flagstar [redacted]

December 29, 2025

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Jennifer M. Jones
Deputy Executive Secretary
Attn: Comments—RIN 3064-AG16
Federal Deposit Insurance Corporation
550 17th St NW
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Re: *Unsafe or Unsound Practices, Matters Requiring Attention; Office of the Comptroller of the Currency RIN 1557-AF35, Docket ID OCC-2025-0174; Federal Deposit Insurance Corporation RIN 3064-AG16; 90 Fed. Reg. 48835 (Oct. 30, 2025)*

Dear Sirs and Madams:

Flagstar Bank, N.A. ("Flagstar") appreciates the opportunity to comment on the Federal Deposit Insurance Corporation's and the Office of the Comptroller of the Currency's (together, "the Agencies") October 30, 2025, joint Notice of Proposed Rulemaking ("NPR"). The NPR proposes to define the term unsafe or unsound practice for purposes of the enforcement powers provided under section 8 of the Federal Deposit Insurance Act, 12 U.S.C. 1818, and to establish minimum criteria for the Agencies to issue matters requiring attention ("MRAs") to national or state nonmember banks (collectively, "banks" or "supervised institutions"). We laud the NPR's goal of minimizing the "litany of process-related items that are unrelated to a bank's current or future financial condition"[1] with which banks are often forced to comply under the existing, unbounded interpretation of safety and soundness.

Our comments seek to strengthen the final rule by urging the Agencies to omit reference to "generally accepted standards of prudent operation" altogether, since it is material financial harm that is truly operative. If the Agencies choose to retain the reference to standards in the final rule, we urge the Agencies to provide a clear and detailed codification of such standards. Additionally, the Agencies should clearly define materiality in the context of financial harm. We also urge the Agencies to adopt an objective, administrable definition for "unsafe or unsound"

[1] Travis Hill, Acting Chairman, Fed. Deposit Ins. Corp., Statement at the FDIC Board Meeting on the Proposal Regarding Unsafe or Unsound Practices, Matters Requiring Attention (Oct. 7, 2025), *available at* https://www.fdic.gov/news/speeches/2025/statement-acting-chairman-travis-hill-proposal-regarding-unsafe-or-unsound. *See* also Scott Bessent, Secretary of the Treasury, Statement at the Federal Reserve Community Bank Conference, U.S. Department Treasury (Oct. 9, 2025), https://home.treasury.gov/news/press-releases/sb0276.

such as other Circuits have previously adopted,[2] and directly address the issues we identify below concerning the Administrative Procedure Act in light of the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) ("*Loper Bright*"). Adopting our recommendations will strengthen the final rule against misinterpretation and help prevent supervised institutions from being subject to *ad hoc*, idiosyncratic supervisory requirements that create onerous, sometimes crippling, compliance costs. It will permit banks to more efficiently direct limited resources towards lending, investing, and other productive economic activities that are essential to helping their communities thrive.

About Flagstar Bank, N.A.

Flagstar is a regional bank with approximately $92 billion in assets and about 400 locations across the greater New York and New Jersey metropolitan region and in the upper Midwest, along with Florida and the West Coast.[3] As a regional bank with community bank roots, we invest in the places we serve and in the customers who rely on us. Flagstar offers a wide range of traditional banking products, non-deposit investment products, and insurance through our retail branch network and our private banking locations as well as through mortgage offerings. By prioritizing convenience and service, we offer products at competitive rates through our branches, banking locations, ATM networks, mobile banking applications and website, which provide 24-hour access for customers.

Flagstar's Comments on the Joint NPR

I. The Agencies Should Not Define Unsafe or Unsound Practice by Referencing Undefined Generally Accepted Standards

The NPR's proposed definition of an unsafe or unsound practice establishes a two-prong test that references undefined standards. First, a practice, act, or failure to act must be contrary to generally accepted standards of prudent operation. Second, the practice must be *likely, if continued*, to *materially* harm the *financial condition* of the supervised institution or present a *material* risk of loss to the Deposit Insurance Fund; *or* have already *materially* harmed the *financial condition* of the supervised institution.

The NPR fails to define the term "generally accepted standards of prudent operation." The NPR's preamble discussion is unclear, providing two circular statements that: 1) "a practice, act, or failure to act under the proposed definition would have to be contrary to generally accepted standards of prudent operation to be considered an unsafe or unsound practice;"[4] and 2) "[a] practice, act, or failure to act could only be considered an unsafe or unsound practice if it deviates from generally accepted standards of prudent operation (and otherwise meets the

[2] *See, e.g., Gulf Fed. Sav. & Loan Assoc. of Jefferson Parish v. Fed. Home Loan Bank Bd.*, 651 F.2d 259, 267 (5th Cir. 1981) (limiting the definition of an "unsafe or unsound practice" to that which "threaten[s] the financial integrity of the" supervised institution at issue).

[3] As of June 30, 2025.

[4] Unsafe or Unsound Practices; Matters Requiring Attention, 90 FED. REG. 48,838 (Oct. 30, 2025) (Office of the Comptroller of the Currency & Fed. Deposit Ins. Corp.).

proposed definition).”[5] This reasoning begs the question. Moreover, the NPR’s discussion of the *Horne* standard[6] and court precedents that reference or rely on “generally accepted standards” sheds no further light on the meaning of the term. The lack of clarity raises questions: what are generally accepted standards of prudent bank operation and how can banks discern them? If such standards are generally accepted, banks should be able to reference and access them in written form as they could, say, access Generally Accepted Accounting Principles published by the Financial Accounting Standards Board. But where can banks access the Agencies’ list of generally accepted standards of prudent operation? Nowhere, as far as we can discern. The failure to define such standards renders the first prong of the proposed test ineffectually vague and risks enabling supervisory imposition of one-size-fits-all “best practices” across the industry, regardless of variances in banks’ size, complexity, and business activities. If the Agencies insist on defining unsafe or unsound practices with reference to generally accepted standards, the final rule must codify such standards.

We urge the Agencies instead to abandon reference to generally accepted standards altogether. The operative question should be only whether a practice, act, or failure to act creates material financial harm or is demonstrably likely to do so, not whether it is generally accepted as prudent. History is replete with practices widely accepted as prudent that nevertheless masked material financial risks. For example, in the years leading up to the 2008 financial crisis, many supervised institutions incorporated continued housing price appreciation assumptions within credit and risk models that wrongly validated the creditworthiness of mortgage-backed securities. Those assumptions were broadly accepted as prudent and justified by historical data. Yet such “generally accepted standards” misdirected regulatory attention away from deeply unsound underwriting standards, excessive leverage, and the proliferation of complex structured products that did severe financial harm to individual supervised institutions and the banking system as a whole. Such examples remind us that industry consensus can distract from more effective, individualized determinants of material financial harm to a supervised institution. For this reason, we urge the Agencies to ground safety and soundness determinations in individualized assessments of whether practices have created or are demonstrably likely to create material financial harm at a supervised institution, rather than whether they conform or conflict with prevailing generally accepted norms.

Furthermore, “generally accepted standards” are subject to “regulatory drift.” In other words, practices observed at one supervised institution are often accepted by supervisors and later forced upon other supervised institutions through moral suasion or regulatory criticism. Over time, the practice comes unmoored from the facts and circumstances that prompted the original bank to adopt it. It becomes a regulatory expectation and, ultimately, a *de facto* requirement. Binding requirements imposed in this manner are especially problematic because they are not subject to notice and comment rulemaking nor subjected to public scrutiny, as they are shielded by the confidential supervisory information privilege. In our professional experience, regulatory drift has especially affected the horizontal examination programs for

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[5] *Id.*

[6] *Id.* at 48,837 n.15.

capital and liquidity planning, as well as model risk management, third-party oversight, BSA/AML monitoring effectiveness, and cybersecurity. For example, the Federal Reserve's SR 11-7, concerning model risk management, appropriately began as a means to ensure models posing material financial risk were conceptually sound and well controlled; over time, however, it drifted to encompass even low-risk tools such as basic spreadsheets, subjecting them to the same governance and validation expectations as capital or credit models. A similar pattern has occurred in third-party risk management, which initially focused on vendors capable of creating critical or material financial impact but has expanded into rigid lifecycle requirements for even minor service providers—so much so that some banks now see even core professional service firms with tenuous connections to safety and soundness rejected or delayed due to nominal "risk" ratings. The same drift is also evident in BSA/AML supervision, where emphasis has shifted toward alert volume counts, maximizing the number of alert scenarios, and process mechanics, rather than more fundamental evaluations of whether programs are truly effective at detecting and deterring money laundering and terrorist financing. In each case, supervisory expectations that may be appropriate for certain high-risk institutions at a specific point in time have hardened into generalized industry-wide expectations, diluting focus on true drivers of material financial harm and imposing disproportionate burdens on banks with fundamentally different risk profiles.

If the Agencies insist on retaining generally accepted standards of prudent operation in defining unsafe or unsound practice, the final rule should provide a clear, detailed codification of such generally accepted standards. The Agencies must also commit to publish any updates to these standards so as to avoid the development and use of secret law—*i.e.*, reliance upon Agencies' internal policies, practices, or procedures, even if unwritten, that articulate expectations regarded by the Agencies' staffs as binding on supervised institutions.[7]

However, to remedy the challenges we have identified, we urge the Agencies to abandon reference to "generally accepted standards of prudent operation" as a basis for safety and soundness determinations altogether. We propose that a banking practice should be deemed unsafe or unsound based solely on a determination that such practice has directly created or is demonstrably likely to directly create material financial harm to a particular supervised institution by negatively impacting its capital adequacy, liquidity position, or operational continuity.[8] Reliance on undefined, evolving, or informal industry norms should not, standing alone, support a finding of unsafe or unsound practice.[9] There must be a clear connection

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[7] *See, e.g.*, Manes, Jonathan, *Secret Law*, Georgetown Law Center, 106 Geo. L.J. 803 (2018), *available at*: https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2018/06/Secret-Law.pdf.

[8] Practices that do not materially impair a supervised institution's capital adequacy, liquidity, or operational continuity do not threaten its financial condition or its ability to operate in a safe and sound manner and therefore should not serve as the basis for an unsafe or unsound determination. In assessing any banking practice, regulators should also consider the particular institution's size, complexity, risk profile, and business model. Practices developed for large, highly complex, or systemically important institutions should not be treated as generalized standards applicable across the banking system.

[9] Divergence from industry best practices, guidance, or peer norms may support supervisory dialogue and voluntary changes to risk management practices at a bank, but is, by itself, insufficient to support findings of unsafe or unsound practices.

between the cited conduct and the demonstrable harm to a bank's capital adequacy, liquidity position, or operational continuity.[10]

II. The Agencies Should Adopt a Clear Definition of Materiality in the Context of Financial Harm

We laud the Agencies' reliance on "material" financial harm as a limiting principle in their NPR but believe the final rule should incorporate a clear and operational definition of materiality. Absent such a definition, "materiality" would remain vague, susceptible to regulatory drift, and likely to be stretched to encompass immaterial process or documentation issues not associated with serious financial harm.

Federal securities regulation and accounting standards provide apposite models the Agencies should consider in crafting an actionable definition of materiality. For example, the Securities and Exchange Commission ("SEC") has long recognized that materiality analysis appropriately begins with a quantitative rule of thumb (e.g., approximately five percent of a relevant financial statement item).[11] This objective boundary can support a preliminary presumption that deviations below that level are unlikely to be material, absent other considerations. While the SEC emphasizes that such numerical benchmarking is only a starting point—and that quantitative magnitude must be evaluated in light of all relevant circumstances, including qualitative factors—its use nonetheless brings useful discipline to materiality analysis.

The Public Company Accounting Oversight Board ("PCAOB") likewise defines materiality in its auditing standards in a manner that bounds the concept to matters with meaningful economic consequence to investors, rather than to regulatory stakeholders, who may seek to advance idiosyncratic policy preferences. For example, PCAOB Auditing Standard 2105 ("AS 2105") cabins materiality in the context of financial misstatements to those that, individually or in the aggregate, could affect the fundamental fairness of the financial statements in a way that matters to users of those statements.[12] Similarly, the archived PCAOB AU § 312 standard (the predecessor to AS 2105) emphasized that auditors are *not* responsible for planning or performing audit procedures to obtain reasonable assurance that immaterial misstatements are detected; rather, auditors should focus their attention on truly material matters.

The Agencies should establish a threshold under which a practice, act, or failure to act will not be presumed materially to harm the financial condition of a supervised institution. For example, a quantitative rule of thumb could hold that a practice must directly cause or be likely to directly cause a certain basis point reduction of a supervised institution's Common Equity Tier

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[10] Absent a direct causal nexus, supervisory communications concerning a particular banking practice should be limited to advisory or observational feedback.

[11] SEC Staff Accounting Bulletin No. 99, n.1 (Nov. 29, 1999), https://www.sec.gov/interps/account/sab99.htm#foot1.

[12] PCAOB, Auditing Standard 2105, Consideration of Materiality in Planning and Performing an Audit (Dec. 15, 2010), https://pcaobus.org/oversight/standards/auditing-standards/details/AS2105.

1 (“CET1”) capital (in an amount that could endanger the supervised institution’s adequately capitalized status),[13] to be material. If a banking practice does not result in financial harm equal to the quantitative starting point threshold, supervisors should bear the onus of explaining why in light of all relevant circumstances it is nonetheless appropriate to determine that the financial harm is critical enough to be material. Such a quantitative starting point would prevent materiality from becoming an unbounded, subjective concept. It would tie judgments to concrete material financial harm rather than abstract, speculative shortcomings and reduce the risk that immaterial process weaknesses, documentation gaps, or speculative contingencies would be elevated to formal supervisory findings based on examiner preference or evolving supervisory norms.

III. Post-*Loper Bright*, the Agencies May No Longer Rely on *Brand X* to Countermand Contrary Judicial Interpretations Regarding Unsafe or Unsound Standard

While we support the Agencies’ efforts, we also believe the NPR’s attempts to define the term “unsafe or unsound” may potentially conflict with existing court precedents in many jurisdictions across the country in the wake of the Supreme Court’s decision in *Loper Bright*. The preamble of the final rule should address these potential conflicts directly and clearly.

Federal agencies including the OCC have long enjoyed the flexibility to interpret and reinterpret the statutes and laws they administer under the Supreme Court’s decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (“*Chevron*”).[14] The Supreme Court expanded *Chevron* further in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005) (“*Brand X*”) by requiring federal courts in specific circumstances to overrule their own decisions about the meaning of a statute in favor of a contrary interpretation by a government agency on the basis of the agencies’ reasonable interpretations of statutes they administer. “[T]his mean[t] a judicial declaration of the law’s meaning in a case or controversy [was] not ‘authoritative,’ . . . but [was] instead subject to revision by a politically accountable branch of government.”[15] Thus, together, *Chevron* and

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[13] Consistent with principles of due process and good government, banks should be able to rely on the Agencies’ rules concerning the appropriate level of capital to hold. The Agencies should stop requiring banks to maintain capital far exceeding the “well-capitalized” level. If the Agencies believe that the capital rules should have higher thresholds, they should make those changes through notice and comment rulemaking, not through the opaque supervisory process.

[14] *Chevron* deference held that where Congress has left an explicit or implicit gap in a statute, it in essence delegated interpretive authority to an agency charged with administering the statute, and courts could not replace a reasonable agency interpretation with their own. *See Chevron* at 844. Under *Chevron*, it was considered appropriate for government agencies, rather than the courts, to decide the meaning of the statute because judges are neither “experts in the field” nor “part of either political branch of the [g]overnment,” (*id.* at 865) while government agency personnel, by contrast, have subject-matter expertise and are ultimately accountable to the executive. As a result of *Chevron*, government agencies in different presidential administrations have been empowered to adopt different approaches on the basis of the agencies’ reasonable interpretations of their governing statutes.

[15] *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149-58 (10th Cir. 2016) (Gorsuch, J., concurring).

Brand X gave government agencies the last word on the meaning of ambiguous statutes they administer.

Indeed, in 2014, the OCC expressly referenced *Brand X* to reject the Fifth Circuit's precedent requiring risk of material financial harm to establish an "unsafe or unsound practice."[16] The Comptroller declined to apply the "Law of the Circuit Doctrine," reasoning that, per *Brand X*, an agency charged with administering the statute may adopt a contrary interpretation entitled to *Chevron* deference, notwithstanding adverse circuit precedent. The Comptroller determined that the OCC was not constrained by Fifth Circuit caselaw requiring risk of substantial financial loss and could instead apply a broader supervisory standard that more closely modeled the *Horne* standard unless and until *Brand X* ceased to apply.[17]

However, in *Loper Bright*, the Supreme Court overruled *Chevron* and, by extension, implicitly overruled *Brand X*.[18] The Court observed that deference under *Chevron* and *Brand X* cannot be squared[19] with the Administrative Procedure Act's ("APA") directive to "the reviewing court to 'decide all relevant questions of law' and 'interpret . . . statutory provisions.'"[20] Fundamentally, therefore, *Loper Bright* returns to the courts the judicial function to interpret and declare what existing law is in cases and controversies between parties, including government agencies, even when the "statute [is] ambiguous" because in all cases "there is a best reading," and the reviewing court is required to adopt the one that, "after applying all relevant interpretive tools, [it] concludes is best."[21] With the collapse of *Chevron* and *Brand X*, government agencies are no longer the last word on the meaning of their governing statutes and can no longer rely on *Brand X* to overrule or revise existing judicial declarations of the law's meaning.

Post-*Loper Bright*, the Agencies must clear a further hurdle in articulating their authority to define an unsafe or unsound practice in the final rule. While the absence of statutory definition for the term "unsafe or unsound" still permits the Agencies "to exercise a degree of discretion"[22] to fill the gap, *Loper Bright* holds that it is the province of the *courts* to "fix the boundaries" of any delegated authority within which Agencies may act free of judicial second guessing.[23] "[O]nce a court has interpreted the bounds of the [Agencies'] delegated authority …, the

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[16] *See* Office of the Comptroller of the Currency, Decision and Order, AA-EC-11-72, EA-2014-126, at 5 (June 4, 2014), *available at* https://www.occ.gov/static/enforcement-actions/ea2014-126.pdf.

[17] *See Id.* Implicit in the OCC's 2014 decision to declare a uniform standard for safety and soundness is an overruling of all judicial decisions that did not exactly match the OCC's understanding of what constituted unsafe or unsound practices.

[18] While the decision in *Loper Bright* did not explicitly overrule *Brand X*, its continued viability is suspect at best, given that *Brand X* was premised on and an extension of *Chevron*. Continued reliance on *Brand X* would be in error.

[19] *Loper Bright*, at 14,18.

[20] *Id.* at 16 (quoting 5 U.S.C. § 706).

[21] *Id.*

[22] *Id.* at 14.

[23] *Id.*

[Agencies] d[o] not have the authority to overrule that interpretation."[24] Thus, where courts have definitively established the limits of what constitutes an "unsafe or unsound" practice, the Agencies are bound to operate within those judicially defined limits and are not free to countermand, alter, or revise such limits to any degree.

We suggest the Agencies could clear this hurdle by articulating, for instance, that in jurisdictions in which no controlling judicial precedent defines "unsafe or unsound practice," their rulemaking authority is a fair use of Agency discretion to interpret an otherwise undefined statutory term. In jurisdictions in which judicial precedents define "unsafe or unsound practice," the Agencies could explain that such precedents were properly displaced by the Agencies under *Brand X* when it was still controlling law (pre-*Loper Bright*).[25] The Agencies could ground their reasoning in the argument that *Loper Bright* does not retroactively invalidate agency actions properly taken in reliance on *Brand X*, nor does it establish a definitive, nationwide judicial definition of an "unsafe or unsound practice." Accordingly, Agencies are not required to revisit or reconcile those decisions currently, as no post–*Loper Bright* court has yet adopted a binding nationwide standard.

We believe the foregoing analysis could support the Agencies' authority to engage in rulemaking to establish a uniform, nationwide standard for determining whether a practice is unsafe or unsound even in a post-*Loper Bright* environment. But whether the Agencies agree with our articulation above or rely on alternative grounds to justify their authority, they should confront this potential conflict head-on and expressly articulate their authority to adopt a uniform national standard notwithstanding differing or contrary judicial precedents.

IV. The Agencies Should Consider Adopting a Clear Safety and Soundness Standard Tied to Material Financial Harm, such as the Fifth Circuit's in *Gulf Federal Savings*

Post-*Loper Bright*, the Agencies find themselves in a transitional posture: they may no longer override judicial precedents through interpretation, but neither has any court, post-*Loper Bright*, definitively resolved the meaning of "unsafe or unsound" in a manner that binds the Agencies nationwide. Thus, the Agencies retain the ability, and, indeed, the responsibility, to proceed through notice-and-comment rulemaking to adopt a clear, administrable, and legally defensible definition of unsafe or unsound. In any final rule, we urge the Agencies to do so by anchoring the definition in a judicially tested articulation that avoids the vagueness and indeterminacy that have historically plagued safety and soundness supervision. For the reasons

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[24] *United States v. Bricker*, No. 24-3286 (6th Cir. Apr. 22, 2025), available at: https://www.opn.ca6.uscourts.gov/opinions.pdf/25a0100p-06.pdf.

[25] Agencies could argue that, prior to *Loper Bright*, they affirmatively maintained and applied interpretations of "unsafe or unsound practice" that did not precisely adopt any particular judicial formulation, even if the standard may have closely approximated some. *See, e.g.*, OCC, Decision and Order, AA-EC-11-72, EA-2014-126, at 5 (June 4, 2014), *available at* https://www.occ.gov/static/enforcement-actions/ea2014-126.pdf.

discussed above, we propose that the Agencies adopt a formulation akin to the Fifth Circuit's in *Gulf Federal Savings & Loan Association of Jefferson Parish*.[26]

In *Gulf*, the Fifth Circuit clarified that an "unsafe or unsound" practice is not established by mere supervisory disagreement with management judgment, nor by abstract concerns about process or best practices. Rather, the court required a showing that the challenged conduct threatens the institution's financial integrity in a concrete and material manner.[27] That articulation properly cabins supervisory authority to practices that cause material financial harm, or pose a clear, proximate risk of doing so.

Adopting the *Gulf* standard or a similar one would ameliorate several defects in the Agencies' current proposal. Unlike a definition tethered to undefined "generally accepted standards of prudent operation," the *Gulf* approach is intelligible, administrable, and judicially grounded. It provides regulated institutions with meaningful notice, constrains supervisory discretion in appropriate ways within legally cognizable bounds, and preserves the critical distinction between enforceable safety and soundness violations and nonbinding supervisory preferences. Most importantly, it aligns safety and soundness determinations with the Agencies' stated objective of focusing enforcement on matters of genuine financial consequence. Accordingly, in the final rule, the Agencies should look to models such as the Fifth Circuit's articulation of financial harm in *Gulf* to adopt an unsafe or unsound standard that is clear, durable, and defensible on judicial review. In so doing, the Agencies will have a principled foundation on which to build a uniform national standard consistent with both statutory limits and Supreme Court precedent.

[26] *Gulf*, 651 F.2d 259 (5th Cir. 1981).

[27] *Id.* at 264–65.