THE AMERICAN ASSOCIATION OF BANK DIRECTORS
[redacted]

December 29, 2025

FDIC
Docket ID RIN 3064-AG16
Unsafe or Unsound Practices, Matters Requiring Attention"

The American Association of Bank Directors appreciates the opportunity to comment on the proposal of the FDIC and OCC to define unsafe or unsound banking practices and adopt other reforms for the supervision and enforcement process.

AABD is a banking trade association focused on the advocacy, information, and training needs of bank directors.

From the perspective of bank directors, we welcome many of the changes in the proposal. They will give management and boards of directors a greater role in resolving challenges to their banks without the unnecessary burdens imposed through supervisory and enforcement actions.

The proposed definition of "unsafe or unsound banking practices" is a welcome alternative to the current definitional chaos. We suggest that you advocate for the codification of the definition in federal law, which we would support.

We also support your effort to reduce the number of MRAs through careful weighing of the materiality of the MRAs relative to financial risk.

Your recognition of the importance of dialogue with bank management and board to convey facts and suggestions short of enforcement actions and MRAs is also important.

In its 2015 Report on banking agency enforcement actions, Deloitte identified more than 5,000 enforcement actions taken in 2007-2013 but not including many informal enforcement actions that often are not made public.

The frequency of the agencies resorting to enforcement actions during the last recession is hard to reconcile with a highly functioning supervisory system where banks are frequently examined and dialogue between the examiners and bank management and board of directors is highly valued.

Focusing on financial risk, as you are doing, may help to diminish the number of enforcement actions in future recessions.

There are other efforts that you may wish to undertake to improve the quality, efficiency, and effectiveness of your supervision of banks. These include:

- Define other terms in your statutory authority to take enforcement action such as "fiduciary duty", "engaging in" and "participation." Also consider asking Congress to codify your definitions.
- Redefine "fiduciary duty" in agency rules and guidance to refer to the fiduciary duty defined by the state in which the bank has its corporate headquarters. Despite the U.S. Supreme Court decision that ruled that there is no federal common law definition of fiduciary duties, the OCC has defined "fiduciary duty"

in some of its issuances, including its CMP Matrix, as a simple negligence standard. But a large majority of state laws define or apply a gross negligence standard either explicitly or through application of the Business Judgment Rule and defenses such as reasonable reliance on management and delegation authority. Each bank is bound by the laws of the state where it is chartered. The agencies should define "fiduciary duty" as that which is required under applicable state law.

- In utilizing their enforcement powers, the agencies should distinguish between banks whose management or board have engaged in unsafe or unsound banking practices that caused the material financial harm and banks whose management and board have not. A large majority of banks fail because of extraneous factors such as the economy and federal government policies and actions. Imposing onerous obligations on banks that have been well managed serves no legitimate purpose where management and board can take steps to strengthen the bank's financial condition without such obligations being created by those who are more distant from and less focused on the individual bank's challenges.
- Distinguish between weak management and strong management that makes a dumb decision, especially in hindsight. The "one-off" mistake in judgment should not result in the conclusion that management and the board are not capable of addressing financial challenges satisfactorily without an enforcement action.
- We believe that your efforts to reform the supervisory system come out of a recognition that improvements are needed on how enforcement actions are used. The recent Supreme Court case in Calcutt v FDIC involves a record of abuse and arbitrariness in the use of enforcement power that should be of concern to the agencies. The agencies have sometimes undefined terms in statutory authority extremely broadly – terms such as unsafe or unsound, breach of fiduciary duty, reckless behavior, and causation – that, in some instances, has expanded their enforcement authority far beyond what Congress may have intended.
- Your proposal also implicitly recognizes the tendency of the agencies to assume that they always know better how to strengthen a bank's financial condition where weakened, even where the economy causes the financial weaknesses. But boards and management of well-managed banks will be able to exercise their fiduciary duties without dictates on how to do that from above. However, well-managed banks ordinarily value the observations and recommendations of the examiners who can convey, under the proposal, those recommendations to the bank without resorting to MRAs and enforcement actions.
- The proposal does not address directly the impact of the definition of unsafe or unsound practices on IAPs. AABD is an advocate for the interests of outside bank directors and, as such, believes that holding bank directors responsible for unsafe or unsound practices because they may have approved an action, policy, practice, loan etc. should not be done unless they have violated their fiduciary duties under state law.
- The agencies should consider to what extent the instinct of the agencies to take enforcement action is driven by the fear of being wrong. Agency staff is often criticized for not taking enough enforcement action early enough where the financial condition of the bank worsened or the bank failed, but never criticized for taking too much enforcement action that can be detrimental to the bank's financial condition.
- Revisit on how the component and composite CAMELS ratings drive the decision to take enforcement action. If the CAMELS ratings are 3 or worse, the agencies will almost always resort to enforcement actions even where management is considered competent and meeting expectations. Where the economy is the main driver of the subpar CAMELS ratings, there is no need for an enforcement action where management and the board are engaged and competent to address financial weaknesses.
- Define "likely" as more likely than not, suggesting that likely translates to 51% or more
- Delete any language that states that the board of directors must ensure a certain result. That is inconsistent with the essence of fiduciary duty, which is to apply fiduciary duty principles to the directors' efforts, but those efforts do not encompass success as a requirement.

Your proposal is outstanding and reflects a detailed, careful and serious consideration of how bank supervision and enforcement practices can be improved.

Thank you for your efforts.

David Baris
President