No. 01-443

In the Supreme Court of the United States

BANK OF AMERICA, N.A., PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

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

BRIEF FOR THE
FEDERAL DEPOSIT INSURANCE CORPORATION
IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514–2217

WILLIAM F. KROENER, III
General Counsel

JACK D. SMITH
Deputy General Counsel

RICHARD A. ABOUSSIE
Associate General Counsel

BARBARA SARSHIK
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

QUESTION PRESENTED

Whether the court of appeals correctly upheld the Federal Deposit Insurance Corporation's longstanding interpretation of the Oakar Amendment, 12 U.S.C. 1815(d)(3), which is reflected in a formal regulation adopted pursuant to notice-and-comment procedures.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 244 F.3d 1309. The opinion of the district court (Pet. App. 27a-38a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2001. A petition for rehearing was denied on May 16, 2001 (Pet. App. 39a). On August 1, 2001, Justice Kennedy extended the time in which to file the petition for writ of certiorari until September 13, 2001. This jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (12 U.S.C. 1811 *et seq.*), in response to the continuing and accelerating deterioration of the savings-and-loan industry at that time and the pronounced insolvency of the Federal Savings and Loan Insurance Corporation (FSLIC) insurance fund. Among its significant reforms, FIRREA abolished the FSLIC and shifted its deposit insurance functions to the Federal Deposit Insurance Corporation (FDIC). See 12 U.S.C. 1811 *et seq.*; *United States* v. *Winstar Corp.*, 518 U.S. 839, 856 (1996); Pet. App. 3a; *Branch Banking & Trust Co.* v. *FDIC*, 172 F.3d 317, 319-321 (4th Cir. 1999).

FIRREA established two separate deposit insurance funds within the FDIC: the Bank Insurance Fund (BIF), to cover the deposits of commercial banks; and the Savings Association Insurance Fund (SAIF), to cover the deposits of savings and loan associations. See 12 U.S.C. 1821(a)(4)-(6); Pet. App. 3a. To replenish the SAIF, which had been depleted by the failure of numerous savings and loan institutions in the 1980s, SAIF-member institutions were required to pay higher deposit insurance premiums than were BIF-member institutions. See Pet. App. 3a.

FIRREA took additional steps to maintain the integrity of the BIF and SAIF funds and their independence from each other. FIRREA gave each fund its own insurance responsibilities (12 U.S.C. 1821(a)(5) and (6)), required that the funds be "maintained separately and not commingled" (12 U.S.C. 1821(a)(4)(A)(ii)), and mandated that each fund be separately funded through assessments upon its respective members (12 U.S.C. 1817(b)). See Pet. App. 3a, 15a.

2. In order to prevent depository institutions from evading the higher SAIF assessments applicable to savings association deposits, Congress imposed a moratorium on transfers of deposits from SAIF-member savings associations to BIF-member banks. 12 U.S.C. 1815(d)(2). The moratorium was originally imposed for five years, and was later extended until 1996, when it ended with the passage of the Deposit Insurance Funds Act of 1996 (Funds Act), Pub. L. No. 104-208, 110 Stat. 3009. See Pet. App. 3a; *Branch*, 172 F.3d at 320-321.[1] While it was in effect, the moratorium applied to any "conversion transaction," defined to include "the merger or consolidation of a Bank Insurance Fund [BIF] member with a Savings Association Insurance Fund [SAIF] member," or any other transaction involving "the transfer of deposits" from a BIF-member institution to a SAIF-member institution (or from a SAIF-member institution to a BIF-member institution).

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[1] The special SAIF assessment at issue in this case was authorized by the 1996 Funds Act, which was enacted for the purpose of recapitalizing the SAIF. The Funds Act provides that the FDIC shall levy a one-time special assessment on the "SAIF-assessable deposits" of insured depository institutions. Section 2702 of the Funds Act, published at 12 U.S.C. 1817 note. It further defines the term "SAIF-assessable deposits" to include deposits that are "treated as insured by SAIF under [the Oakar Amendment]." Section 2710(8) of the Funds Act, published at 12 U.S.C. 1821 note. The "SAIF-assessable deposits" that were subject to the special assessment were to be determined as of March 31, 1995. Section 2702(c) of the Funds Act, published at 12 U.S.C. 1817 note. As a result, deposits that were assessable by the SAIF on March 31, 1995, such as the Oakar deposits held by the Oakar banks that merged with Bank of America in 1996, were subject to the special assessment.

12 U.S.C. 1815(d)(2)(B)(ii) and (v); Pet. App. 4a; *Branch*, 172 F.3d at 320.

The moratorium had certain limited exceptions, each requiring FDIC approval. 12 U.S.C. 1815(d)(2)(C). Those exceptions required institutions participating in a conversion transaction to pay both an "exit" fee to the insurance fund being exited and an "entrance" fee to the insurance fund being entered. 12 U.S.C. 1815(d)(2)(E); Pet. App. 4 n.3; *Branch*, 172 F.3d at 321. Such exit and entrance fees were significant in amount, and could make a conversion transaction cost prohibitive. See 12 C.F.R. Pt. 312; 56 Fed. Reg. 29,893, 29,894 (1991).

3. The Oakar Amendment, 12 U.S.C. 1815(d)(3), another limited exception to the moratorium, permitted the FDIC to approve a conversion transaction between a SAIF-member institution and a BIF-member institution without the initial payment of exit and entrance fees, so long as the institution resulting from the transaction assumed the continuing responsibility to pay assessments to both the SAIF and the BIF in proportion to the pre-transaction amount of deposits insured by each fund. 12 U.S.C. 1815(d)(3)(B). For example, if the acquiring bank was a BIF-insured institution, then the resulting hybrid institution would have to pay deposit insurance premiums both to its primary fund, in this example the BIF, and to its secondary fund, the SAIF. See 12 U.S.C. 1815(d)(3)(B)(i) and (ii). Such a hybrid institution is commonly referred to as a "BIF-Oakar institution" (to distinguish it from a "SAIF-Oakar institution," which would result if the acquiring institution was insured by the SAIF). The amount of insurance assessments paid by a BIF-Oakar bank to its secondary fund, the SAIF, was based on its adjusted attributable deposit amount (AADA), which

was equal to the value of the deposits acquired from the SAIF-insured institution. See 12 U.S.C. 1815(d)(3)(C); Pet. App. 5a. In other words, the amount of insurance assessments that an Oakar bank had to pay to each fund was a function of the relative portions of BIF-assessed and SAIF-assessed deposits at the time of the conversion transaction. See 12 U.S.C. 1815(d)(3)(B) and (D); Pet. App. 5a.[2]

Accordingly, the Oakar Amendment provided that when a BIF-insured bank acquires a SAIF-insured savings association, the savings association's deposits "shall be treated as deposits which are insured by the Savings Association Insurance Fund." 12 U.S.C. 1815(d)(3)(B)(i).[3] It further provided that if an Oakar bank fails, any loss incurred by the FDIC shall be allocated between the BIF and the SAIF in amounts "reflecting the amount" of the bank's deposits that are insured by the BIF and the SAIF. 12 U.S.C. 1815(d)(3)(G); Pet. App. 15a. In addition, Congress mandated that nothing in the Oakar Amendment "shall * * * be construed as authorizing transactions which result in the transfer of any insured depository institution's Federal deposit insurance from [one] Federal deposit insurance fund to the other * * *." 12 U.S.C. 1815(d)(3)(E)(iii).

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[2] The Oakar Amendment also provided that upon expiration of the moratorium, an Oakar institution would be permitted to convert all of its deposits to its primary fund upon payment of entrance and exit fees. 12 U.S.C. 1815(d)(3)(H); see *Branch*, 172 F.3d at 322 n.9.

[3] Similarly, if a SAIF-insured savings association acquires a BIF-insured bank, the deposits transferred by the bank are "treated as deposits which are insured by the Bank Insurance Fund." 12 U.S.C. 1815(d)(3)(B)(ii).

4. Following the enactment of FIRREA and the Oakar Amendment, a question arose as to whether a BIF-Oakar institution's SAIF assessment would survive if the BIF-Oakar institution's SAIF-assessable deposits were subsequently acquired by another BIF-member institution. Put differently, would the FDIC assess a BIF-member bank that acquired deposits from a BIF-Oakar institution at the SAIF rate for the acquired deposits that were subject to the SAIF assessment? Failure to continue the SAIF assessment after the second transaction would allow banks to circumvent the higher SAIF assessments by engaging in two transactions, where the statute specifically prohibited such a circumvention in a single transaction.

Because this question is not specifically addressed by statute, the FDIC in 1990 issued an interpretive letter known as the Rankin Letter. See FDIC Advisory Op. No. 90-22, 1990 FDIC Interp. Ltr. LEXIS 23 (June 15, 1990); Pet. App. 6a; *Branch*, 172 F.3d at 322-323. The FDIC concluded in that interpretive letter that deposits subject to a SAIF assessment would maintain that character when transferred from a BIF-Oakar institution to a BIF-member institution. As relevant here, the Rankin Letter provided that when an acquiring BIF-member institution acquired all the deposits of a BIF-Oakar institution, the deposits subject to a SAIF assessment would remain subject to that assessment after the acquisition.[4]

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[4] More technically, the Rankin Letter provided that an Oakar institution would be deemed to transfer its primary fund deposits first, and would be deemed to transfer its secondary fund deposits only after its primary fund deposits had all been transferred. Thus, the FDIC advised, the treatment of an Oakar-related transfer would depend upon whether the total amount of deposits being transferred would reduce the Oakar bank's total deposit base

5. On December 10, 1996, after notice-and-comment rulemaking, the FDIC published a final regulation codifying its then-longstanding position regarding deposit transfers by Oakar institutions to BIF-member banks. See 61 Fed. Reg. 64,960 (1996), codified at 12 C.F.R. 327 (1997); Pet. App. 6a-7a. The FDIC noted in the preamble to the regulation that "[n]either section 5(d)(2) [12 U.S.C. 1815(d)(2)] nor the Oakar Amendment explicitly addresses the case of an Oakar institution that transfers deposits to another institution," and that "[t]he FDIC has by interpretation developed a procedure for attributing the transferred deposits to the BIF and the SAIF." 61 Fed. Reg. at 64,962. Although the FDIC later took the view that its regulation was a permissible interpretation of the ambiguous statutory terms "Bank Insurance Fund member" and "Savings Association Insurance Fund member" as used in the statutory definition of a "conversion transaction," in the preamble to the regulation the FDIC viewed a

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below the amount of its AADA. If the total amount of deposits transferred would reduce the Oakar bank's total deposit base below the amount of its AADA, then the transaction would be deemed a "conversion transaction," and the acquiring institution would be responsible for the SAIF assessment for any SAIF-assessable deposits it acquired:

> "[I]f the aggregate of all deposits transferred to BIF-member banks reduces the Oakar bank's total deposit base below the amount of its [AADA], any subsequent deposit transfer by the Oakar bank to another BIF-member bank would be regarded as a conversion transaction * * * ."

FDIC Advisory Op. No. 90-22, 1990 FDIC Interp. Ltr. LEXIS 23, at 1* (June 15, 1990); Pet. App. 6a. The FDIC subsequently reiterated this approach in other interpretive letters. FDIC Interp. Ltr. 92-80, 1992 WL 813385 (Nov. 16, 1992); FDIC Interp. Ltr. 93-8, 1993 WL 853505 (Jan. 29, 1993); FDIC Interp. Ltr. 95-27, 1995 WL 788916 (May 23, 1995).

BIF-Oakar bank as formally a BIF member, while in substance a member of both funds. 61 Fed. Reg. at 64,962, 64,963.

Moreover, even if the regulation was not precise about the basis for the regulation, it was clear about the regulation's substance. The regulation, like the FDIC's earlier interpretive letters, required that in any transaction involving the transfer of deposits by an Oakar institution, "[t]he deposits [held by the resulting institution] shall be deemed * * * to be insured by the same fund or funds in the same amount or amounts as the deposits were so insured immediately prior to the transaction." 12 C.F.R. 327.37(b). Thus, under the regulation, if a BIF-member bank acquired the deposits of an Oakar bank, the deposits transferred by the Oakar bank are treated as being insured by the SAIF and the BIF in the same amounts as they were insured immediately before the transfer. The FDIC explained that "[t]he contrary view would render [12 U.S.C. 1815(d)(2)] and the Oakar Amendment meaningless," because under that view "a BIF-member buyer could acquire deposits from a SAIF-member seller without paying entrance and exit fees simply by passing the deposits through an intermediary BIF-member Oakar bank," and "the acquired deposits would be neither SAIF-assessed nor SAIF insured." 61 Fed. Reg. at 64,962. The FDIC also explained that its interpretation would prevent manipulative strategies designed to evade obligations to the SAIF (*id.* at 64,962), had "the virtue of simplicity" (*id.* at 64,963) and "the virtue of being well established and well understood" (*ibid.*), and is consistent with the structure and purpose underlying the Oakar Amendment (*id.* at 64,962-64,963).

6. Petitioner Bank of America acquired 29 sister bank subsidiaries of its parent holding company through

two merger transactions undertaken in June and September, 1996.[5] Before the mergers, petitioner was a BIF-insured bank that had never engaged in an Oakar transaction. However, 17 of the 29 acquired banks were Oakar banks that paid deposit insurance assessments to both the BIF and the SAIF. Pet. App. 8a. Following the mergers, the FDIC required petitioner to pay assessments on its deposits to the SAIF to reflect the SAIF-assessability of the deposits formerly held by the Oakar banks. Those assessments included a semi-annual assessment, which for the second half of 1996 was in the amount of $3,622,425.53, and a one-time special assessment in the amount of $25,296,967. Gov't C.A. Brief 8.

7. In 1997, petitioner filed a suit for declaratory and injunctive relief against the FDIC in the United States District Court for the Middle District of Florida. Pet. App. 27a. Petitioner alleged that the SAIF assessments imposed upon it by the FDIC were contrary to the plain meaning of the statutory definition of "conversion transaction," which it alleged was limited to transfers involving institutions that were "members" of different insurance funds. See *id.* at 8a-9a, 36a.

The district court granted the FDIC's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Pet. App. 27a-38a. Applying *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the district court rejected petitioner's challenge to the FDIC's assessments, concluding that the Oakar Amendment is ambiguous as to its application to

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[5] Barnett Bank was the original party to this suit. After the initiation of the appeal to the court of appeals, Bank of America acquired Barnett Bank. Accordingly, all references to petitioner are to Bank of America. Pet. App. 2a n.1.

deposit transfers between a BIF-member bank and a BIF-Oakar bank, and that the FDIC's longstanding interpretation of the statute as reflected in its regulation is reasonable and consistent with the text, structure, and purposes of the statutory scheme. Pet. App. 36a-37a.

8. The court of appeals affirmed. Pet. App. 1a-26a. Applying *Chevron*, the court of appeals held at the first step of its *Chevron* analysis that the Oakar Amendment is ambiguous because it can be construed to regard an Oakar institution as a "member" of both the BIF and the SAIF. Accordingly, "the statute is ambiguous about whether the merger of a BIF-member institution with a BIF-Oakar institution is a 'conversion transaction' under the Oakar Amendment; Congress did not speak directly and unambiguously to that precise issue." *Id.* at 16a. The court of appeals also concluded that "the statute is ambiguous in part because the 'substance of the relationship' between an Oakar institution and the two funds to which it pays insurance premiums makes it seem as though it is insured by (and thus a member of) both funds." *Id.* at 24a.

The court of appeals rejected petitioner's contentions that the FDIC should be bound by its statement in the preamble to the regulation that an Oakar institution was a "member" only of its primary deposit insurance fund, and that the court should reject more recent statements by the FDIC indicating the agency considered the Oakar Amendment's "member" language to be ambiguous. The court of appeals explained that any possible inconsistency in the FDIC's position could have no bearing on the court's analysis at the first step of the *Chevron* analysis because "[i]t is the duty of the courts to interpret statutory language, and courts should decide whether there is ambiguity in a statute without regard to an agency's prior, or current, interpretation." Pet. App. 19a. The court also noted that the policy reflected in the regulation "has always remained consistent." *Id.* at 26a.

At the second step of its *Chevron* analysis, the court of appeals upheld the FDIC's interpretation of the Oakar Amendment as "embodied in the regulation" (as opposed to any informal statements made by the FDIC during the litigation) because the regulation is consistent with the purpose and intent of FIRREA and the Oakar Amendment. Pet. App. 25a. The court of appeals also noted that Bank of America had not challenged the permissibility of the FDIC's longstanding interpretation under the second step of *Chevron*. *Id.* at 25a n.8.

ARGUMENT

The decision of the court of appeals properly upheld the FDIC's interpretation of the Oakar Amendment, which prevents circumvention of the manifest intent of Congress to prevent acquiring institutions from avoiding the payment of assessments on SAIF-insured deposits. That conclusion does not conflict with any decision of this Court, and it accords with the Fourth Circuit's decision in *Branch*, 172 F.3d at 317, the only other court of appeals decision to have addressed the issue.

Petitioner's argument that the decision below conflicts with *United States* v. *Mead Corp.*, 121 S. Ct. 2164 (2001), by improperly deferring to an informal litigating position of the FDIC misconstrues the court of appeals' decision. Moreover, petitioner has failed to preserve any argument that would render *Mead* relevant. As the court of appeals stated in its decision, petitioner never raised any issue before the court of appeals concerning the second step of the *Chevron* analysis, the only element of the *Chevron* analysis relevant to petitioner's *Mead* argument. See Pet. App. 25a n.8 ("Bank of America did not contest the second step [of the *Chevron* analysis] before us, instead aiming all of its arguments at the first step."). Accordingly, the petition for certiorari should be denied.

1. Under *Chevron*, courts reviewing an agency's interpretation of statutory language apply a two-step test. If a court determines that a congressional enactment speaks directly "to the precise question at issue," the court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842, 843. If "the statute is silent or ambiguous with respect to the specific issue," however, the court must sustain an agency's interpretation and implementing regulations if they are "based on a permissible construction of the statute." *Id.* at 843. In *Mead*, this Court further refined the standard for judicial review of an agency's implementation of a particular statutory provision by holding that certain types of informal agency actions are not entitled to deference under the *second step* of the *Chevron* analysis. 121 S. Ct. at 2171, 2173-2177.

Petitioner's sole ground for seeking certiorari is an alleged conflict with this Court's decision in *Mead*. Petitioner contends that "the Eleventh Circuit erred in deferring under *Chevron* to an agency interpretation of a statute," where that interpretation was "offered for the first time in litigation" and "contradict[s] the agency's definition of the disputed statutory term as expressed in notice-and-comment rulemaking." Pet. 8-9. Contrary to petitioner's argument, however, the court of appeals expressly did *not* defer to any recent or informal interpretation by the FDIC in upholding the FDIC's implementation of the Oakar Amendment.

In concluding under the first step of *Chevron* that the statutory provisions at issue were sufficiently ambiguous as to indicate an intent by Congress to delegate interpretive authority to the FDIC, the court of appeals appropriately declined to defer to any position of the FDIC, post-litigation or otherwise. The court of appeals recognized that deference is applied at step two of *Chevron*, not step one. The court expressly held that "[i]t is the duty of the courts to interpret statutory language, and courts should decide whether there is ambiguity in a statute without regard to an agency's prior, or current, interpretation." Pet. App. 19a; *id.* at 21a-22a ("[I]t is ultimately the function of the judiciary, not the administrative agency, to decide whether Congress spoke directly to the issue in question."); *id.* at 25a ("[T]he fact that the FDIC identified a different source of its perceived authority to adopt the regulation is of no moment under the first prong of *Chevron*.").

The court therefore conducted its own analysis of the relevant statutory language and concluded that "the statute is ambiguous about whether the merger of a BIF member institution with a BIF Oakar institution is a 'conversion transaction' under the Oakar Amendment; Congress did not speak directly and unambiguously to that precise issue." Pet. App. 16a. That conclusion comports with the FDIC's own assessment of the Oakar Amendment in promulgating the regulation, when it noted that "neither [12 U.S.C. 1815(d)(2)] nor the Oakar Amendment explicitly addresses the case of an Oakar institution that transfers deposits to another institution." 61 Fed. Reg. at 64,962.

The court of appeals, moreover, emphasized that "the agency's basis for adopting the regulation is entirely consistent with the basis of our holding." Pet. App. 24a. As the court of appeals explained:

> The original grounds the FDIC identified for promulgating the regulation was that nominal fund membership did not determine whether a conversion transaction had taken place; instead, the FDIC would look to the substance of the relationship between the Oakar institution and the FDIC as insurer. Similarly, our conclusion is that the statute is ambiguous in part because the "substance of the relationship" between an Oakar institution and the two funds to which it pays insurance premiums makes it seem as though it is insured by (and thus is a member of) both funds.

Ibid.[6] Thus, while the court did not defer to any position of the FDIC under the first step of the *Chevron* analysis, it reached essentially the same conclusion that

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[6] Compare 61 Fed. Reg. at 61,962-61,963:

> Membership entails a well-defined set of obligations that the institution and the FDIC have to each other. * * * Oakar institutions owe assessments to both funds, and both funds must share the loss that the FDIC would suffer if an Oakar institution were to fail. The FDIC resolves those conflicting themes by focusing on the relationship of an Oakar institution to the FDIC—the set of obligations that the label "BIF-member" or "SAIF-member" ordinarily signifies—and not on nominal fund membership. * * * Put another way, the FDIC considers that the label "member" must be given only that degree of significance that is appropriate to preserve the integrity of the two-fund structure."

The FDIC thus regarded the relationship of an Oakar institution to the FDIC in terms of its *insurance* relationship to both funds. The court of appeals relied on the definitions of SAIF member and BIF member in 12 U.S.C. 1817(*l*)(4) and (5), which likewise turn on whether the institution is "insured" by the relevant fund. Those definitions simply reinforce and confirm the conclusion reached by the FDIC when it promulgated the regulation, looking to the structure of the relevant statutory provisions as a whole.

the FDIC had articulated in both its regulation and in litigation. See *ibid.* ("[T]he basis for the FDIC's interpretation of the source of its authority to adopt the regulation and our subsequent interpretation are substantively the same.").

At the second step of its *Chevron* analysis, the court of appeals deferred only to the FDIC's interpretation as embodied in a formal regulation adopted after notice-and-comment. ("[T]he FDIC's interpretation of the statute, *which is embodied in the regulation*, was permissible under the highly deferential second step of the *Chevron* analysis.") (footnote omitted) (emphasis added). Pet. App. 25a. The court of appeals did not defer to any FDIC position different from that reflected in the regulation. Quoting approvingly from the Fourth Circuit's decision in *Branch*, the court of appeals stated that the FDIC regulation requiring BIF institutions that merge with BIF-Oakar institutions to continue to pay SAIF assessments was "consistent with the purpose and intent of FIRREA as a whole—to recapitalize the failing FSLIC-insured institutions." *Ibid.* (quoting *Branch*, 172 F.3d at 328). The court of appeals further found the FDIC's regulation to be "consistent with * * * the purpose of the Oakar Amendment—allowing certain conversion transactions between institutions that are BIF members and SAIF members, while protecting SAIF by requiring the resulting institution to continue to pay assessments to SAIF." *Id.* at 25a-26a.

Furthermore, the court of appeals concluded that, although in its view "the FDIC has taken inconsistent positions on the basis for its authority to adopt the interpretive regulation at issue, *the policy reflected in the regulation itself, embodied originally in the Rankin letter and later in the regulation, has always remained* *consistent*." Pet. App. 26a (emphasis added). Any possible inconsistency concerned only whether the term "member" was ambiguous—a question for the court on which *Chevron* deference is not owed. The FDIC's longstanding and consistent policy embodied in the regulation, on the other hand, is relevant to the reasonableness of the agency's interpretation of an ambiguous term, to which deference is appropriate. Any possible inconsistency about the regulatory basis does not deprive the FDIC of deference to its longstanding articulation of statutory meaning embodied in notice-and-comment rulemaking. As the court of appeals recognized, the FDIC consistently held that "Congress intended to protect the SAIF by ensuring either: (1) that no SAIF-insured institution switched to the BIF (as reflected in the moratorium on conversion transactions), or (2) that a SAIF institution that engaged in an Oakar conversion transaction would continue to pay SAIF assessments until the moratorium was lifted." *Ibid.* The FDIC's policy, the court of appeals correctly held, was reasonable, consistent with the language and goals of the underlying statute, and fully entitled to *Chevron* deference. See *Mead*, 121 S. Ct. at 2172-2173 (noting that *Chevron* deference is generally appropriate where, as here, the agency acts through formal notice-and-comment rulemaking).[7]

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[7] Indeed, at all times, the FDIC's interpretation of the Oakar Amendment has been consistent with the statutory scheme of federal deposit insurance. A depository institution and the FDIC have a well-defined set of obligations to each other: the depository institution must pay assessments to a deposit insurance fund, and the FDIC must use the resources of that fund to insure the institution's deposits. As the FDIC stated in the preamble to its regulation, "Oakar institutions owe assessments to both funds, and both funds must share the loss that the FDIC would suffer if an Oakar

2. Not only is *Mead* unhelpful to petitioner because the court below deferred to an interpretation embodied in notice-and-comment rulemaking, but petitioner failed to preserve any argument to which its reliance on *Mead* could be relevant. As the court of appeals' decision specifically stated, petitioner failed to raise *any* arguments before the court of appeals regarding the second step of the *Chevron* analysis. Pet. App. 25a n.8 ("Bank of America did not contest the second step [of the *Chevron* analysis] before us, instead aiming all of its arguments at the first step."). The court of appeals properly characterized petitioner below as arguing only that "on appeal, the FDIC points to a different, and indeed antithetical, source of authority for adopting the interpretation of the Oakar Amendment than it did in the regulation." *Id.* at 16a. But as the court of appeals explained, "[t]he problem with Bank of America's argument is that, while the FDIC's new interpretation of the statute [regarding whether the definitions of BIF member and SAIF member are ambiguous] does appear to be post-hoc, or post-litigation, and is inconsistent with the position the agency took in the preamble to its regulation, those characteristics do not have any legal significance on the issue of whether the statute is ambiguous under the first step of the *Chevron* analysis." *Id.* at 19a. If *Mead* has any relevance here, however, it is only at *step two* of the *Chevron* analysis. See *Mead*, 121 S. Ct. at 2171-2174. *Mead* does not purport to change the analysis of the

institution were to fail." 61 Fed. Reg. at 64,962-64,963. To uphold the integrity of this system, Congress has enacted protections to prevent the transfer of deposits from the SAIF to the BIF. These facts have been at the heart of the FDIC's interpretation of the Oakar Amendment, both in the regulation and before the court of appeals. See Pet. App. 26a.

step one trigger to determine whether any deference is appropriate, but rather only affects the level of deference afforded, if any level of deference is appropriate.[8] Moreover, the fact that the *Mead* decision did not issue until after petitioner's rehearing petition had been denied does not excuse petitioner's failure to raise any step-two argument as to which *Mead* might be pertinent.[9]

3. In addition, the court of appeals' decision accords with the Fourth Circuit's decision in *Branch*, the only other court of appeals decision that has addressed the issue. Although differing somewhat in their reasoning, both decisions correctly held that the relevant statutory provisions were sufficiently ambiguous to indicate an intent by Congress to confer interpretive authority on the FDIC, and that the FDIC's regulation, adopted after notice and comment, was reasonable and entitled to deference. See *Branch*, 172 F.3d at 327-329.

Finally, petitioner's argument that this case is similar to *Matz* v. *Household International Tax Reduction Investment Plan*, 227 F.3d 971 (7th Cir. 2000), a case in which this Court summarily granted certiorari, vacated,

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[8] *Mead* does address the circumstances in which a statute will be construed to delegate interpretive authority to an agency. See 121 S. Ct. 2172-2173. Here, however, Congress has expressly authorized the FDIC to promulgate regulations. See 12 U.S.C. 1812(g).

[9] Indeed, petitioner's reliance on *Mead* is particularly unpersuasive because petitioner's position in the court of appeals was based in substantial part on an effort to bind the FDIC to the position articulated in its regulatory preamble, rather than on an effort to undermine deference to the agency. The court of appeals, however, found that *no* deference was appropriate to the FDIC on the step one inquiry of whether the statute was ambiguous. That was the only inquiry at which petitioner's argument was directed.

and remanded for further consideration in light of *Mead*, is mistaken for the same reasons petitioner's *Mead* argument is mistaken. In *Matz*, the parties joined issue on step two of *Chevron*. The court of appeals deferred under step two to a position that the Internal Revenue Service expressed for the first time in an *amicus* brief submitted in another case in another court of appeals. *Id.* at 974-975. Here, in contrast, the parties' dispute concerned the step one question of whether the statute was ambiguous. As a result, the court of appeals gave no deference, and indeed found irrelevant, any agency interpretation at the first step of its *Chevron* analysis. Moreover, at the second step of its *Chevron* analysis, the court of appeals deferred only to the FDIC's longstanding interpretation embodied in a formal regulation after notice and comment. Accordingly, unlike in *Matz*, there is no need in this case to grant certiorari, vacate, and remand to the court of appeals for further proceedings in light of this Court's *Mead* decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

WILLIAM F. KROENER, III
General Counsel

JACK D. SMITH
Deputy General Counsel

RICHARD A. ABOUSSIE
Associate General Counsel

BARBARA SARSHIK
Counsel
Federal Deposit Insurance Corporation

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