imposition of that specific  
21 maximum rate must be disclosed.

22 JUSTICE GINSBURG: Mr. Palmore, suppose  
23 there was no triggering event, but in the initial  
24 statement the company said: We reserve the right to  
25 raise the interest to X amount. No triggering event,

1 just a reservation of the right to raise the interest.  
2 Would that have to be -- and then it implements that  
3 later on. Would the cardholder have to have notice of  
4 that under the old reg?

5 MR. PALMORE: Yes. Under staff comment  
6 9(c)-1, the staff makes clear that if there's a general  
7 -- exercise of a change in rates pursuant to a general  
8 reservation of rights clause that's not specific with  
9 respect to the maximum rate that could apply or the  
10 specific triggering events that could lead to imposition  
11 of the maximum rate, that advance notice is required.

12 But the staff contrasted that to the  
13 situation we have here, when the specific change is  
14 previously disclosed, and it provided some examples, the  
15 third of which is quite analogous here. It's a  
16 situation where the cardholder has agreed to maintain a  
17 certain balance in a savings account at the risk of  
18 having his rate go up if he -- if he goes below that  
19 balance.

20 JUSTICE KENNEDY: And when was that staff  
21 comment made?

22 MR. PALMORE: That was in -- that's been  
23 there since 1981, Justice Kennedy.

24 But going back to the 2007 notice of  
25 proposed rulemaking, the Court specifically -- sorry --

1 the Board specifically addressed this situation. It  
2 said: "Some credit card account agreements permit the  
3 card issuer to increase the periodic rate if the  
4 consumer makes a late payment. Because the  
5 circumstances of the increase are specified in advance  
6 in the account agreement, the creditor currently need  
7 not provide a change-in-terms notice; under current  
8 226.7(d), the new rate will appear on the periodic  
9 statement for the cycle in which the increase occurs."

10 This statement by the Board authoritatively  
11 interpreting its rules is inconsistent with the court of  
12 appeals' view of those rules.

13 CHIEF JUSTICE ROBERTS: Could you address  
14 your friend's contention that because the notice doesn't  
15 occur -- the notice that the increase has gone into  
16 effect doesn't occur until the end of a billing cycle,  
17 it's a retroactive increase without notice.

18 MR. PALMORE: It's a retroactive increase  
19 without notice that was specifically disclosed  
20 initially. So, if you look to the cardholder agreement  
21 here on page 20a of the petition appendix, Chase was up  
22 front that that's what would happen, that the change  
23 would be -- the increase in rates would be applied to  
24 existing balances and that -- and that consistent with  
25 the statement from the notice of proposed rulemaking,

1 that the consumer would find out about that when he  
2 received his next periodic statement. That's a  
3 backward-looking statement.

4 That's inconsistent with the court of  
5 appeals' view that advance notice had always been  
6 required. The court of appeals tried to dismiss this  
7 statement and others like it as incidental descriptions  
8 of current law.

9 CHIEF JUSTICE ROBERTS: But it is correct to  
10 characterize what's being allowed under your  
11 interpretation as an increase in rates without notice?

12 MR. PALMORE: Without advance notice. There  
13 are actually two kinds of notice under the old rule.  
14 Now there are three.

15 CHIEF JUSTICE ROBERTS: Well, advance notice  
16 --

17 MR. PALMORE: First, you have to be --

18 CHIEF JUSTICE ROBERTS: Advance notice is  
19 notice, right?

20 MR. PALMORE: Right. It has to be -- it has  
21 to be disclosed initially. It had to be disclosed  
22 initially, and if the cardholder didn't like the term,  
23 he didn't have to sign up for that card. And then it  
24 had to be disclosed subsequently on the periodic  
25 statement immediately following the rate increase, which

1 would typically be within a matter of weeks.

2 Now, the Board now believes that there  
3 should be a third form of notice --

4 JUSTICE SCALIA: So, what would have to be  
5 disclosed, just the increase in rate?

6 MR. PALMORE: The new rate, right.

7 JUSTICE SCALIA: Not the reason for the --

8 MR. PALMORE: Not the reason. Under the new  
9 rule, a general reason has to be given.

10 So, when the court of appeals described this  
11 as an incidental description of current law, it was  
12 correct that this is a description of current law, but  
13 it wasn't at all incidental. It was inherent in the  
14 rulemaking proceeding. The agency needed to explain  
15 what its old rules required while it was -- so the  
16 readers could make sense of what it was proposing to do  
17 to those rules.

18 And then, as Mr. Waxman said, when the --  
19 when the Board then adopted amendments, it did two  
20 different things. It changed 226.9(c), the provision at  
21 issue here, to extend the notice period to 45 days. But  
22 then it did something additional. It adopted a new  
23 subsection, 226.9(g), to provide for notice in  
24 situations where there was no change in terms, where, by  
25 contrast, the card issuer was simply implementing terms



1 that had previously been disclosed.

2 JUSTICE ALITO: Did the Board think that  
3 this -- that requiring the card-issuing company to  
4 provide immediate notice would be very burdensome? And  
5 if not, what's the -- what was its reason for  
6 interpreting the Regulation Z the way it did?

7 MR. PALMORE: I think it's important to note  
8 that in 1981, as we discussed earlier, there was no  
9 provision in the Truth in Lending Act requiring  
10 subsequent disclosure at all. And the focus in the  
11 statute at that time and in the Board at that time was  
12 on the importance of initial disclosure. And it was  
13 thought that initial disclosure was the key tool that  
14 consumers could use to comparison shop for credit. And  
15 the Board wasn't as focused on things that happened  
16 later in that credit arrangement. And it thought that  
17 the initial disclosure and the subsequent disclosure was  
18 sufficient, in the same way that, in a variable rate  
19 plan, there's initial disclosure of the variable rate  
20 and there's subsequent disclosure on the periodic  
21 statement after the rate adjusts.

22 There was no requirement and there still is  
23 no requirement that there be advance notice when a  
24 variable rate increases. The consumer finds out about  
25 it on the periodic statement within a matter of weeks of

1 the rate adjustment. And the Board previously viewed  
2 these penalty rate provisions in much the same way. The  
3 Board has now come to a different judgment.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
5 Mr. Beck.

6 ORAL ARGUMENT OF GREGORY A. BECK

7 ON BEHALF OF THE RESPONDENT

8 MR. BECK: Mr. Chief Justice, and may it  
9 please the Court:

10 The question in this case is whether a bank  
11 must provide notice of a change in terms when, after  
12 prominently disclosing a specific purchase rate in the  
13 cardholder agreement, the bank then changes that rate --  
14 then changes that rate based on a reservation of  
15 discretion in the fine print of the cardholder  
16 agreement.

17 JUSTICE GINSBURG: Changes the rate in the  
18 cardholder's favor?

19 MR. BECK: Changes the rate -- the rules,  
20 the regulations, as they -- as they exist as relevant to  
21 this case, provide that you do not need to provide  
22 notice if the interest rate is reduced. Is that your  
23 question, Justice Ginsburg?

24 JUSTICE GINSBURG: Yes, but would you --  
25 would it be in the greater interest of your client if

1 the initial notice said we're going to raise it to the  
2 top, no discretion?

3 MR. BECK: It -- there -- Justice Ginsburg,  
4 there would still be discretion. And we're not -- and  
5 nothing we say would take away discretion or discourage  
6 discretion. We're simply saying that either the -- the  
7 credit card company has to decide specifically what rate  
8 will apply beforehand and put it in the cardholder  
9 agreement, or it can specify a range of possible rates,  
10 reserve that discretion, and then when it decides which  
11 rate it wants to apply, it would then inform the  
12 borrower what that rate is.

13 JUSTICE GINSBURG: But if it says: We  
14 prefer one notice to two. So, sorry, we can't give our  
15 cardholders that benefit. We'll say this is the rate,  
16 this is going to be it. Then we will spare ourselves a  
17 second notice.

18 MR. BECK: Right. And -- and there's -- but  
19 there has been no showing that the -- this notice cost  
20 would be -- would be a significant burden on the credit  
21 card companies. And the important thing is that, if you  
22 don't know, if you don't get that notice and all you  
23 know is that the credit card company has discretion to  
24 raise the rate, then you never know for sure whether  
25 your rate has even gone up or not, much less how much

1 it's gone up. So you never have that opportunity to go  
2 and see whether there's a better-priced loan available.  
3 You might not -- you might miss an opportunity to avoid  
4 making a purchase that would -- that would be at a rate  
5 higher than you expected, and the lack of that -- that  
6 ability to shop between loans is really the central  
7 motivating --

8 JUSTICE GINSBURG: Well, you know the  
9 highest rate, because that's stated in the original  
10 notice, and you could shop on the basis of that.

11 MR. BECK: You -- you could, but you  
12 wouldn't know that the rate had gone up at all, because  
13 all you know is that there's a maximum rate, and the --  
14 and the credit card company has discretion to raise the  
15 rate or not. So absent any notice, the assumption would  
16 be that the rate hasn't changed, that there's --

17 JUSTICE SCALIA: You -- you get the notice  
18 with your next statement. But you're talking about the  
19 purchases made before the next statement, right?

20 MR. BECK: Right. You -- you don't get  
21 notice on your next statement, Your Honor.

22 JUSTICE SCALIA: Well, you get notice if  
23 your rates changed. It would show it, wouldn't it?

24 MR. BECK: It will -- it will state, Your  
25 Honor, it will state on the statement that -- what your

1 rate is.

2 JUSTICE SCALIA: Right.

3 MR. BECK: But it will not tell you that the  
4 rate has changed, and it won't tell you how much it has  
5 changed. So you'd have to figure that out by yourself.  
6 So it's not notice of a change in that sense.

7 JUSTICE SCALIA: What's to figure out? I  
8 mean --

9 MR. BECK: Well --

10 JUSTICE SCALIA: If he had been paying,  
11 what, 10 percent and it's now 25 percent, it would seem  
12 evident on the face. But that doesn't solve the problem  
13 of the purchases that you have made before you got that  
14 statement.

15 MR. BECK: Well, that's right -- that's  
16 correct, Your Honor. It still doesn't solve that  
17 problem. And when the rate is applied retroactively  
18 back to the beginning of the cycle, so this would go  
19 back to the first of the month even before the default  
20 occurred, as happens in this case, then the problem is  
21 exacerbated even more.

22 JUSTICE KAGAN: Mr. Beck, just to clarify  
23 your position, if the initial agreement said your rate  
24 is 10 percent, but if you're delinquent, your rate will  
25 be 20 percent, so not up to 20 percent, just 20 percent,

1 it's an automatic increase in your rate -- in that case,  
2 would notice -- would subsequent notice be required?

3 MR. BECK: I think if the disclosure was  
4 specific and -- and prominent, as required by the  
5 initial disclosures, and it wasn't retroactive, then I  
6 think the best reading of the rules would be you would  
7 not need to disclose that.

8 JUSTICE KAGAN: So if you don't need to  
9 disclose this -- and I think that this is the import of  
10 Justice Ginsburg's question --

11 MR. BECK: Right.

12 JUSTICE KAGAN: -- what's the difference  
13 between going, okay, we'll do the initial agreement, 10  
14 percent to 20 percent; then we can always lower the rate  
15 without providing notice; we'll go back down to  
16 12 percent, and now you have a 12 percent rate. What's  
17 the difference between doing that and, on the other  
18 hand, doing what the card issuer said here, which is if  
19 you're delinquent, we have the discretion to go up to 20  
20 percent, but, you know, we could also go to 12?

21 MR. BECK: Well, the easy answer to that  
22 question is that it -- it's different because the  
23 language of the regulation specifies a different result  
24 in each case. Section 226.9(c)(2) says that no notice  
25 is required when any component of the finance charge

1 decreases or is changed in the customer's favor. So  
2 there would be under the plain language of the  
3 regulation no need to -- to provide notice there.

4 But I think the intent of the question is,  
5 is Chase's argument about there's no practical  
6 difference between the two, that is, there's basically  
7 no harm from -- from not telling people that the --  
8 about their rate change. And we disagree with that as  
9 well, first of all because, as I was saying to Justice  
10 Ginsburg, you need to have the notice that there has  
11 been a change at all in order to -- to realize that you  
12 might want to avoid making extra purchases or  
13 consider -- not throw away the low APR offer that comes  
14 in the mail, for example.

15 And also, aside from that, we think that  
16 when you have only a -- a maximum rate, that's basically  
17 the equivalent of a range of possible rates between the  
18 initial rate and the maximum rate. And that undercuts  
19 the ability to compare loans at the time of the  
20 cardholder agreement, even before the whole default  
21 comes into play, because at that point you have to  
22 compare two loans with two possible ranges of rates, and  
23 the key factor between the two, the value of the two  
24 loans, is how the credit card company will issue -- will  
25 use its discretion in --

1 CHIEF JUSTICE ROBERTS: Well, that's just  
2 saying that the problem that Justice Ginsburg is  
3 concerned with isn't likely to come up, because a credit  
4 card issuer realizes he's not going to get chosen by a  
5 consumer if he says your rate is going to be somewhere  
6 between 5 and 20 percent. No one's going to sign up for  
7 that card.

8 MR. BECK: Well, that's -- that's part of  
9 the problem, Mr. Chief Justice, because the point of --  
10 the central motivating purpose of TILA is to provide  
11 clear and up-front and specific disclosures, and that --  
12 that would put the burden on the consumer to -- to look  
13 into the fine print to figure out the conditions, and  
14 after judging all the applicability of those conditions,  
15 to figure out how it would apply and compare with other  
16 loans.

17 JUSTICE GINSBURG: And it's fine to say  
18 then, Federal Reserve Board, this regulation that you  
19 had and that you explained a number of times was a bad  
20 one; you should change it, which they did. But you are  
21 up against a regulation that both sides say has some  
22 ambiguity, but that the Board has said what it meant a  
23 number of times. So is -- is the Court free to say the  
24 new rule is much better so we're going to say that  
25 that's what the old rule was as well, in the face of



1 what the Board has said?

2 MR. BECK: No, definitely not, Justice  
3 Ginsburg. But --

4 JUSTICE BREYER: Why not? Can't an agency  
5 interpret its own rules? I thought there was a long  
6 line of cases, Udall v. -- whatever it was. I mean,  
7 there are like 50 of them --

8 MR. BECK: Yes.

9 JUSTICE BREYER: -- where an agency can  
10 interpret its own rules, and if it has authority to make  
11 the rule, it can decide that it means something  
12 different. Why not? Where -- where in the law does it  
13 say they can't do that?

14 MR. BECK: It doesn't, Justice Breyer, and  
15 -- and all we're saying is that agencies speak with  
16 varying levels of authority, and -- and those different  
17 methods of statement make a difference in how much  
18 deference will go towards those statements. And what we  
19 have here is the official staff commentary which the  
20 Board has designated as the official source of -- of  
21 interpretation of the rules, and we're asking the Court  
22 to -- to read those rules and defer to those.

23 JUSTICE BREYER: But at the Board -- I mean,  
24 isn't there realism in this? When you read what the  
25 Board later said in -- in these reports, you'd say,

1 well, is this what the Board now thinks? And what in  
2 the law prevents the Board, which is in charge of its  
3 own regulations, from telling us what it thinks, if it's  
4 in good faith and isn't making up some kind of ex-post  
5 rationalization? That's the word used, you know, in the  
6 brief case.

7 MR. BECK: I think that the Board itself  
8 made that law when it decided that it would issue  
9 official staff commentary through a notice-and-comment  
10 process and interpret the rules in that way.

11 JUSTICE GINSBURG: But the problem with that  
12 is in the Ninth Circuit split about the official  
13 statements, and Judge Cudahy gave a very cogent  
14 explanation of why the majority just is dead wrong in  
15 how it read those official comments. So you're relying  
16 on what two judges have said the official interpretation  
17 was, against the dissenting opinion and the Board itself  
18 saying that's what we meant in our official comments, in  
19 our official comments.

20 MR. BECK: Well, we -- we think that Justice  
21 Cudahy's analysis made the same mistake that other  
22 courts have made in examining the regulations, which is  
23 to defer to the -- the unofficial statements of the  
24 Board, the Board or the Board's staff, before coming to  
25 a conclusion about the plain meaning of the official

1 regulations, the official interpretation.

2 JUSTICE GINSBURG: And what about the  
3 invited brief in the First Circuit?

4 MR. BECK: Well, there's no question that  
5 the invited brief is against our position, and we  
6 certainly wouldn't argue otherwise. But --

7 JUSTICE KENNEDY: You talk about the plain  
8 meaning or -- I thought you agreed that the -- that the  
9 regulation is ambiguous.

10 MR. BECK: No, we don't agree that the  
11 regulation is ambiguous.

12 JUSTICE KENNEDY: I thought you did.

13 MR. BECK: And I'd like to talk about that.  
14 Section 226.9 is the relevant change-of-terms provision,  
15 and it states that notice is required, quote, "whenever  
16 any term required to be disclosed under section 226 is  
17 changed." And section 226.6 in turn states that -- that  
18 there is a required disclosure when -- "of each periodic  
19 rate that may be used to compute the finance charge."

20 And so those two sections working together  
21 say that you have to -- you have to disclose when  
22 there's a change of terms and -- and that one of the  
23 terms that has to be disclosed is the interest rate.  
24 And, in fact, the interest rate is the most important  
25 disclosure --

1 JUSTICE SCALIA: But the rate -- the rate  
2 that may be charged --

3 MR. BECK: Right.

4 JUSTICE SCALIA: -- hasn't been changed.  
5 That still remains what it was.

6 MR. BECK: All right. But I don't think the  
7 word "may" here can be read to exclude the requirement  
8 that the bank also disclose the rates that are charged.

9 JUSTICE SCALIA: Ah. No, you're the one  
10 that's reading it to say something different from what  
11 it says. It says the rates that may be charged. That's  
12 the term, "these rates may be charged." That term  
13 hadn't been changed. You want to change it to "the  
14 rates that are charged."

15 MR. BECK: But even -- even the Board and  
16 even Chase does not argue that you do not have to  
17 disclose the actual -- the actual purchase rate at the  
18 beginning of the agreement. Everybody agrees that that  
19 has to be disclosed, and that has to be disclosed with  
20 specificity. So the word "may" has to include the --  
21 both rates that might be applied and rates that are  
22 applied.

23 And the reason the word "may" has to be  
24 there is because it's quite possible that a -- that a  
25 rate may never come into play. For example, if you have

1 an initial rate that changes at the end of 6 months and  
2 you leave the credit card before the 6 months are up,  
3 then that new rate will never come into play. But that  
4 doesn't mean you don't also have to disclose the rate  
5 that happened at the beginning of the credit card  
6 agreement.

7 JUSTICE SCALIA: Well, I think it's at least  
8 a horse race, and that brings us back to how much  
9 deference you give to the -- to the Board.

10 MR. BECK: Uh-huh. And I --

11 JUSTICE SCALIA: You're trying to make the  
12 argument that it's clear. The fact that it says "may be  
13 charged" alone makes it unclear, it seems to me.

14 MR. BECK: Well, I would say that even the  
15 Government doesn't -- doesn't agree with that, that  
16 "may" means that. Because that would -- the Government  
17 doesn't argue initial disclosures don't have to be  
18 specific and don't have to be -- don't have to be made.

19 The Government's argument is a little bit  
20 different. What they're saying is that the word "term"  
21 in section 226.9 means contractual terms rather than  
22 credit terms. And that's a different argument because  
23 it doesn't -- it wouldn't -- it wouldn't affect the  
24 initial disclosures. It would only -- it would only  
25 mean that you don't have to give subsequent notice if

1 you haven't changed the contract in the first instance.

2           And so these are actually somewhat --  
3 somewhat different theories. And under the Government's  
4 theory, there would be no role for section 226.9 to play  
5 because you would -- the only times it would come into  
6 play is when there's a change in the contract. And any  
7 time there's a change in the contract, under the basic  
8 contract law of every State, you have to provide notice  
9 at least to the other party to the contract. So the  
10 only time notice would be required under section 226.9  
11 would be when the -- when contract law requires that  
12 notice to be given anyway.

13           And even worse than that, it would -- it  
14 would actually cut back on the required notice that  
15 would be available under contract law, because, for  
16 example, Delaware says you have to give 15 days' advance  
17 notice of a change in terms to a credit card agreement  
18 in the event of a default. And under this reading, you  
19 would -- even if the creditor changed the terms of the  
20 contract, as in increased the default rate above the  
21 maximum that the contract would authorize, so the  
22 contract says we can charge you 30 percent in the event  
23 of a default and you impose an interest rate of  
24 100 percent -- then even in those circumstances, you  
25 only have to provide contemporaneous notice of the

1 change. So you would basically have to put a letter in  
2 the mailbox on the day that you implement the new  
3 100 percent interest rate that was not disclosed in the  
4 initial agreement.

5           And our submission is that that's not a  
6 reasonable interpretation of section 226.9. And it is  
7 true that the rules have been amended, but we have to  
8 look at the purpose of the rules from the point of view  
9 of the -- of the Board which enacted those rules in  
10 1981. And you can't assume that the Board at that time  
11 expected a set of rules that would never -- that would  
12 never require subsequent notice to be -- to be supplied  
13 unless there is a change in the terms of a contract, in  
14 which -- in which notice would have to be required  
15 anyway.

16           The next point that the parties -- aside  
17 from the language of the -- of the regulation itself,  
18 the parties rely on the official staff commentary, as do  
19 we, in supporting their position. And the parties argue  
20 that the word "specific" allows them to -- I'm sorry --  
21 the Government and Chase Bank argue that the word  
22 "specific" allows them to specify in advance only the  
23 maximum rate and that the word "specific" encompasses a  
24 maximum and the circumstances of causing that maximum to  
25 go in effect of a universal default situation, where if

1 you default to any creditor or make a late payment to  
2 any creditor, then it triggers the new rate, which goes  
3 up to a discretionary maximum.

4           It's our contention that that kind of  
5 situation of a universal default and a discretionary  
6 maximum rate is not a specific disclosure under any  
7 sense of the word. And --

8           JUSTICE GINSBURG: So we're getting back to  
9 what was my initial question. So you say you can't have  
10 flexibility that would favor the cardholder. If the  
11 initial notice is to count, then it has to be a fixed  
12 rate and the company can't exercise discretion to reduce  
13 the rate. That's what you're saying: A fixed rate  
14 would be okay. The problem with this is the company  
15 provided flexibility to reduce the rate in the interest  
16 of the cardholder.

17           MR. BECK: That's one of the problems. The  
18 other problems are that the triggering event is not  
19 specific enough and that it applies retroactively.

20           But, as to that problem, which we -- we do  
21 agree is a problem, that's a result of the Board's  
22 decision to allow reductions in interest rates without  
23 requiring notice. And if it were true that that meant  
24 that there's no point in giving a specific interest rate  
25 because it could always, after all, be lower --



1 JUSTICE BREYER: It doesn't say "specific  
2 interest rate." I mean, my understanding of it -- and  
3 I'm asking, so you can correct me if that isn't so -- is  
4 there's a regulation, Regulation Z.

5 MR. BECK: Right.

6 JUSTICE BREYER: And then the staff put out  
7 some commentary and says here's what that means, among  
8 other things: That the creditor can increase the rate  
9 at its discretion, and you've got to give notice. You  
10 have to give notice, but you have to give some more  
11 notice if the original notice does not include specific  
12 terms for an increase.

13 And then they give an example. Suppose the  
14 increase could occur under the creditor's contract  
15 reservation right to increase the periodic rate.

16 MR. BECK: Right.

17 JUSTICE BREYER: That's a little obscure.  
18 As I say it, I'm not sure what I'm talking about. So  
19 then, later on, the Board puts out another -- not called  
20 official staff commentary, but they say: We'll tell you  
21 what that specific -- word "specific" terms mean. It  
22 means when they didn't say anything about the interest  
23 rate or they didn't say when in fact they were going to  
24 increase the interest rate from X to Y, then they didn't  
25 give specific notice.

1           But they did give specific notice if they  
2 told you when it would increase, by default -- when you  
3 default. And they did give specific notice when they  
4 told you what the maximum it would go up to was, like 8  
5 percent or 18 or whatever it is. Okay? So that's the  
6 Board's interpretation of its official staff commentary,  
7 which in turn is an interpretation of the reg.

8           So if we're supposed to defer to their  
9 interpretation of their own reg -- I mean, my goodness,  
10 wouldn't we defer like double to their own  
11 interpretation of their own staff commentary, which is  
12 an interpretation of a reg which they have an authority  
13 to issue under the -- you see my point.

14           (Laughter.)

15           MR. BECK: I see your point, Justice Breyer.  
16 But I would say that when you're talking about an  
17 interpretation of an interpretation, you're even further  
18 away from the original congressional intent that's  
19 empowering these kinds of interpretations. So I don't  
20 think that would --

21           JUSTICE BREYER: I mean, that would be an  
22 argument you could make. You could say that -- that  
23 their interpretation here exceeds their authority under  
24 the statute. Now, of course, if you're right about  
25 that, all this stuff goes out the window.

1 MR. BECK: Right.

2 JUSTICE BREYER: But it's a pretty hard  
3 argument to make that one, I think.

4 MR. BECK: And we're not making that  
5 argument, Your Honor. But what we are saying is -- is  
6 that when you look at the interpretation, you have to  
7 judge it based on the authority that comes with it and  
8 the deliberation that comes with it.

9 And in this case, we know that the Board  
10 itself has designated the official staff commentary with  
11 notice-and-comment process as the way that it wants to  
12 officially interpret rules. And there's good reason for  
13 that, because the Board was concerned, as Congress was  
14 concerned, that there was all these differing  
15 interpretations of the -- of Regulation Z that were  
16 going out in the form of opinion letters.

17 JUSTICE SOTOMAYOR: What's left of your  
18 arguments if we decide that the statute is ambiguous,  
19 the official staff commentary is ambiguous? What's  
20 left? Is Auer deference then required?

21 MR. BECK: I think -- I think Auer --

22 JUSTICE SOTOMAYOR: To -- to the amicus  
23 brief at least? We can talk about whether the ANPRs or  
24 the unofficial commentaries are -- are due deference.  
25 But what are we left with if we think there is

1 ambiguity?

2 MR. BECK: I think in that case that the  
3 Court would have to defer to some degree to the brief,  
4 because that would be the only source of the Board's  
5 opinion in that case.

6 JUSTICE SOTOMAYOR: So your case rises and  
7 falls on whether we believe that the statute is clear?

8 MR. BECK: The regulation and the official  
9 staff commentary.

10 But I would also say that that deference  
11 does not have to be conclusive, and it should not be  
12 given the force of law, even to the brief, because the  
13 agency has said that it doesn't -- it specified the  
14 official staff commentary so that there aren't these  
15 multiplicity of different opinions going out,  
16 interpretations of Regulation Z that are difficult for  
17 banks to access to figure out what their obligations are  
18 under the regulations.

19 And -- and so the Board itself doesn't want  
20 opinion letters and briefs and things to be -- to be  
21 interpreted as -- with the force of law, because that  
22 would, you know --

23 JUSTICE SOTOMAYOR: Well, that's a different  
24 question. You're claiming that the Board's regulations  
25 supersede whatever deference Auer would otherwise give

1 to amicus briefs?

2 MR. BECK: Yes. I think that's right or at  
3 least limit that deference. I think that the Court  
4 should at least -- should at least view the brief with  
5 more skepticism, given that the Board has wanted this  
6 very careful deliberative process for making its rules.

7 JUSTICE KAGAN: Mr. Bauer, if -- most of  
8 your argument seems to rely on the official staff  
9 commentary, but the official staff commentary itself  
10 seems to me to cut against you. It says no notice may  
11 be -- need be given if the specific change is set forth  
12 initially. And then it gives examples of what that  
13 means. And it says such as an increase that occurs when  
14 the consumer has been under an agreement to maintain a  
15 certain balance in a savings account in order to keep a  
16 particular rate and the account balance falls below the  
17 specified minimum.

18 So the example that they give is an example  
19 where there's a triggering event and there's a penalty  
20 rate that comes into effect as a result of the  
21 triggering event. And that's exactly what is true here.

22 MR. BECK: Yes, but in that case, Justice  
23 Kagan, you know for certain anyone who has a bank  
24 account can know what the balance of that bank account  
25 is. And so there's no uncertainty about whether the

1 balance triggering event is satisfied. And then there's  
2 no uncertainty about what the resulting rate is because  
3 section 226.6 says you have to disclose each interest  
4 rate and the range of balances to which it is  
5 applicable. So you have to know both the interest rate  
6 and you have to know the triggering event. And that's  
7 very different from a case where you're not sure, first  
8 of all, whether the bank is going to use its discretion  
9 at all. You don't know for sure whether your -- whether  
10 there's anything negative on your credit report that  
11 would even trigger that discretion to begin with. And  
12 you don't know, if the discretion is triggered, what the  
13 rate will be because the bank reserves discretion to set  
14 it anywhere up to the maximum.

15 JUSTICE KAGAN: Well, on the triggering  
16 event first, it's true that you might know your account  
17 balance, but it's also true that you might know whether  
18 you paid your bills on time. What's the difference?

19 MR. BECK: Well, as -- there's the  
20 discretionary difference, for example. There's no -- in  
21 the bank situation, the rate is automatic and is not  
22 based -- it doesn't just trigger an exercise of  
23 discretion.

24 JUSTICE KAGAN: Well, I don't see that in  
25 the example that's given. I don't see that it limits it

1 to a situation in which there is an automatic increase  
2 in your rate rather than a discretionary increase in  
3 your rate.

4 MR. Beck: Well, for that, I would look to  
5 section 226.6(a)(2), which says that each periodic rate  
6 and the range of balances to which it is applicable must  
7 be set forth initially. And so you know from the very  
8 beginning which balances on your account will trigger a  
9 certain interest rate. And so there's no -- in that  
10 case, there's no uncertainty. But the other difference  
11 is that in the bank account situation, your balance is  
12 either above the maximum or below the maximum.

13 But when you're talking about universal  
14 default, it's not always going to be obvious to you,  
15 first of all, whether anyone has reported anything to  
16 the credit agency. Oftentimes, certain creditors will  
17 overlook a certain late payment, for example, and maybe  
18 they reported one and it might not show up on your  
19 Experian credit report for months or years later, and  
20 then you will not know at what point it comes into play.  
21 So you would -- the only way to know for sure in that  
22 circumstance is to subscribe to the Experian credit  
23 reporting service just like Chase does so that you would  
24 know when there's any negative events that are reported  
25 to the credit agency that would possibly trigger Chase's

1 discretion, but even in that case you wouldn't know for  
2 sure whether Chase had implemented its discretion or  
3 not.

4           And I wanted to say that the -- that the  
5 government -- its own interpretation of the regulation  
6 is, especially when considering the amendment, is itself  
7 inconsistent, because the government says that the new  
8 regulation fixed the problem. But the new regulation  
9 uses the same language as the old regulation when it  
10 comes to what's required for a -- for a later change.  
11 It does carve out the default rate situation as a  
12 special case. But for every other kind of rate increase  
13 that has happened subsequent to the initial disclosure,  
14 it still uses as a triggering event any change in terms  
15 required to be disclosed by section 226.6.

16           And if it were true that -- that what the  
17 Board wanted to do was fix this ambiguity and this  
18 problem that was set forth in -- that was in the  
19 original regulations, then it would be very, very  
20 unlikely that the government would then implement the  
21 same language in the amended regulation and leave that  
22 same ambiguity in place rather than clarifying exactly  
23 when subsequent notice would be required.

24           JUSTICE GINSBURG: I'm not following that  
25 argument. I thought that the new regulation says now



1 any time there is a change in the rate, whether it was  
2 announced originally or comes up later, just keeping it  
3 nice and simple, a rate change, you send notice. And  
4 you've got -- and you have to do it -- give 45 days'  
5 notice. I thought that that's what the new regulation  
6 was.

7 MR. BECK: That's why I am saying the  
8 government is inconsistent because that's what the  
9 government says that it does, but what it -- what the  
10 regulation actually says in 226.6(c), the new version,  
11 any change required to be disclosed -- a change in any  
12 term required to be disclosed by section 226.6 is the  
13 same thing. It is true that there's a new subsection  
14 (g) that applies just to default rates, and it's very  
15 extensive because it covers a lot of aspects of default  
16 rates. So now I think it is clear that default rate  
17 increases would have to be disclosed. So the problem in  
18 this case would certainly be resolved.

19 But the Government's position is that --  
20 that there was a consolidation of all change notices  
21 into one 45-day notice period, and that's not clear from  
22 the regulation because it still uses this same ambiguous  
23 language that was in the old version. So I think the  
24 Court -- the Court should -- and for us that's an  
25 independent reason for the Court to view skeptically the

1 Government's submissions in this case and to view it  
2 with some skepticism instead of granting it the force of  
3 law, because the Court should -- should consider that.  
4 The Board itself hasn't -- hasn't adopted a consistent  
5 interpretation of the language at issue.

6 Unless there are any further questions --

7 CHIEF JUSTICE ROBERTS: Thank you, Mr. Beck.

8 MR. BECK: Thank you, Your Honor.

9 CHIEF JUSTICE ROBERTS: Mr. Waxman, you have  
10 3 minutes remaining.

11 REBUTTAL ARGUMENT OF SETH P. WAXMAN

12 ON BEHALF OF THE PETITIONER

13 MR. WAXMAN: May it please the Court:

14 Just three small points. My interest was  
15 piqued when Justice Breyer said that he acknowledged  
16 that he may have no idea what he was talking about in --  
17 with respect to a reservation of rights. And I just  
18 want to be clear that reservation of rights clauses,  
19 which are also referred to as change-in-terms clauses,  
20 are ubiquitous in these -- in contracts and initial  
21 disclosures. They are a term of art, as the Board has  
22 recognized. And what they are is simply a statement by  
23 the credit card issuer in a consumer open-credit account  
24 arrangement that, you know, it may decide to change any  
25 term in any respect at any time. And the Board's

1 regulations make clear that if you do that, that is if  
2 you implement a change in terms pursuant to a  
3 reservation of rights clause, you have to provide  
4 notice.

5 Now, the specific -- what "specific" means  
6 in the commentary to the regulation, which is a question  
7 that Justice Kagan asked, it seems to me was absolutely  
8 explained by the Board in a 1998 amendment to Regulation  
9 Z, which is comment 6(a)(2)-11, which is reprinted in  
10 relevant part on page A of our blue brief. This really  
11 is in our blue brief.

12 JUSTICE BREYER: So in your view, that's  
13 staff commentary, the staff thing means --

14 JUSTICE SCALIA: Page A?

15 JUSTICE BREYER: -- look, if you didn't  
16 say --

17 MR. WAXMAN: Page 8.

18 JUSTICE SCALIA: 8.

19 MR. WAXMAN: 8.

20 JUSTICE BREYER: If you failed to say in  
21 your original notice that default is the trigger, then  
22 you would have to give another notice?

23 MR. WAXMAN: Correct. You have to -- I  
24 mean, what it says -- and I'm quoting from, like,  
25 four-fifths of the way down page 8 -- quote: "If the

1 initial rate may increase upon the occurrence of one or  
2 more specific events, such as a late payment or an  
3 extension of credit that exceeds the credit limit, the  
4 creditor must disclose the initial rate and the  
5 increased penalty rate that may apply." And this was an  
6 amendment in 1998 that the Board made to Reg Z in what  
7 it recognized, what it stated was on account of the  
8 increased use of default penalty terms in the initial  
9 disclosures, that it wanted to make clear that if both  
10 the triggering event and the maximum rate was specified,  
11 there would be no change in terms if an increased rate  
12 were implemented.

13 And finally, I just want to address my  
14 friend's point that there may be some question about  
15 whether TILA even authorizes the Board's explanation of  
16 the type of subsequent disclosure that was or wasn't  
17 required and underscore Mr. Palmore's observation that  
18 in TILA until 2009, there was a requirement for initial  
19 disclosures, there was a requirement for periodic  
20 statements, but nothing at all about subsequent  
21 disclosures. Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 The case is submitted.

24 (Whereupon, at 10:59 a.m., the case in the  
25 above-entitled matter was submitted.)

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