No. 10-1042

IN THE

Supreme Court of the United States

TAMMY FORET FREEMAN ET AL.,

Petitioners,

v.

QUICKEN LOANS, INC.,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

REPLY BRIEF FOR PETITIONERS

Quicken acknowledges that it would be liable in this case if it had shared with petitioners' mortgage brokers or another third party even a dollar of the unearned fees it charged petitioners. It contends, however, that the Real Estate Settlement Procedures Act (RESPA) unambiguously permits it to charge consumers the exact same unearned fees without fear of liability, so long as it retains all of the fraudulent charges for itself. Quicken says this follows from the plain text of the statute. But it does not contest for purposes of this appeal that it "accept[ed]" a "charge made . . . for the rendering of a real estate settlement service" involving a federally insured mortgage loan – the loan discount fee – and that the money it accepted was not for "services actually performed." 12 U.S.C. § 2607(b).[1] Nor does it seriously dispute that as a matter of English usage, prohibiting someone from accepting "any portion" or "any percentage" of a fee can be understood to prohibit

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[1] Quicken states in passing that it earned the loan discount fees because the fees were "a component of the price petitioners willingly paid in order to get the loans that they wanted." Resp. Br. 26. It also asserts in a footnote that loan discount fees are not charges for a "real estate settlement service," and therefore are not subject to RESPA. Resp. Br. 26 n.9. But Quicken does not assert either undeveloped argument as an alternative ground for affirmance. Nor does it contest petitioners' showing that these arguments were waived below. *See* Petr. Br. 9–11 nn.12–13. Both claims are meritless in any event. *See* U.S. Br. 28–32.

that person from accepting the entirety of the fee. *See* Resp. Br. 17.

Even if Quicken could show that the statute could be read differently, that would do it no good here – when a statute is susceptible to more than one reading, this Court defers to the reasonable interpretive choice made by the agency Congress charged with administering the statute. And in this case, the Department of Housing and Urban Development (HUD) construes the statute and the agency's notice-and-comment regulations as prohibiting all unearned fees, divided or not. Quicken therefore has its work cut out for it. It must either show that the statute does not bear HUD's construction or that there is some reason why the agency's reasonable view of its regulations and the statute should not prevail. Quicken has failed to do either.

I. RESPA's Text, Structure, And Purposes Preclude Quicken's Narrow Construction Of The Unearned Fee Provision.

While it is ultimately enough that HUD's interpretation of the statute is reasonable, in fact, HUD's interpretation is the one that best accounts for RESPA's language, structure, and purposes.

A. The Most Natural Reading Of Section 2607(b)'s Text Encompasses Undivided, Unearned Fees.

Quicken's defense of the court of appeal's contrary construction of the statutory language falls short.

1. "No Person Shall Give And No Person Shall Accept"

Quicken first asserts that "the plain meaning of Section 2607(b)'s opening words — 'No person shall give and no person shall accept' — contemplates the actions of two culpable actors," not a transaction between an innocent consumer and a culpable service provider. Resp. Br. 13. Quicken notes that it is more natural to speak of consumers *paying* charges, rather than *giving* them. And viewing consumers as potential "give[rs]" would mean that consumers themselves violate the statute when they acquiesce to demands for unearned charges. In the interest of protecting consumers, Quicken claims, the Court therefore must construe the statute to allow service providers to accept unearned fees so long as the source of the fee is a victimized consumer rather than a culpable service provider.

That conclusion makes no sense and nothing in the language of the statute compels it.

a. To avoid holding consumers liable, Quicken would have the Court read Section 2607(b) to provide "no person shall *culpably* give and no person shall *culpably* accept," or perhaps "no *service provider* shall give and no person shall accept," any portion of an unearned charge. But even if Congress had written the statute that way, Quicken still would have violated it, because it acted culpably when it accepted a charge for which it provided no actual service.

Quicken's only response is to argue that the word "and" requires that there be both a culpable giver and a culpable accepter in the same transaction. Resp.

Br. 13. That argument fails at its grammatical premise. In this context, the conjunction joins two independent prohibitions, saving Congress the trouble of having to repeat the direct object of the verbs "give" and "accept" (*i.e.*, "any portion, split, or percentage of any charge" relating to a federally insured mortgage) and the final clause of the sentence ("other than for services actually performed"). This formulation does not require that both prohibited acts occur in tandem for either culpable party to be liable.

For example, as petitioners have already pointed out, and Quicken simply ignores, a law stating that "no person shall send and no person shall accept child pornography" is most naturally read to prohibit the act of sending child pornography, even if no one ever accepts it because it got lost in the mail. Petr. Br. 14. And a statute providing that "no person shall knowingly make and no person shall knowingly accept" certain prohibited campaign contributions would be violated even if the giver did not act with the requisite culpability, so long as the candidate knew the donation was unlawful. *See* Petr. Br. 22.

Just as there can be an unlawful acceptance of a campaign donation even if there was no unlawful giving of the donation, there is nothing anomalous in finding that Quicken unlawfully accepted an unearned charge even if there was no unlawful giver in this case. Congress reasonably determined that when a consumer pays a settlement service charge, only those who have provided an actual service should share in any part of it. As a consequence, even if a consumer cannot violate the proscription

against giving unearned fees, a provider like Quicken can violate the ban on service providers accepting them.

b. Quicken is wrong, in any event, to argue that consumers cannot be considered *givers* of unearned fees because that would subject them to civil or criminal liability. Quicken concedes that consumers cannot be sued under RESPA's private right of action. *See* Resp. Br. 18 n.7; Petr. Br. 21 n.16. And although RESPA's criminal provision does not include an express mens rea element, *see* 12 U.S.C. § 2607(d)(1), "far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement" in a criminal case. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978); *see also Staples v. United States*, 511 U.S. 600, 605 (1994). As a result, consumers who give service providers unearned fees thinking that they are paying for services actually provided would not be subject to civil or criminal liability. *See Sosa v. Chase Manhattan Mortg. Corp.*, 348 F.3d 979, 983 (11th Cir. 2003). And, of course, if consumers can be *givers* then Quicken violated the statute even under its interpretation of "and" because petitioners gave and Quicken accepted an unearned fee.

c. Quicken nonetheless insists that Congress was not referring to a payment from a consumer when it prohibited providers from accepting unearned fees. The statute, Quicken points out, prohibits accepting a charge "made" or "received" – past tense – for the rendering of a settlement service. Resp. Br. 20. This shows, Quicken says, that the prohibited giving and

accepting of unearned fees occur *after* the consumer has already paid the initial service provider. Therefore, Quicken reasons, the prohibition applies only to the subsequent disposition of the funds paid by the consumer, *i.e.*, through kickbacks to third parties. *Id.*

This argument fails because it is perfectly sensible to speak of Quicken *accepting* a charge that it previously *made*. First, a "charge" can refer to the demand for payment, which will be made prior to the consumer actually tendering, and a provider accepting, the fee. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 377 (unabr. 1981) (defining "charge" as "the price demanded for a thing or service"). That is the only sense in which a charge can be "made" – a consumer does not *make* a charge by paying money to a provider; the provider *makes* the charge by sending the consumer a bill. Second, even if a charge is "made" only when the consumer tenders the fee, the service provider must then decide whether to "accept" it – a provider would not violate the statute if it refused the tender of an unearned fee. Under either interpretation, reading the statute to prohibit undivided, unearned fees is consistent with the tense of the verbs "made" and "received."

d. Quicken is right to the extent it observes that the provision seems to contemplate the possibility of two transactions. Resp. Br. 18–21. But that simply reflects that Congress intended the provision to play a dual role, prohibiting both unearned charges to customers and kickbacks of charges between providers. To reach both situations, Congress reasonably chose broad, generic language that could

encompass both kinds of transactions. If Congress had provided that "[n]o charge shall be made in connection with the settlement other than for services actually performed," as Quicken suggests (*id*. 20), it would have failed to prohibit a great many kickbacks that arise when the initial service provider legitimately earns the charge paid by the consumer (say, a fee for title research) and then passes some or all of that charge along to another provider who did nothing to earn the kickback (say, a real estate agent who referred the client).

2. "Any Portion, Split, Or Percentage"

Quicken also claims that the phrase "any portion, split, or percentage" limits the provision to kickbacks, but it acknowledges that the terms "portion" and "percentage" can "include the entirety of something," Resp. Br. 35, and that Congress has used these terms in such a manner in other statutes, *id*. 36–37. Moreover, while Quicken argues that "portion" and "percentage" ordinarily refer to less than the whole, the statutory question here is whether someone who accepts the entirety of something thereby accepts "any portion" or "any percentage" of it. She does. For example, a school that declares that "no student shall give and no student shall accept any portion of another student's lunch money," has not left a loophole for the school bully to empty the smaller children's pockets. Likewise, a lab technician who insists that she "did not observe any portion" of a

test[2] is lying if, in fact, she observed the test from start to finish.

Quicken's interpretation would not make sense even if the provision were limited to kickbacks. If Section 2607(b) does not regulate the giving or accepting of the entirety of a fee, a provider would not be liable under that provision for giving a kickback to a third party so long as it kicked back the entirety of a charge.

B. The Structure Of Section 2607 Further Supports The Conclusion That Congress Intended The Provision To Address Both Kickbacks And Undivided, Unearned Fees.

It may seem incongruous that under HUD's interpretation, Section 2607(b) prohibits kickbacks as well as unearned fees, given that subsection (a) addresses kickbacks as well. But that unusual feature of the statute is unavoidable — Quicken's interpretation likewise results in kickbacks being prohibited by both subsections. *See* Resp. Br. 22. The only question is whether subsection (b) will play a significant independent role in the statute.

Under Quicken's interpretation, it will not. The only work subsection (b) does under Quicken's view is to prohibit kickbacks that are excluded from coverage under subsection (a) because they were not undertaken "pursuant to any agreement or

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[2] *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2722 (2011) (Sotomayor, J., concurring).

understanding." 12 U.S.C. § 2607(a); *see* Resp. Br. 22. Under this construction, subsection (b) exists only to fill a gap in coverage expressly created a sentence earlier in subsection (a). Why Congress would have not simply enacted a single provision without that gap, Quicken does not say.

Under HUD's view, subsection (b) plays a more meaningful role, prohibiting undivided, unearned fees that are not addressed in subsection (a). This interpretation affords each provision a more sensible independent focus, consistent with the Section title. *See* 12 U.S.C § 2607 (entitled "Prohibition against kickbacks *and* unearned fees") (emphasis added). While both provisions prohibit traditional kickbacks, subsection (a) is focused on the corrupting effect of referral relationships on the settlement market. It therefore makes no difference where the funds for the kickback come from, or what form the kickback takes. Subsection (b), in contrast, is focused on the charges imposed in particular transactions with consumers, protecting consumers from unearned fees and ensuring liability for any service provider that accepts any part of a charge unless the provider has earned it.

C. RESPA's Purposes Do Not Require Allowing Providers To Collect Unearned Fees So Long As They Keep Them For Themselves.

Quicken insists that Congress intended to permit false charges, so long as the provider keeps them for itself, because the purpose of the statute was to promote disclosure, not to regulate rates. And prohibiting providers from charging for services they

never performed, Quicken says, will inevitably lead to judicial rate setting. Not so.

1. RESPA Is Not Limited To Preventing Abusive Practices Through Disclosure Requirements.

There is no question that Congress intended RESPA's disclosure provisions to play an important role in reducing settlement costs. But requiring that the services listed on the disclosure forms actually be performed is entirely consistent with that purpose.

Quicken's principal evidence to the contrary is a negative inference it draws from the fact that Congress specifically mentioned disclosure and kickbacks in Section 2601(b), but not undivided unearned fees. But Section 2601(b) does not purport to catalog every prohibition in the statute. *See, e.g.*, 12 U.S.C. § 2608 (prohibiting sellers from requiring buyer's use of a specific title insurer); *id.* § 2610 (prohibiting fees for preparing federally required settlement statements). And in any event, the best evidence of what Congress intended to prohibit is the operative language of the statute, which is reasonably construed to extend to undivided, unearned fees as well.

Moreover, the measures subsection (b) does list belie any intent to protect consumers solely through disclosure requirements. For example, Congress did not address the problem of excessive escrow demands by simply requiring advance disclosure of escrow requirements, assuming that "[e]mpowered by this information, the consumer can [respond] . . . by shopping, comparing, and negotiating." Resp. Br. 39.

Instead, Congress directly limited the amount of money providers can require consumers to place in escrow. 12 U.S.C. § 2609.

Congress also directly prohibited kickbacks. *Id*. § 2607. Quicken says this makes sense because such "backroom deals between settlement service providers by their nature are not transparent to the consumer and impede the effectiveness of increased loan cost disclosure." Resp. Br. 1–2. But kickbacks are generally forbidden even if they are fully disclosed. *See* 12 U.S.C. § 2607(a), (c).[3]

2. Prohibiting Undivided, Unearned Fees Does Not Inevitably Lead To Rate Regulation.

Rather than make any serious attempt to explain why Congress would have intended to allow providers to pad their bills with false line items, Quicken and its amici focus instead on the straw man of overcharges, claiming that construing the statute to prohibit undivided, unearned fees would inevitably lead to a regime of judicial rate regulation. Nonsense.

First, prohibiting fraudulent fees does not amount to rate regulation by any stretch of the imagination. "When the fee is entirely unearned, the court is not forced to determine the reasonableness of a fee — a task for which courts are not well suited — because the reasonable fee for nothing is nothing."

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[3] 12 U.S.C. § 2607(c)(4) permits some payments between affiliated businesses so long as they are disclosed.

Pet. App. 17a–18a (Higginbotham, J., dissenting). Thus, in this case, if Quicken gave petitioners discounts on their interest rates in exchange for their loan discount fees, that is the end of the case, even if the court might think that the price for the discounts was too high or the corresponding reduction in interest rate was too low.

Second, there is no basis for Quicken's claim that the split-requirement is the only thing standing between the industry and rate regulation. Indeed, it acknowledges that no court has yet fallen down that alleged slippery slope. Resp. Br. 41. To the contrary, every court of appeals that has interpreted Section 2607(b) to prohibit undivided, unearned fees has simultaneously rejected the proposition that the provision is violated simply because a provider has charged too much for a service actually provided. *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 115 (2d Cir. 2007); *Santiago v. GMAC Mortg. Group, Inc.*, 417 F.3d 384, 387 (3d Cir. 2005); *Sosa*, 348 F.3d at 983–84. Even if an unearned fee need not be split to violate the statute, it still must be *unearned*. And, these courts have held, a fee is earned so long as the defendant provided *some* service in exchange for the charge, even if the amount of the charge is unreasonably high.[4]

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[4] HUD has taken a contrary view. But accepting HUD's construction of the statute as reaching undivided, unearned fees would not compel the Court, in a future case, to accept HUD's position on the distinct question of whether excessive fees are unearned. *See Smith v. City of Jackson*, 544 U.S. 228, 247 (2005) (Scalia, J., concurring) (noting that even "simultaneously

3. Quicken's Interpretation Draws Arbitrary Distinctions Congress Could Not Have Intended.

Congress could not have intended RESPA to operate in the bizarre manner envisioned by Quicken. Under its view, providers may charge and keep the entirety of a $1,000 unearned fee but face criminal prosecution if they share even a nickel of a $10 fee with someone else; unless they give that third party the *entirety* of the unearned charge, in which case they have not violated the statute either because they have not split the fee. It is therefore unlawful to share either too much or too little of a fee with third parties, but Congress provided a safe harbor for the selfish cheat who keeps all the ill-gotten gains for itself.

The irrationality of the lines the Court must draw to reject HUD's interpretation is reason enough to reject Quicken's. It is far more sensible to believe that Congress intended to shield consumers from all unearned fees, divided or not, given that the object of the statute was to protect consumers from abusive practices and unnecessarily high settlement costs.

D. Quicken's Reliance On Legislative History And The Rule Of Lenity Is Misplaced.

Looking beyond the text and purposes of the statute, Quicken seeks assistance from the legislative

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adopted interpretations [that] appear in the same paragraph" of a regulation need not "stand or fall together").

history and the rule of lenity, but neither provides it much help.

1. It is the "rare case[]" in which legislative history so decisively resolves a statutory ambiguity that there is no room left for a contrary agency interpretation of the statute. *Zuni Public Sch. Dist. No. 89 v. Dept. of Educ.*, 550 U.S. 81, 104–05 (2007) (Stevens, J., concurring). This is not one of them. Most of Quicken's citations simply show that kickbacks were a significant concern, which petitioners do not contest. *See* Resp. Br. 28–34. Nonetheless, both the House and Senate Committee Reports treated unearned fees as an abusive practice distinct from kickbacks. *See* S. Rep. No. 93-866, at 1 (1974) (explaining that statute was intended to "eliminate the payment of kickbacks *and* unearned fees") (emphasis added); H.R. Rep. No. 93-1177, at 4 (1974) (describing statute as designed to regulate "abusive practices, such as kickbacks, unearned fees, and unreasonable escrow accounts"). That undivided, unearned fees did not receive more significant discussion is hardly a basis to conclude that the statute unambiguously excludes them from regulation.

Other than that silence, the only evidence Quicken points to as establishing an affirmative intent to leave undivided, unearned fees unregulated is the statement of a single member of the House of Representatives, entered into the record *after* the House had already enacted the bill. Resp. Br. 32 (quoting 120 Cong. Rec. 29,442-43 (Aug. 20, 1974) (statement of Rep. Blackburn)). "Whether the floor statements are spoken where no [member of

Congress] hears, or written where no [member] reads, they represent at most the views of a single" Congressman. *Hamdan v. Rumsfeld*, 548 U.S. 557, 666 (2006) (Scalia, J., dissenting).

2. Quicken's reliance on the rule of lenity as an alternative to *Chevron* deference is also misplaced. This Court has "never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon*, 515 U.S. 687, 704 n.18 (1995); *see also, e.g.*, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011) (looking to agency interpretation in construing statute rather than applying the rule of lenity). The fair notice objective of the rule of lenity is fully realized when statutory ambiguity is resolved by an authoritative administrative interpretation. In any event, while there may be room for administrative interpretation, the statute is not so grievously ambiguous as to trigger the rule of lenity. *See, e.g.*, *Reno v. Koray*, 515 U.S. 50, 65 (1995) ("The rule of lenity applies only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended.") (citation and internal quotation marks omitted).

II. Any Ambiguity Should Be Resolved By Deferring To HUD's Reasonable Construction Of The Statute.

At best, Quicken's arguments may show that RESPA is ambiguous. But Congress assigned HUD responsibility for resolving any ambiguities in the

statute, and that agency has repeatedly made clear that it construes the statute to prohibit unearned fees, even if providers keep the fraudulent charges entirely for themselves. That interpretation merits *Chevron* deference, both as expressed in HUD's 1992 notice-and-comment regulation and its 2001 Statement of Policy.

A. HUD's Notice-And-Comment Regulation Merits *Chevron* Deference.

Deference is due first and most obviously to HUD's notice-and-comment regulation, which states that a "charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section." 24 C.F.R. § 3500.14(c). HUD confirms that it construes this regulation to prohibit unearned fees even if they are not divided. U.S. Br. 24. Quicken thus is forced to argue that HUD has misconstrued the regulation or that the regulation as construed by HUD does not warrant *Chevron* deference. Neither claim succeeds.

1. HUD's Interpretation Of The Regulation Is Controlling.

Three times last term, this Court reaffirmed that under *Auer v. Robbins*, 519 U.S. 452 (1997), the Court "defer[s] to an agency's interpretation of its regulations, even in a legal brief, unless the interpretation is 'plainly erroneous or inconsistent with the regulation[]' or there is any other 'reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.'" *Talk Am., Inc. v. Mich. Bell Tel. Co.*,

131 S. Ct. 2254, 2261 (2011) (quoting *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880–81 (2011)); *see also PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2575 (2011).[5] Accordingly, Quicken must show not only that its interpretation of the regulation is the better one, but that HUD's interpretation of the regulation is clearly wrong.

Quicken does not even claim that HUD's interpretation of the pertinent sentence of the regulation is impermissible. It argues, instead, that "the better view" is that the sentence merely defines what it means for a fee to be unearned and does not purport to state that such unearned fees, in themselves, violate the statute. Resp. Br. 47–48. But that is *exactly* what the regulation says – "A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee *and violates this section*." 24 C.F.R. § 3500.14(c) (emphasis added).[6] Quicken simply ignores the final clause.

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[5] In a single sentence, Quicken suggests that the Court rethink this recent precedent. Resp. Br. 60. But it does not develop the argument to any degree that would allow a considered reevaluation of the Court's half-century-old doctrine. Accordingly, this case does not present an appropriate occasion to consider the questions raised in Justice Scalia's concurrence in *Talk America, Inc.*, 131 S. Ct. at 2266 (Scalia, J., concurring).

[6] Of course, the "charge" to which the sentence refers is a charge for a settlement service connected to a federally related mortgage, a point that is obvious on the face of the statute and required no reiteration.

Instead, Quicken relies on the subtitle of the regulation, which refers to split charges. Resp. Br. 45. While subtitles may be helpful in resolving ambiguity in the body of a regulation, they are not a basis for introducing an ambiguity into the otherwise clear text of the regulation itself. In any event, as HUD has explained, the "rule headings and preamble text are a generalized description of Section [2607]" and do not purport to define the full scope of any given provision. 66 Fed. Reg. 53,052, 53,057 n.4 (Oct. 18, 2001). The subtitle is accurate as far as it goes – the regulation does prohibit unearned splits, which were a substantial focus of the statute. But that is not the only thing the regulation prohibits and nothing in the title says otherwise.

Quicken then turns to the text of a *different* regulation, which provides that HUD may investigate high prices for evidence of illegal referral fees or fee splitting, but makes no mention of undivided, unearned fees. Resp. Br. 46. The failure to mention unearned fees, however, may simply show that HUD believed that the mere fact a fee is high does not indicate that the provider did nothing to earn it. In contrast, a provider intent on splitting a fee may very well raise its prices to pass the cost of the kickback on to the consumer.

As a last resort, Quicken points to a sentence in the Notice of Final Rule that says "HUD reorganized this section [24 C.F.R. § 3500.14] and added some language to clarify what constitutes payments and services for purposes of Section [2607]." 57 Fed. Reg. 49,600, 49,605 (Nov. 2, 1992). HUD appears, however, not to be referring to the subsection at issue

here (which Quicken itself claims is addressing whether a fee is *earned*, not what constitutes a "payment" or a "service"). Instead, it appears to refer to other parts of the amended regulation that do define the term "payment" and address "services." *See* 24 C.F.R. § 3500.14(d) (defining the term "payment"); *id*. § 3500.14(g)(3) (addressing "multiple services").

At most, Quicken's arguments may draw into question whether HUD really meant what it said when it declared that an unearned fee "violates this section." 24 C.F.R. § 3500.14(c). But HUD has told this Court that it did, and there is nothing so incongruous about that interpretation as to justify withholding deference to HUD's construction of its own regulation.

2. The Regulation Warrants Chevron *Deference.*

Quicken briefly runs through a litany of reasons why the regulation, even if properly construed to prohibit undivided, unearned fees, is not subject to *Chevron* deference. None has merit.

First, Quicken says that *Chevron* does not apply because the regulation reflects a "legal judgment" rather than a "policy judgment." Resp. Br. 50. Even if that were a basis for denying *Chevron* deference, it has no application here. Deciding whether Section 2607(b) encompasses undivided, unearned fees necessarily entails an exercise of policy judgment, including determining whether the purposes of the statute are adequately served by disclosure alone; whether prohibiting undivided, unearned fees is

necessary to end the abuses Congress targeted; and whether implementation of that prohibition is feasible and desirable in this industry. Indeed, Quicken and its amici spend a significant portion of their briefing laying out a policy rationale for limiting the Act to prohibiting kickbacks. Resp. Br. 38–39; Br. Am. Bankers' Ass'n et al. as Amici Curiae in Support of Respondent 19–21.

Second, Quicken argues the regulation is "procedurally defective" because the final rule "set forth a new theory of liability" that was not "reasonably foreseeable" from the notice of proposed rulemaking. Resp. Br. 50–51. The statute of limitations for bringing a challenge to the procedural adequacy of the rule expired years ago. *See, e.g.*, *Sai Kwan Wong v. Doar*, 571 F.3d 247, 263 (2d Cir. 2009) (statute of limitations for notice-and-comment challenge is six years) (citing 28 U.S.C. § 2401); *Dunn-McCampbell Royalty Interest, Inc. v. National Park Service*, 112 F.3d 1283, 1286-87 (5th Cir. 1997) (same). "[C]hallenges to the *procedural lineage of agency regulations*, whether raised by direct appeal, by petition for amendment or rescission of the regulation or as a defense to an agency enforcement proceeding, will not be entertained outside the [limitations] period provided by statute." *JEM Broadcasting Co., Inc. v. FCC*, 22 F.3d 320, 325 (D.C. Cir. 1994) (emphasis in original); *see also, e.g.*, *Sai Kwan Wong*, 571 F.3d at 263 (same). Accordingly, although *Chevron* deference is not afforded to procedurally defective rules, the procedural regularity of HUD's regulation is now no longer open to challenge.

But even assuming *Chevron* provides affected parties a second chance to raise otherwise untimely procedural objections to a regulation, Quicken's complaint has no merit. The Administrative Procedure Act (APA) requires an agency to give notice of "*either* the terms or substance of the proposed rule *or* a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3) (emphasis added). HUD did both. It advised the public that it would be making "changes to improve the clarity of the current regulations," 53 Fed. Reg. 17,424 (May 16, 1988), and solicited comments "on any matters related to Regulation X." The then-current version of the regulations simply restated the language of Section 2607(b), so there was every reason for commenters to understand that the final rule might provide additional clarification on the meaning of the provision. The final rule's codification of HUD's long-standing interpretation of the statute as prohibiting undivided, unearned fees should have taken no one by surprise and was a "logical outgrowth" of the original proposal. *Long Island Care at Home, Ltd v. Coke*, 551 U.S. 158, 174 (2007).

Finally, Quicken argues that "HUD's failure to give any explanation for [its] interpretation of Section 2607(b)" renders its interpretation "arbitrary and capricious." Resp. Br. 51. That argument adds nothing to the analysis, as this Court has recently explained that "judicial review of an agency's statutory interpretations" is governed by *Chevron*, the second step of which fully implements the "arbitrary and capricious" standard of the APA. *Judulang v. Holder*, 132 S. Ct. 476, 483 n.7 (2011);

see also Mayo Found. for Med. Educ. and Research v. United States, 131 S. Ct. 704, 711–12, 714 (2011). In any event, the agency's explanation of the regulation has been more than adequate. *See, e.g.*, U.S. Br. 13–23; 57 Fed. Reg. 49,600, 49,600 (Nov. 2, 1992) (notice of final rule, explaining that HUD was "taking the opportunity to . . . incorporate in this regulation certain matters which were previously only covered by informal legal or program advice"); 66 Fed. Reg. 53,052, 53,057 n.3 (Oct. 18, 2001) (collecting prior informal opinions expressing view that RESPA prohibits all unearned fees); *id*. at 53,057-59 (HUD 2001 Statement of Policy addressing unearned fees).

B. HUD's 2001 Statement Of Policy Independently Warrants *Chevron* Deference.

Quicken does not dispute that even if the regulations are ambiguous, HUD's 2001 Statement of Policy is not. Instead, Quicken argues only that the Statement of Policy is not the kind of agency interpretation that qualifies for *Chevron* treatment and that it is insufficiently persuasive to warrant deference under any lesser standard. Both assertions are wrong.

1. Quicken argues that the Statement of Policy does not carry the force of law because it is an "interpretative rule" within the meaning of the APA and therefore was not required to undergo notice and comment. Resp. Br. 52. But interpretive rules, while not granted *Chevron* deference "as a class," *United States v. Mead Corp.*, 533 U.S. 218, 232 (2001), are not categorically precluded from *Chevron* deference either, *see, e.g.*, *Barnhart v. Walton*, 535 U.S. 212,

221 (2002) (explaining that lack of notice-and-comment procedures "does not automatically deprive that interpretation of the judicial deference otherwise its due"). To be sure, a great many interpretive rules do not qualify for *Chevron* deference. For example, the agency issuing an interpretive rule may not administer the statute in the *Chevron* sense. *See, e.g.*, *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (noting that the Attorney General does not administer criminal laws within the meaning of *Chevron*); *cf.* Resp. Br. 54.

But if interpretive rules were categorically excluded from *Chevron* treatment, this Court's decision in *Gonzalez v. Oregon*, 546 U.S. 243 (2006), would have been considerably shorter. In that case, as Justice Scalia noted, the Court did "not take issue with the Solicitor General's contention that no alleged procedural defect, such as the absence of notice-and-comment rulemaking before promulgation of the [Attorney General's] Directive, renders *Chevron* inapplicable here." *Id.* at 281 (Scalia, J., dissenting). Instead, the Court engaged in an extensive inquiry into whether the Attorney General's interpretation addressed a question within the scope of the limited lawmaking authority Congress had delegated to him under the Controlled Substances Act. *Id.* at 258–68. That inquiry would have been entirely unnecessary if, as Quicken argues, interpretive rules are categorically disqualified from receiving *Chevron* deference.

2. In this case, there is ample basis to conclude that Congress would have intended HUD's official

interpretations to carry the force of law. *See* Petr. Br. 35–41.

That conclusion is confirmed by the provision of a safe harbor defense for acts undertaken in reliance on HUD's interpretations as well as its regulations. *See* 12 U.S.C. § 2617(b); Petr. Br. 36; U.S. Br. 26–27. In *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980), this Court noted that a materially indistinguishable provision of the Truth in Lending Act "signals an unmistakable congressional decision to treat administrative rulemaking and interpretation under TILA as authoritative." *Id*. at 568. Quicken acknowledges the logic of *Ford*, but attempts to distinguish it on the ground that the decision "preceded much of the modern law as to administrative deference." Resp. Br. 55 n.23. But if anything, the Court's subsequent decisions in *Chevron* and its progeny have only expanded the scope of administrative deference. *See, e.g.*, *Christensen v. Harris Co.*, 529 U.S. 576, 589–90 (2000) (Scalia, J., concurring in part and concurring in the judgment). Moreover, like the agency in *Ford*, HUD was "directly involved in the creation of the law and had been delegated 'broad administrative lawmaking power' by Congress." Resp. Br. 55 n.23; *see id*. 28 (RESPA enacted in response to congressionally ordered report from HUD); 12 U.S.C. § 2617(a) (authorizing HUD to issue regulations and interpretations "as may be necessary to achieve the purposes of this Act"). Quicken argues that if "Congress intended that HUD's interpretations would *be* the law, it would not have been necessary to provide immunity for good faith compliance with

them." Resp. Br. 54 (emphasis in original). But the provision itself answers that argument, providing a defense even if an "interpretation is amended, rescinded, or determined by judicial or other authority to be invalid." 12 U.S.C. § 2617(b).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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