



December 5, 2025

The Honorable Travis Hill, Chairman  
Attn: Comments–RIN 3064-AG16  
Federal Deposit Insurance Corporation  
550 17th Street NW  
Washington, DC 20429

*Via comments@fdic.gov*

The Honorable Jonathan V. Gould, Comptroller of the Currency  
Attn: Comment Processing  
Office of the Comptroller of the Currency  
400 7th Street SW, Suite 3E-218  
Washington, DC 20219

*Via regulations.gov*

RE: Request for Public Comments Regarding Unsafe or Unsound Practices,  
Matters Requiring Attention, 90 Fed. Reg. 48835 (proposed Oct. 30, 2025);  
RIN 1557-AF35, RIN 3064-AG16; Docket ID: OCC-2025-0174.

Dear Chairman Hill and Comptroller Gould,

Alliance Defending Freedom (ADF) respectfully submits the following comment in support of the agencies' proposed rulemaking, Unsafe or Unsound Practices, Matters Requiring Attention, 90 Fed. Reg. 48835 (proposed Oct. 30, 2025); RIN 1557-AF35, RIN 3064-AG16; Docket ID: OCC-2025-0174.

ADF is an alliance-building legal organization that advocates for the right of all people to be free to live and speak the truth. ADF is dedicated to protecting the unalienable rights endowed by our Creator. Since its founding in 1994, ADF has handled many legal matters involving federal regulations that exceed an agency's statutory authority and overreach in areas of free speech, religious liberty, gender and sexuality, abortion, and parental rights.

ADF appreciates the opportunity to comment on this important proposal. The Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC), collectively referred to here as "the agencies," have proposed a valuable rule ("the proposal") that addresses a real and significant issue with how the agencies supervise, examine, and regulate financial institutions. The following comment discusses why the proposal is justified and offers recommendations to strengthen the rule.

The first section discusses the rule proposed by the agencies. The second section suggests an additional definition to clarify the meaning of material harm. The third section provides a red-lined version of the sections of the proposal where recommendations for changes were made.

## **I. The Proposal**

The agencies have proposed a rule that would define what constitutes an “unsafe or unsound practice” for the purposes of supervision and enforcement.<sup>1</sup> This proposal represents a significant reform that will enhance supervision and enforcement, making them more consistent, effective, and accountable.

The agencies propose to define an unsafe or unsound practice as:

- (a) ... a practice, act, or failure to act, alone or together with one or more other practices, acts, or failures to act, that:
  - (1) Is contrary to generally accepted standards of prudent operation; and
  - (2)(i) If continued, is likely to—
    - (A) Materially harm the financial condition of the institution; or
    - (B) Present a material risk of loss to the Deposit Insurance Fund; or
  - (ii) Materially harmed the financial condition of the institution.<sup>2</sup>

In the proposal, the agencies describe a material harm as something that “would *materially* impact the institution’s capital, asset quality, liquidity, earnings, or sensitivity to market risk, or would *materially* impact the risk that an institution fails and causes a loss to the DIF.”<sup>3</sup>

While the agencies’ proposal is a significant improvement over the status quo, the proposed definition tries to use an undefined term, “material,” to define itself. This risks reintroducing the uncertainty and arbitrariness that the proposal seeks to eliminate. As such, the proposal would clearly benefit from a more concrete and fulsome definition of material. Such a definition would provide a more objective and

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<sup>1</sup> 90 Fed. Reg. at 48835.

<sup>2</sup> 90 Fed. Reg. at 48849 (to be codified at 12 C.F.R. §§ 4.92, 305.1).

<sup>3</sup> 90 Fed. Reg. at 48839 (emphasis added).

predictable baseline that both the agencies and the organizations they supervise could use when evaluating whether an action or inaction might constitute an unsafe or unsound practice.

## **II. Suggested Definition of Material**

The proposal should provide a clear and meaningful definition of material harm that fulfills the agencies' legitimate objectives of protecting the safety and soundness of banks and the DIF, while also placing proper limits on agency discretion. The definition should focus on whether an action (or inaction)<sup>4</sup> is likely to threaten the bank's ability to continue operating as a going concern in the economic environment in which it currently operates or is reasonably likely to operate in the future.

The definition of material harm should not require that the action threatens the ongoing viability of the bank or threatens the DIF entirely on its own. Rather, an action that causes a bank or the DIF to be imperiled when combined with the operational and economic environment in which a bank is, or is reasonably expected to be, faced with in the near future should be considered material.

To illustrate by analogy, striking a match is not inherently materially unsafe. If, however, the person striking the match is in, or, with the match still alight, likely to enter a coal mine with a lot of coal dust in the air, striking a match becomes materially unsafe. In this scenario, it is reasonably likely that the lit match will ignite the coal dust, causing a catastrophic explosion. It does not matter that the match is not the exclusive cause of the potential explosion; it is a proximate cause.

Conversely, an action that might lead to economic loss for a bank but not be reasonably expected to cause loss of the sort that would be expected to threaten the institution's viability or implicate the DIF should not be considered an unsafe or unsound practice. The agencies are not responsible for ensuring that banks are maximally profitable, and actions that might lead to economic loss or forgone economic gain should not be considered unsafe or unsound unless they are likely to be an essential, though not necessarily exclusive, cause of the bank's failure or require the use of the DIF.

To return to our match analogy, if a person is outdoors on a clean blacktop and strikes a match, the person might risk a minor burn to his or her fingers. While strictly speaking, this is a harm, it cannot be said to be material to the individual's

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<sup>4</sup> Going forward it should be assumed that references to action also include inaction.

health and safety. In this scenario, there is also a chance that a fluke event occurs, such as the person's shirt instantly combusting, that results in death or serious injury; but such an occurrence is extremely unlikely and not reasonably foreseeable. Therefore, it cannot be said that striking a match in that scenario is inherently materially unsafe.

Importantly, the coal mine does not need to explode for the act of striking a match to have posed a material risk of harm. Likewise, freak spontaneous combustion would not have made striking a match while standing on a blacktop materially unsafe. When evaluating past actions, agencies should consider what was likely and foreseeable, rather than focusing solely on what actually happened. Of course, what happened is important information that should inform the agency's assessment: perhaps coal dust is less explosive than originally thought, or maybe a certain type of textile is more flammable than believed. However, this should not be dispositive.

In summary, the agencies should define materiality to encompass both the severity of potential harm and the likelihood of that harm in light of the environment in which the bank operates or is likely to operate. This is consistent with the theme of the proposal, but since the definition of materiality is at the foundation of the rule's application, these criteria should be explicitly hardwired into the rule.

### **III. Proposed Language**

For the above reasons, the rule's language should be changed in the following manner:

#### **Subpart G—Enforcement and Supervision Standards**

Sec.

4.91 [Reserved]

4.92 Enforcement and supervisory standards.

#### **§ 4.91 [Reserved]**

#### **§ 4.92 Enforcement and supervisory standards.**

(a) *Unsafe or unsound practices.* For purposes of the OCC's supervisory and enforcement activities under 12 U.S.C. 1818, an "unsafe or unsound practice" is a practice, act, or failure to act, alone or together with one or more other practices, acts, or failures to act, that:

- (1) Is contrary to generally accepted standards of prudent operation; and

(2)(i) If continued, is likely to—

(A) Materially harm the financial condition of the institution; or

(B) Present a material risk of loss to the Deposit Insurance Fund; or

(ii) Materially harmed the financial condition of the institution.

**(b) *Material harm.*** For purposes of the OCC’s supervisory and enforcement activities under 12 U.S.C. 1818, “material harm” is harm that, in conjunction with the reasonably foreseeable operational and economic conditions that the institution is likely to be subject to, causes an institution to no longer be financially viable or to impose a loss on the Deposit Insurance Fund.

**(~~b~~ c) *Matters requiring attention.*** The OCC may only issue a matter requiring attention to an institution for a practice, act, or failure to act, alone or together with one or more other practices, acts, or failures to act, that:

(1)(i) Is contrary to generally accepted standards of prudent operation; and

(ii)(A) If continued, could reasonably be expected to, under current or reasonably foreseeable conditions,

(1) Materially harm the financial condition of the institution; or

(2) Present a material risk of loss to the Deposit Insurance Fund; or

(B) Materially harmed the financial condition of the institution; or

(2) Is an actual violation of a banking or banking-related law or regulation.

**(~~e~~ d) *Clarification regarding supervisory observations.*** Nothing in paragraph (~~b~~-c) of this section prevents the OCC from communicating a suggestion or observation orally or in writing to enhance an institution’s policies, practices, condition, or operations as long as the communication is not, and is not treated by the OCC in a manner similar to, a matter requiring attention.

**(~~d~~ e) *Tailored application required.*** The OCC will tailor its supervisory and enforcement actions under 12 U.S.C. 1818 and issuance of matters requiring attention based on the capital structure, riskiness, complexity, activities, asset size and any financial risk-related factor that the OCC deems appropriate. Tailoring required by this paragraph (~~d~~ e) includes tailoring with respect to the requirements

or expectations set forth in such actions as well as whether, and the extent to which, such actions are taken.

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## **PART 305—ENFORCEMENT AND SUPERVISION STANDARDS**

Sec.

305.1 Enforcement and supervision standards.

**Authority:** 12 U.S.C. 1818, 1819(a) (Seventh, Eighth, and Tenth), 1831p–1.

### **§ 305.1 Enforcement and supervision standards.**

(a) *Unsafe or unsound practices.* For purposes of the FDIC’s supervisory and enforcement activities under 12 U.S.C. 1818, an “unsafe or unsound practice” is a practice, act, or failure to act, alone or together with one or more other practices, acts, or failures to act, that:

- (1) Is contrary to generally accepted standards of prudent operation; and
- (2)(i) If continued, is likely to—
  - (A) Materially harm the financial condition of the institution; or
  - (B) Present a material risk of loss to the Deposit Insurance Fund; or
- (ii) Materially harmed the financial condition of the institution.

(b) *Material harm.* For purposes of the FDIC’s supervisory and enforcement activities under 12 U.S.C. 1818, “material harm” is harm that, in conjunction with the reasonably foreseeable operational and economic conditions that the institution is likely to be subject to, causes an institution to no longer be financially viable or to impose a loss on the Deposit Insurance Fund.

(~~b~~ c) *Matters requiring attention.* The FDIC may only issue a matter requiring attention to an institution for a practice, act, or failure to act, alone or together with one or more other practices, acts, or failures to act, that:

- (1)(i) Is contrary to generally accepted standards of prudent operation; and
- (ii)(A) If continued, could reasonably be expected to, under current or reasonably foreseeable conditions,

- (1) Materially harm the financial condition of the institution; or
- (2) Present a material risk of loss to the Deposit Insurance Fund; or
- (B) Materially harmed the financial condition of the institution; or
- (2) Is an actual violation of a banking or banking-related law or regulation.

(e d) *Clarification regarding supervisory observations.* Nothing in paragraph (b c) of this section prevents the FDIC from communicating a suggestion or observation, orally or in writing, to enhance an institution's policies, practices, condition, or operations as long as the communication is not, and is not treated by the FDIC in a manner similar to, a matter requiring attention.

(d e) *Tailored application required.* The FDIC will tailor its supervisory and enforcement actions under 12 U.S.C. 1818 and issuance of matters requiring attention based on the capital structure, riskiness, complexity, activities, asset size and any financial risk-related factor that the FDIC deems appropriate. Tailoring required by this paragraph (d e) includes tailoring with respect to the requirements or expectations set forth in such actions as well as whether, and the extent to which, such actions are taken.

#### IV. Conclusion

We commend the agencies for proposing to define “unsafe or unsound practices.” Defining this term will provide clarity to banks and allow for consistent, objective regulation of banks. Adding a definition for material harm, as described in this letter, would make this rule even more effective as a means to protect banks, bank regulators, and the public that relies on both.

Thank you for your consideration.

Respectfully Submitted,

  
Brian Knight  
Senior Counsel, Corporate Engagement  
Alliance Defending Freedom