December 26, 2025

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

Re: Unsafe or Unsound Practices, Matters Requiring Attention

To Whom It May Concern:

Paradigm Operations LP ("Paradigm") appreciates the opportunity to comment on the joint rulemaking by the Office of the Comptroller of the Currency (the "OCC") and the Federal Deposit Insurance Corporation (the "FDIC" and together with the OCC, the "Agencies") to establish a definition of "unsafe or unsound practice" for use in enforcement and supervision. This letter responds to question 12, highlighting the shortfalls with the phrase "contrary to generally accepted standards of prudent operation" as used in the proposed definition of "unsafe or unsound practice."

Our core concern is that the proposed rule could be interpreted and applied by the Agencies in a manner that impedes innovation. This is because the standard "contrary to generally accepted standards of prudent operation" is vague and backward looking, akin to driving by looking exclusively through the rearview mirror. Paradigm recommends that the Agencies amend this phrase in the regulation by either striking the "generally accepted standards of prudent operation" phrase or including alternative language to avoid the undesirable outcome of limiting innovation.

* * * * *

Question 12: ***Is the agencies' use of the term "generally accepted standards of prudent operation[]," as described in this proposal, appropriate for making safety and soundness determinations? Are there other terms the agencies should consider using instead?***

Response to Question 12

The term "contrary to generally accepted standards of prudent operation" could lead to less innovation and impede banks' safe and sound operations if included in the final rule.[1] To prevent this outcome, the Agencies should strike this phrase from the regulation and hew to the statutory text.

1. There is no statutory basis for including "is contrary to generally accepted standards of prudent operation" as part of the definition of "unsafe or unsound practices."

We support the Agencies' objective of defining the term "unsafe or unsound practices" to limit supervisory discretion. That said, we believe it is an error to use the phrase "is contrary to generally accepted standards of prudent operation." This phrase does not have the force of law but is mere commentary from someone not even in Congress.

In reality, this phrase comes to us from thirty years after the FDIC was founded, via the testimony of a 1960s Federal Home Loan Bank Board Chairman, John Horne.[2] In 1966, Congress granted the Agencies cease-and-desist authority, which is now codified in the Federal Deposit Insurance Act.[3] As Congress was deliberating over this new authority, Chairman Horne testified about how "unsafe or unsound practices" could be used as a basis for issuing a cease-and-desist order. He explained:

> Generally 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.

But the Horne testimony survives only in the Congressional Record, and the text from that testimony did not appear in the final statute. Put simply, one piece of testimony from the 1960s should not become the Agencies' formal interpretation of the statute.[4] As the Supreme Court has

---

1 As Comptroller Jonathan Gould recently observed, impediments to innovation are a safety and soundness risk. *See* CoinDesk, *LIVE: CoinDesk Policy & Regulation in Washington, D.C.*, YOUTUBE (Sep. 10, 2025), *available at* https://www.youtube.com/watch?v=pZSTtO4h9UA.

2 112 Cong. Rec. 26474 (1966) (statement of Chair John Horne).

3 12 U.S.C. § 1818(b).

4 *Calcutt v. FDIC*, 37 F.4th 293, 353-57 (6th Cir. 2022) (quoting *First Nat'l Bank v. Department of Treasury, Office of Comptroller of Currency*, 568 F.2d 610 (8th Cir. 1978)).

held previously, the authoritative statement is the statutory text, not the legislative history.[5] In part, this is because legislative history is often "murky, ambiguous, and contradictory."[6]

Moreover, legislative history typically comes from events roughly contemporaneous with the passage of a law, thereby reflecting the views of the drafters at the time. This statement, from someone not involved in the creation or early establishment of the FDIC,[7] does not even deserve the label of legislative history.[8]

For these reasons, we recommend that the phrase not be included in the Agencies' final rule defining the term "unsafe or unsound practice." As we know from the Court, relying on a bad prior interpretation of our laws is not a reason to continue relying on that bad interpretation. Our system of government expects public servants to self-criticize and change course when they discover an error, not heedlessly double-down.

2. <u>The "contrary to generally accepted standards of prudent operation" concept is too ambiguous and unpredictable.</u>

Even if there were a statutory basis for the "contrary to generally accepted standards of prudent operation" concept (which there is not), the Agencies should decline to adopt it due to its ambiguity and unpredictability. Dissenting in a recent Sixth Circuit case, Judge Eric E. Murphy criticized the FDIC's view that an "unsafe or unsound practice" could include an act contrary to "generally accepted standards."[9] In highlighting these dangers, he rightly asked:

> If an agency condones a banker's "new business model," the agency can constrict the statute to give the banker a pass? …. But if the agency disapproves of a competitor's practice, it can expand the statute to punish the competitor? This accordion-like view of the rule of law has no place in our constitutional order—one in which the President lacks any "dispensing" prerogative.[10]

If the Agencies adopt the "generally accepted standards" phrasing in the final regulation, federal courts will struggle to interpret its meaning. This will inevitably lead to a circuit split, where different and conflicting interpretations apply in different regions of the country. Unless the

---

5 *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005).

6 *Id.*

7 *See*, *New York Times*, "John Horne, Ex-Federal Aide," (January 10, 1985), *available at*, https://www.nytimes.com/1985/01/10/us/john-horne-ex-federal-aide.html

8 Although the FDIA was not enacted until 1950, the "unsafe or unsound practices" phrase was codified in other federal law at the FDIC's creation and later moved to the FDIA. *See* Banking Act of 1933, Pub. L. 73-66 (codifying Section 12B of the Federal Reserve Act); *see also* Federal Deposit Insurance Act, Pub. L. 81-797 (removing Section 12B from the Federal Reserve Act to the separate FDIA).

9 *Calcutt v. FDIC*, 37 F.4th 293, 353-57 (6th Cir. 2022) (Murphy, J., dissenting), *rev'd on other grounds*, 598 U.S. 623 (2023).

10 *Id*. at 354 (citations omitted).

Supreme Court steps in, this rulemaking may worsen the very problem the Agencies were trying to solve – no clear understanding of "unsafe or unsound" practices.

* * * * *

Paradigm appreciates the consideration of the Agencies in our comments. If you have any questions or would like to discuss these comments further, please reach out to [redacted].

Sincerely,

/s/ *Justin Slaughter*
Justin Slaughter
VP of Regulatory Affairs
Paradigm