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Via Electronic Mail

Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
400 7th Street, NW
Suite 3E-218
Washington, DC 20219
Docket ID OCC-2025-0174

Ms. Jennifer M. Jones
Deputy Executive Secretary
Attention: Comments/Legal OES
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429
RIN 3064-AG16

Re: Unsafe or Unsound Practices, Matters Requiring Attention

To Whom It May Concern:

I write to oppose the FDIC's and OCC's proposal to weaken their enforcement and supervisory practices. Enforcement and supervision are essential tools for ensuring the safety of the U.S. banking system. This proposal would impair that goal by codifying excessively narrow and legally unsupported standards for enforcement actions and matters requiring attention (MRAs). The agencies should withdraw the proposal for five reasons.

First, the proposed definition of "unsafe or unsound practices" is inconsistent with, and far narrower than, established judicial precedent. While courts have differed in their precise wording, judges have consistently adopted the Horne standard or similar formulations requiring only an act, "the *possible* consequences of which, if continued, would be *abnormal* risk of loss or damage."[1] The agencies' proposal, by contrast, would limit unsafe or unsound practices to acts that are "*likely* to … *materially harm* the financial condition of the institution."[2] Thus, the proposal would impose two additional restrictions beyond the Horne standard: the harm must be both "likely" and "material." The agencies cite no court that has adopted so narrow a definition.[3] Under *Loper Bright Enterprises v. Raimondo*, courts—not agencies—are responsible for interpreting undefined

[1] *See* Heidi Mandanis Schooner, *Fiduciary Duties' Demanding Cousin: Bank Director Liability for Unsafe or Unsound Banking Practices*, 63 GEO. WASH. L. REV. 175, 190 (1995) ("In seeking a general definition for unsafe or unsound banking practices, the courts have relied on either Chairman Horne's definition or one almost identical to it.").

[2] 90 Fed. Reg. 48,835, 48,838 (Oct. 30, 2025) [hereinafter Proposed Rule].

[3] Even courts that have adopted formulations somewhat stricter than the Horne standard have not gone so far as to require that harm be both likely and material. *See, e.g.,* Gulf Fed. Sav. & Loan Assoc. of Jefferson Parish v. Fed. Home Loan Bank Bd., 651 F.2d 259, 264 (5th Cir. 1981) (limiting "unsafe or unsound practices" to "practices with a reasonably direct effect on an [institution's] financial soundness").

statutory terms because "agencies have no special competence in resolving statutory ambiguities."[4] Against this background, the agencies should not codify a definition of "unsafe or unsound practices" that lacks support in judicial precedent and departs from the long-established Horne standard.

Second, by requiring that harm be "likely" before supervisors can act, the proposal will prevent the agencies from addressing low-probability, high-impact risks. Banks routinely face risks that are statistically unlikely but could be catastrophic if realized: a prolonged systems outage, a major cybersecurity breach, a severe trading loss, or a natural disaster. The proposal would bar agencies from classifying deficiencies that exacerbate these vulnerabilities—such as running unsupported legacy systems, deferring cybersecurity investments, or relying on outdated manual processes—as "unsafe or unsound" because actual harm remains improbable. But a 1 percent chance of a $100 billion loss is just as dangerous as a 50 percent chance of a $2 billion loss. The proposed "likely" threshold would unwisely prevent supervisors from addressing serious high-impact risks until it is too late.[5]

Third, the proposal's undefined "materiality" standard will undermine effective supervision and conflicts with both judicial precedent and statutory text. The agencies propose to limit unsafe or unsound practices and MRAs to acts that "materially harm the financial condition of the institution," yet they explicitly decline to "more precisely define the materiality of harm required."[6] If the agencies codify such a vague standard, banks and institution-affiliated parties will have incentive to challenge enforcement actions and MRAs by arguing that potential harm falls below the undefined materiality threshold. More fundamentally, the materiality requirement lacks support in judicial precedent—the Horne standard requires only "abnormal risk of loss or damage," not "material" harm. The requirement also conflicts with section 8 of the Federal Deposit Insurance Act itself, which makes clear that Congress intended "unsafe or unsound practices" to encompass acts that do not cause material harm.[7] If the agencies insist on retaining a materiality standard, they should withdraw this proposal and issue a new one that defines materiality with concrete, measurable thresholds and provides the public a meaningful opportunity to comment on those specific standards.

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[4] 603 U.S. 369, 400-01 (2024).

[5] The agencies' ability to address low-probability, high-impact risks through supervision and enforcement is especially important given their apparent decision not to incorporate operational risk into the bank capital framework.

[6] Proposed Rule at 48,839.

[7] For example, section 8(i)(2)(B) authorizes a second-tier civil money when an institution or party recklessly engages in an unsafe or unsound practice that "(I) is part of a pattern of misconduct; (II) causes or is likely to cause more than a minimal loss to such depository institution; **or** (III) results in pecuniary gain or other benefit to such party." 12 U.S.C. § 1818(i)(2)(B) (emphasis added). Because these are alternative grounds, Congress clearly contemplated that unsafe or unsound practices need not cause "more than a minimal moss"—much less the material harm the proposal would require. Similarly, section (8)(e) authorizes removal of an institution-affiliated party who engages in an unsafe or unsound practice when: "(i) such [institution] has suffered or will probably suffer financial loss or other damage; (ii) the interests of the [institution's] depositors have been or could be prejudiced; **or** (iii) such party has received financial gain or other benefit." 12 U.S.C. § 1818(e)(1)(B). The agencies' proposed materiality standard would render clauses (ii) and (iii) superfluous.

Fourth, the agencies have buried a massive change to the Uniform Financial Institutions Rating System (UFIRS) in a single paragraph without following proper notice-and-comment procedures. The agencies state that they "expect" any downgrade to a less-than-satisfactory composite rating "would only occur in circumstances in which the institution receives an MRA that meets the standard outlined in the proposed rule or an enforcement action."[8] Yet the agencies propose no formal amendments to the UFIRS rating definitions, which currently authorize a less-than-satisfactory composite rating for any institution that "exhibit[s] some degree of supervisory concern" due to "weaknesses that may range from moderate to severe."[9] A revision of this magnitude should not be accomplished through an informal "expectation" buried in a loosely related rulemaking. If the agencies wish to revise UFIRS downgrade standards, they must issue a separate proposal with formal amendments to the rating definitions and adequate opportunity for public comment on this sea change in the supervisory framework.

Finally, if the FDIC and OCC insist on codifying standards for enforcement actions and MRAs, they should only do so in coordination with the Federal Reserve Board. The three banking agencies operate under identical statutory authority in Section 8 of the Federal Deposit Insurance Act, and they share the same supervisory and enforcement powers. Creating divergent enforcement standards across agencies would create an uneven playing field for different types of banks and encourage supervisory arbitrage. FDIC Chair Travis Hill has repeatedly emphasized that regulatory actions should be coordinated across the three banking agencies to avoid these types of problems.[10] This principle applies with particular force here, as the agencies propose to redefine a core statutory term that governs every enforcement action and examination finding. If changes are necessary, all three agencies should act together.

In sum, the proposal would unwisely limit the agencies' ability to fulfill their statutory mandate to ensure the safety and soundness of the banking system. The agencies should withdraw the proposal.

Sincerely,

Jeremy C. Kress

[8] *Id.* at 48,842.

[9] Uniform Financial Institutions Rating System, 61 Fed. Reg. 67,021, 67,026 (Dec. 19, 1996).

[10] *See, e.g.*, Travis Hill, Reflections on Bank Regulatory and Resolution Issues (July 24, 2024), https://www.fdic.gov/news/speeches/2024/reflections-bank-regulatory-and-resolution-issues ("I believe strongly any re-proposal should be issued jointly by all three banking agencies. For just one agency to re-propose … would be unprecedented, sow confusion, and lead to a number of practical and legal questions."); Travis Hill, Charting a New Course: Preliminary Thoughts on FDIC Policy Issues (Jan. 10, 2025), https://www.fdic.gov/news/speeches/2025/charting-new-course-preliminary-thoughts-fdic-policy-issues ("Addressing the issue holistically and transparently through a notice-and-comment rulemaking process … will ensure consistent treatment across the agencies.").