From:	Anonymous
To:	Comments; [redacted]
Subject:	[EXTERNAL MESSAGE] Unsafe or Unsound Practices, Matters Requiring Attention (Docket ID: OCC-2025-0174; RIN: 3064-AG16)
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[redacted]

Via e-mail

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Re: Unsafe or Unsound Practices, Matters Requiring Attention (Docket ID: OCC-2025-0174; RIN: 3064-AG16)

To whom it may concern:

Thank you for the opportunity to comment on the notice of proposed rulemaking, "Unsafe or Unsound Practices, Matters Requiring Attention" (the "Proposal"). OCC & FDIC, 90 Fed. Reg. 48835 (NPRM Oct. 30, 2025). The Federal Deposit Insurance Corporation ("FDIC") and the Office of the Comptroller of the Currency ("OCC") (the "agencies") address two important yet distinct issues: 1) the meaning of the statutory term "unsafe or unsound practices" and 2) the management and prioritization of supervisory and enforcement programs. This comment discusses the former, based, as it must be, on "the traditional tools of statutory construction, not individual policy preferences." *Loper Bright v. Raimondo*, 144 S. Ct. 2244, 2252 (2024).

Specifically, this comment focuses primarily on the most traditional tool of statutory construction—statutory text—as well as several methodological hurdles that the agencies would need to address for a proposed regulatory definition to be successful. As it stands, just based on text alone, the agencies fail to carry their burden. A "legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992). Whatever the policy merits of "focus[ing] institution and examiner attention on practices that are likely to materially harm an institution's financial condition," 90 Fed. Reg. 48838, "pleas of administrative inconvenience and self-serving regulations never 'justify departing from the statute's clear text.'" *Niz-Chavez v. Garland*, 141 S.Ct. 1474, 1485 (2021).

* * *

At a minimum, a purported definition of a statutory term should encompass all its relevant statutory uses. The proposed definition does not. The agencies propose that for practices to be unsafe or unsound, they must "materially harm" (or have "materially harmed") the "financial condition" of an institution or "[p]resent a material risk of loss to the Deposit Insurance Fund," and that a prospective potential harm must be "likely." 90 Fed. Reg. 48848, 49. However, the term "unsafe or unsound practices" repeats throughout 12 U.S.C. § 1818 in an elaborate remedial scheme designed by Congress that addresses a broader range of unsafe or unsound practices than the proposed definition contemplates.

For one, Congress created tiers of civil money penalties. Congress authorized different penalties for unsafe or unsound practices that pose a "a minimal loss" or "a substantial loss" to an institution. 12 U.S.C. §§ 1818(i)(2)(B)(ii)(II), (C)(ii). How

can the definition of "unsafe or unsound practices" require material harm to the financial condition of an institution if Congress explicitly authorized penalties for such practices based on less financial loss? Congress also authorized penalties for unsafe or unsound practices that are "part of a pattern of misconduct" in addition to penalties in a case of financial loss. *Id.* § 1818(i)(2)(B)(ii)(I). How can the definition of "unsafe or unsound practices" require harm to the financial condition of an institution if Congress explicitly authorized penalties for such practices independent of financial loss? To both questions, the answer is that it cannot.

As a result, the proposed definition would render superfluous the statutory provisions that authorize such penalties. "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). "[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx v. General Revenue Corp.*, 133 S.Ct. 1166, 1178 (2013). Such would be the effect of the proposed definition on the statutory penalty provisions.

Likewise for the agencies' cease-and-desist authorities. The agencies may institute cease-and-desist proceedings, including to address "an unsafe or unsound practice in conducting the business of such depository institution." 12 U.S.C. § 1818(b)(1). The agency may also issue a temporary cease-and-desist order in light of an "unsafe or unsound practice or practices, … likely to cause insolvency or significant dissipation of assets or earnings of the depository institution, or [that are] … likely to weaken the condition of the depository institution." *Id.* § 1818(c)(1). A requirement under the proposed definition that harm to the financial condition of the institution be material shrinks from the statutory authorization for an order in light of mere weakening, which only indicates a negative direction without specifying any particular threshold. A requirement for material financial harm would further also attempt to compromise temporary orders to remedy the dissipation of assets or earnings that although significant do not (likely) harm the condition of the institution. It would also obviate proceedings over an unsafe or unsound practice in conducting the business of such depository institution that does not merit a temporary order because of the impact on solvency, assets, earnings, or the financial condition of an institution.

As these examples also demonstrate, the agencies tend to conflate *practices* with the *condition* of an institution. They are statutorily distinct concepts. As discussed, there are a range of remedial authorities to target a range of unsafe or unsound practices. Congress further distinguished between such practices and the financial condition of an institution, by providing specific authorities for when the latter may be compromised. As noted, when "weakened," the agencies may issue a temporary cease-and-desist order. *Id.* So too when the condition becomes unclear because "an insured depository institution's books and records are so incomplete or inaccurate that the appropriate Federal banking agency is unable, through the normal supervisory process, to determine the financial condition of that depository institution or the details or purpose of any transaction or transactions that may have a material effect on the financial condition of that depository institution." *Id.* § 1818(c)(3). If "an insured depository institution is in an unsafe or unsound condition to continue operations as an insured institution," Congress authorized involuntary termination of FDIC insurance. *Id.* § 1818(a)(2). Congress addressed the condition of an institution directly and distinctly. It is a category error to predicate unsafe or unsound practices on a condition of an institution.

The proposed requirement that the potential harm must be "likely" for a practice to be considered unsafe or unsound is an additional departure from statutory text. There is no such sweeping requirement found in statute. Rather, similar to the range of practices that Congress considers unsafe or unsound, Congress tailored the relevant causation standards to the remedial authorities. Tier two civil money penalties may issue for certain "likely" harm, 12 U.S.C. § (i)(B)(ii)(II). In contrast, a removal order may issue if an institution-affiliated party engaged in any unsafe or unsound practice that (1) "will probably" result in financial loss or other damage to an institution or (2) "could" prejudice depositors' interests (and the practice involves personal dishonesty or willful or continuing disregard for the safety and soundness of the institution). *Id.* § 1818(e). Yet, the agencies expressly contradict the statutory text when they indicate that their proposed likelihood standard would exclude practices that "could" result in harm. 90 Fed. Reg. 48838. Congress clearly understood the differences between causation standards, and it is not the agencies' role to contradict Congress.

If the agencies continue to seek a regulatory definition, they should return to the drawing board and propose a definition that aligns with statutory text and best accords with the other traditional tools of statutory construction. Any attempt to finalize a definition now based on the Proposal would either compound the inconsistency or not logically grow out of the Proposal. To conform an anti-textual proposed definition with statute would require a "volte-face"—a reversal of direction—by the agencies, classically indicating that the "final rule was not a logical outgrowth of the proposed rule." *Allina Health Services v. Sebelius*, No. 13-5011 (D.C. Cir. 2014). Proceeding without re-proposal would "pull a surprise," and verboten, "switcheroo" of one proposed meaning for another. *Envt'l Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005).

In addition to textual considerations, there are a number of methodological hurdles that the agencies would need to clear on re-proposal. First, the agencies would need to square themselves to the proper scope of their authority. According to the Proposal, the agencies propose a definition of a statutory term "as a matter of policy*."* 90 Fed. Reg. 44837. In light of the

recent *Loper Bright* decision, this is a puzzling statement. *Loper Bright* reminds that "[w]hen the meaning of a statute was at issue, the judicial role was to 'interpret the act of Congress.'" 144 S.Ct. 2257. Although a court may "accord[] due respect to Executive Branch interpretations of federal statutes" in appropriate circumstances, 144 S.Ct. 2257, this is not a situation where "an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time," *id.* at 2258. Nor were current agency principals or staff the "the draftsmen of the laws," i*d.*, which originated long ago as discussed below. This is also not a situation where an agency is adjudicating the application of a statute to "specific facts found by the agency" that would garner deference. 144 S.Ct. 2249. The meaning of a statutory term such as "unsafe or unsound practices" is a "pure legal question." *Id.* It "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 2259 (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)).

Second, the courts, whose judicial role *is* to interpret an act of Congress, have already developed a thick and sustained body of law that elaborates the meaning of unsafe or unsound practices. *See, e.g., Landry v. FDIC*, 204 F.3d 1125, 1138 (D.C. Cir. 2000) ("In *Kaplan* we suggested that an 'unsafe or unsound practice' was one that posed a 'reasonably foreseeable' 'undue risk to the institution.' 104 F.3d at 421. Other courts seem to have agreed, using slightly different language. The Third Circuit in *In re Seidman*, 37 F.3d 911 (3d Cir.1994), for example, said that an 'imprudent act ... pos[ing] an abnormal risk to the financial stability of the banking institution' would qualify. *Id.* at 928. We trust that 'undue' risks are abnormal in the banking industry, so we see no difference there. Plunging ahead with such a risk where its character is 'reasonably foreseeable' surely constitutes the imprudence of which the Third Circuit speaks."); *Greene County Bank v. FDIC*, 92 F.3d 633, 636 (8th Cir. 1996) ("It is well-settled in this Circuit, however, that an 'unsafe or unsound practice' exists where the conduct is 'deemed contrary to accepted standards of banking operations which might result in abnormal risk or loss to a banking institution or shareholder.'"); *Hoffman v. FDIC*, 912 F.2d 1172, 1174 (9th Cir. 1990) ("It has been said that an unsafe or unsound practice is one 'which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds' and that it is a practice which has a 'reasonably direct effect on an association's financial soundness.' *Gulf Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 651 F.2d 259, 264 (5th Cir.1981), *cert. denied*, 458 U.S. 1121, 102 S.Ct. 3509, 73 L.Ed.2d 1383 (1982)."). The agencies are unable to displace the courts. *Loper Bright*, 603 U.S. 2266 (2024) ("agencies have no special competence in resolving statutory ambiguities. Courts do.").

Finally, unsafe or unsound practices is most likely best understood a term of art and should be understood accordingly. "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached." *Morissette v. United States*, 342 U.S. 246, 263 (1952). In this situation, Congress was expressly on notice of what it was doing by using the term. Chairman of the Federal Home Loan Bank Board, John Horne, explained to Congress the pedigree and meaning of the term during the debate over the enactment of the Financial Institutions Supervisory Act of 1966, which provided the agencies with the expanded remedial authorities to address unsafe or unsound practices without shuttering an institution. Some congressman raised questions about whether they would be introducing "novel" standards. 112 Cong. Rec. 26474. As Horne explained to Congress, the term was well-established in federal and state banking law and "akin to other necessarily open-ended legal expressions such as "'fraud,' 'negligence,' 'probable cause,' or 'good faith,'… [that] must be applied to constantly changing factual circumstances." *Id.*

Horne provided a contemporaneous understanding of the term that has become the common touchstone for courts, the agencies, regulated parties, and the public and that has demonstrated by its widespread adoption the "power to persuade." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Horne explained, "[g]enerally speaking, an 'unsafe or unsound practice' embraces any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds." 112 Cong. Rec. 26474. Courts have described Horne's explanation as the "authoritative definition of an unsafe or unsound practice, adopted in both Houses." *Gulf Fed. Sav. & Loan Assoc. of Jefferson Parish v. Fed. Home Loan Bank Bd.*, 651 F.2d 259, 264 (5th Cir. 1981); *see also Matter of Seidman*, 37 F.3d 911 (3d Cir. 1994). The agencies have likewise tended to follow Horne's meaning. *See, e.g.*, FDIC, Formal and Informal Enforcement Actions Manual 3-1 (2022), https://www.fdic.gov/regulations/examinations/enforcement-actions/ch-03.pdf ("An unsafe or unsound practice is any action or lack of action that is contrary to generally accepted standards of prudent financial institution operation that, if continued, would result in abnormal risk of loss or damage to an IDI, its shareholders, or the DIF."); OCC, Comptroller's Handbook, Examination Process, Problem Bank Supervision 3 n.11 (2021), https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/problem-bank-supervision/pub-ch-problem-bank-supervision.pdf ("An unsafe or unsound practice is generally any action or lack of action that is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the DIF."); FRB, FDIC, NCUA, OCC, Order granting an exemption from customer identification program requirements implementing section 326 of the USA PATRIOT Act, 31 U.S.C. § 5318(l), for loans extended by banks (and their subsidiaries) subject to the jurisdiction of the Federal Banking Agencies to commercial customers to facilitate purchases of property and casualty insurance policies, at 5 (Sept. 27, 2018), https://www.fdic.gov/news/inactive-financial-institution-letters/2018/fil18052a.pdf ("this exemption is consistent with safe

and sound banking. The resulting banking practices will not be contrary to generally accepted standards of prudent operation, and will not give rise to abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds."). Regulated industry and the public have also coalesced around it. *See, e.g.*, Comment, Mercatus Center, FDIC Proposed Guidelines on Standards of Corporate Governance and Risk Management for Covered Institutions with Total Consolidated Assets of 10 Billion Dollars or More, at 2 (2023), https://www.fdic.gov/system/files/2024-06/2023-guidelines-establishing-standards-for-corporate-governance-3064-af94-c-003.pdf ("To be unsafe or unsound, an action must pose an "abnormal risk of loss or damage" to the bank, its shareholders, or the insurance fund."); Comment, Society for Corporate Governance, Re: Proposed Corporate Governance and Risk Management Rules, at 4 (2023), https://www.fdic.gov/system/files/2024-06/2023-guidelines-establishing-standards-for-corporate-governance-3064-af94-c-014.pdf ("in the FDIC's own enforcement actions and under general banking law, safety and soundness violations occur when a person's actions or inactions imprudently create "*an abnormal risk of loss*""); Comment, SMAART Consulting, Comment on the OCC Perspective on Responsible Innovation, at 4 (2016), https://www.occ.gov/topics/supervision-and-examination/financial-technology/responsible-innovation/comments/smaart-comment-responsible-innovation.pdf ("It is worth keeping in mind that 'safe and sound' is not a standard compelling minimum risk, but rather is a guard against 'abnormal risk.'"); Comment, American Bankers Association, Re: Proposed guidance on deposit advance products Docket ID OCC-2013-0005, at 12 (2013), https://www.fdic.gov/system/files/2024-07/2013-deposit_advance_products-c_48.pdf ("As discussed in our August 2011 latter, while the Agencies have "broad authority to define and eliminate unsafe and unsound conduct, it is well-established that conduct considered to be unsafe and unsound is 'conduct deemed contrary to accepted standards of banking operations which might result in *abnormal risk or loss* to a banking institution or shareholder'20 (Emphasis added).""). In such a case "where a phrase in a statute appears to have become a term of art … any attempt to break down the term into its constituent words is not apt to illuminate its meaning." *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990). The agencies need look no further for their desired "consistent nationwide standard," 90 Fed. Reg. 48838, than the persuasive explanation provided by Horne.

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A regulatory definition that departs from the longstanding and undisturbed understanding of the term would only introduce needless complexity and confusion by attempting to create two meanings for the same term: one in statute and one in regulation. Instead, the agencies should conform their interpretation to the statutory meaning revealed by the traditional tools of statutory construction. Thank you for your attention to this matter.

Anonymous