December 29, 2025

Submitted via Regulations.gov

Chief Counsel's Office, Attention: Comment Processing
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E–218
Washington, DC 20219

Jennifer M. Jones, Deputy Executive Secretary
Attention: Comments - RIN 3064-AG12
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: Unsafe or Unsound Practices, Matters Requiring Attention (OCC RIN 1557-AF35; FDIC RIN 3064-AG16)

To Whom It May Concern:

I appreciate the opportunity to submit comments concerning the above-captioned notice of proposed rulemaking (Proposal) of the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC, collectively "the Agencies").[1] I am an Assistant Professor of Legal Studies at the J. Mack Robinson College of Business at Georgia State University. I submit these comments in my personal capacity.

I make two overarching comments in this letter. First, the Agencies lack the authority to define the term "unsafe or unsound practice" with any legal effect, such that the rulemaking should not proceed. Second, the FDIC should not adopt the "Matters Requiring Attention" terminology.

I. The Agencies lack the authority to define the term "unsafe or unsound practice" with legal effect, so the Proposal should not go forward.

In *Loper Bright Enterprises v. Raimondo*, the Supreme Court overruled the concept of *Chevron* deference, declaring that, unless otherwise provided by statute, "an agency's interpretation of a statute 'cannot bind a court.'"[2] The Court explained that statutes may "'expressly delegate[ ]' to an agency the authority to give meaning to a particular statutory term" or "empower an agency to prescribe rules to 'fill up the details' of a statutory scheme;"[3] in such cases, courts will defer to agencies' interpretations as statute requires. Otherwise, "courts must exercise independent judgment in determining the meaning of statutory provisions."[4]

The Agencies have not identified a source of statutory authority that allows them to interpret the phrase "unsafe or unsound practice" in a way that is legally binding—because the

[1] 90 Fed. Reg. 48835 (Oct. 30, 2025).

[2] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 402 (2024) (quoting Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 98 n. 8 (1983)).

[3] *Id*. at 394–95.

[4] *Id*. at 394.

Federal Deposit Insurance Act ("FDI Act") does not provide such authorization. The statute simply authorizes the Agencies to bring enforcement actions before administrative law judges that allege violations of the Act, including that the defendant bank or institution-affiliated party engaged in an unsafe or unsound practice. Although this adjudicatory process allows the Agencies to conclude that unsafe or unsound practices "ha[ve] been established," these conclusions can be appealed to Article III courts for final review.[5] During these appeals, courts rely on the Agencies' fact-finding, while judges, as the Supreme Court has noted, "must exercise independent judgment in determining the meaning of statutory provisions."[6] Although courts may have in the past been deferential to the Agencies' conclusions that banks engaged in unsafe or unsound practices,[7] courts did not give formal *Chevron* deference to the Agencies even before *Loper Bright*.[8]

Moreover, the term "unsafe or unsound" is not underdetermined, such that Congress would likely not have seen a need for regulators to interpret what it means. The Chairman of the Home Loan Bank Board, John Horne, is quoted in the Congressional Record as explaining,

> The term "unsafe or unsound" . . . is not a novel term in banking or savings and loan parlance. The words "unsafe" or "unsound" as a basis for supervisory action appear in the banking or savings and loan laws of 38 States. For more than 30 years, "unsafe or unsound practices" have been grounds for removal under section 30 of the Banking Act of 1933[or] of a director or officer of a member bank of the Federal Reserve System. . . . It has been grounds since 1935 for the termination of insurance of a bank insured by the [FDIC].
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> . . .
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> Like many other generic terms widely used in the law, such as "fraud," "negligence," "probable cause," or "good faith," the term "unsafe or unsound practices" has a central meaning which can and must be applied to constantly changing factual circumstances.[9]

To that end, Congress intended to adopt the so-called Horne Standard, which provides than the concept "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

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[5] 12 U.S.C. § 1818(b).

[6] *Loper Bright*, 603 U.S. at 394.

[7] *See* Franklin Sav. Ass'n v. Off. of Thrift Supervision, 934 F.2d 1127, 1145–46 (10th Cir. 1991) ("Whether a financial institution is in an unsafe or unsound condition is largely a predictive judgment . . . and reviewing courts should be particularly deferential when they are reviewing an agency's predictive judgments."); MCorp Fin. v. Bd. of Governors, 900 F.2d 852, 862 (5th Cir. 1990) (explaining that Congress "l[eft] the development of the phrase to the regulatory agencies"). *But see* In re Seidman, 37 F.3d 911, 929 (3d Cir. 1994) (holding that a loan made "in violation of its policies, while imprudent, . . . was not an unsafe or unsound practice").

[8] Proffitt v. Fed. Deposit Ins. Corp., 200 F.3d 855, 863 n.7 (D.C. Cir. 2000) ("Because a section 8(e) proceeding can be initiated by more than one agency, . . . we do not extend *Chevron* deference to [the FDIC's] interpretation of the statute.").

[9] 90 Fed. Reg. 48835, 25008.

the insurance funds."[10] As U.S. House of Representatives Banking Committee Chairman Wright Patman explained on the House floor,

> Some of the Members were concerned about the exact meaning of "unsafe or unsound" practices, and the Federal Home Loan Bank Board furnished a detailed memorandum on this question which is included in the printed hearings available to all the Members. We of the committee are of the opinion that these terms are sufficiently exact and do not involve an overly broad delegation of power to administrative agencies.[11]

Importantly, the Horne Standard also appropriately accomplishes Congress's goal under the FDI Act of giving the Agencies authority to issue cease-and-desist orders pursuant to unsafe or unsound practices in the first place. For over a century, the only penalties any federal banking agency could bring against banks were to strip them of their FDIC insurance or membership in the Federal Reserve System, or to force them into receivership. In enacting the Financial Institutions Supervisory Act of 1966, Congress desired to give regulators authority to put a stop to actions that did not imminently threaten the solvency of banks.[12] Congress intended to, in Patman's words, provide the agencies with "*flexible*, intermediate supervisory tools to be used short of the last resort of insurance termination."[13]

Courts have relied on the Horne Standard to interpret the phrase "unsafe or unsound" since the 1966 Act's enactment. Some courts have applied the Horne Standard without elaboration.[14] Others have explained that the standard applies to practices that have a "reasonably direct effect on an [institution]'s financial soundness"[15] or "threaten the financial integrity" of the institution."[16] Others still have required that unsafe or unsound practices cause "abnormal risk to

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[10] 112 Cong. Rec. 26474. *See also generally* Thomas L. Holzman, *Unsafe or Unsound Practices: Is the Current Judicial Interpretation of the Term Unsafe or Unsound?*, 19 ANN. REV. BANKING L. 425 (2000) (describing this so-called "Horne Standard").

[11] 112 Cong. Rec. 23753, 24984 (remarks of Rep. Wright Patman).

[12] Financial Institutions Supervisory Act of 1966 § 202, Pub. L. No. 89-695, 80 Stat. 1028, 1046 (codified as amended at 12 U.S.C. § 1818(b)).

[13] 112 Cong. Rec. 23753, 24984 (remarks of Rep. Wright Patman) (emphasis added).

[14] *See, e.g.,* Greene Cnty. Bank *v.* FDIC*,* 92 F.3d 633, 636 (8th Cir. 1996) (quoting First Nat'l Bank of Eden, S.D. *v.* Dep't of Treas., OCC*,* 568 F.2d 610, 611 n.2 (8th Cir. 1978)); Doolittle *v.* NCUA*,* 992 F.2d 1531, 1538 (11th Cir. 1993) (quoting Nw. Nat'l Bank, Fayetteville, Ark. *v.* Dep't of Treas.*,* 917 F.2d 1111, 1115 (8th Cir. 1990)).

[15] Gulf Federal Savings and Loan Ass'n v. Fed. Home Loan Bank, 651 F.2d 259, 264 (5th Cir. 1981).

[16] Johnson *v.* OTS*,* 81 F.3d 195, 204 (D.C. Cir. 1996).

the financial stability of the . . . institution,"[17] "abnormal risk of financial loss or damage,"[18] "reasonably foreseeable undue risk,"[19] or "unacceptable levels of risk."[20]

To be abundantly clear, the Agencies' interpretation of the term "unsafe or unsound" is radically different from how courts have interpreted it, even as they explain that they "believe that the proposed regulatory definition faithfully reflects the intent of the standard as enacted by Congress and aligns with the interpretations of the term unsafe or unsound practice within section 8 of the FDI Act by most Federal courts."[21] The Agencies' definition requires activities to be, *inter alia*, "likely" to "materially" harm institutions. This is quite different from courts' interpretations that merely require actions to be "contrary to generally accepted standards;" to have "reasonably direct effect[s];" to "threaten" institutions' solvency regardless of probability; or to be of an "abnormal risk," "reasonably foreseeable undue risk," or "unacceptable levels of risk." The Agencies' claim of consistency with the Horne Standard is just not true.

Given this legal background, any rules the Agencies write are liable to be considered, at most, policy statements describing how the Agencies plan to exercise their enforcement discretion going forward. Future regulators may nevertheless bring enforcement actions for acts and practices that meet *judicial* definitions of "unsafe or unsound" and were undertaken even as the Agencies' interpretations were in the Code of Federal Regulations. Moreover, because the Proposal is unlikely to be considered binding, finalizing this rulemaking merely gives banks a false sense of security as to what constitutes an unsafe or unsound practice.

The Agencies should not proceed with the Proposal.

II. The FDIC should not adopt the "Matters Requiring Attention" terminology.

Although the OCC and the Federal Reserve use the term "matters requiring attention" to communicate concerns about institutions' deficient practices, the framing misleadingly implies that addressing regulators' concern is legally required of institutions when it is not. MRAs are issued as part of exam reports and constitute individualized guidance from examiners to bank management. Failure to implement MRAs cannot serve as the basis for enforcement actions, which are limited to violations of banking statutes and regulations, as well as unsafe or unsound practices.[22] Though it is true that the issues underlying MRAs may metastasize over time and warrant enforcement actions if left unaddressed, it is not accurate to say that failing to address an MRA will render a bank legally deficient. Indeed, exam reports have additional sections that

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[17] In re Seidman, 37 F.3d 911, 928 (3d Cir. 1994); *see also id.* at 932 (stating that "[a]n unsafe or unsound practice has two components: (1) an imprudent act (2) that places an abnormal risk of financial loss or damage on a banking institution").

[18] Michael v. FDIC, 687 F.3d 337, 352 (7th Cir. 2012). *See also* Hoffman v. Fed. Deposit Ins. Corp., 912 F.2d 1172, 1174 (9th Cir. 1990) (requiring "abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds"); Greene Cnty. Bank v. Fed. Deposit Ins. Corp., 92 F.3d 633, 636 (8th Cir. 1996) (requiring actions that are "contrary to accepted standards of banking operations which might result in abnormal risk or loss").

[19] Blanton v. OCC, 909 F.3d 1162, 1172 (D.C. Cir. 2018) (quoting Landry *v.* FDIC, 204 F.3d 1125, 1138 (D.C. Cir. 2000)).

[20] Franklin Sav. Ass'n v. Off. of Thrift Supervision, 934 F.2d 1127, 1145 (10th Cir. 1991).

[21] 90 Fed. Reg. 48835, 48838.

[22] *See* 12 U.S.C. § 1818(b).

discuss compliance with ongoing enforcement actions and identify new legal and regulatory violations. Because the Agencies cannot bring enforcement actions merely for failing to address MRAs, the word "requiring" should not be used. As the Administrative Conference of the United States explains, guidance "should not include mandatory language unless the agency is using that language to describe an existing statutory or regulatory requirement."[23]

The FDIC explains in a footnote that "MRAs would replace MRBAs."[24] Although there is value in consistency across the three federal banking agencies, the term "matter requiring board attention" seems less compulsory than "matter requiring attention" because the former distinguishes these guidance documents from those meant for management (i.e., the FDIC's "supervisory recommendations").[25]

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Thank you for the opportunity to comment on this Proposal.

Sincerely,

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[23] Admin. Conf. of the U.S., Recommendation 2019-1, Agency Guidance Through Interpretive Rules, 84 Fed. Reg. 38927 (Aug. 8, 2019).

[24] *See* 90 Fed. Reg. 48835, 25008 n.44.

[25] *See* Fed. Deposit Ins. Corp., RMS Manual of Examination Policies § 16.1-2 (2023), https://www.fdic.gov/resources/supervision-and-examinations/examination-policies-manual/section16-1.pdf ("The term 'supervisory recommendation' refers to FDIC communications with a bank that are intended to inform the bank of the FDIC's views about changes needed in its practices, operations or financial condition.").