BANK POLICY INSTITUTE

December 29, 2025

Via Electronic Submission

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–AG16
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

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

To Whom It May Concern:

The Bank Policy Institute strongly supports the Office of the Comptroller of the Currency's and Federal Deposit Insurance Corporation's proposed rulemaking defining "unsafe or unsound practices" and establishing standards for issuing Matters Requiring Attention (MRAs).[1] These are necessary and important reforms that would improve bank supervision by focusing agency examiners on material financial risks. The proposed rule should be adopted without delay with the additional refinements recommended in this letter, which are intended to ensure that the text of the final rule provides clear and objective standards that align with binding case law and promote the proposal's goals.

I. Introduction

The proposed standards are necessary to refocus bank examination on material risks to an institution's financial condition and to align supervisory practices with statutory authority and binding case law. Specifically, we strongly support the proposal to (i) define "unsafe or unsound practices" by regulation to focus on material harm to an institution's financial condition or material risk of loss to the Deposit Insurance Fund and (ii) establish uniform standards for issuing

[1] The Bank Policy Institute is a nonpartisan public policy, research, and advocacy group that represents universal banks, regional banks, and the major foreign banks doing business in the United States. The Institute produces academic research and analysis on regulatory and monetary policy topics, analyzes and comments on proposed regulations, and represents the financial services industry with respect to cybersecurity, fraud, and other information security issues.

MRAs that would similarly focus supervisory resources on material financial risk rather than immaterial procedural matters.

"Safety and soundness" is a cornerstone of bank supervision. U.S. state laws have used the term "unsafe or unsound practices" or its variants going back to the 1830s.[2] Subsequently, Congress charged the agencies with ensuring the safety and soundness of the institutions they examine and granted the agencies enforcement authority specifically with respect to "unsafe or unsound practices." Over time, however, the concept of "safety and soundness," as it has been applied in practice, has become untethered from both material financial risks and the law that established the framework. It has yielded a system that encourages examiners to focus on process and immaterial issues and thereby deemphasizes material financial risks. We agree with the agencies' observation in the preamble to the proposal that this dynamic has resulted in "a proliferation of supervisory criticisms for immaterial procedural, documentation, or other deficiencies that distract management from conducting business and that do not clearly improve the financial condition of institutions."[3] We submit that this overbroad interpretation of the meaning of an "unsafe or unsound" practice weakens supervision, diverting finite agency and bank resources.

The proposal, if adopted, would help to reverse this trend. It would provide, for the first time, a clear regulatory definition of the bedrock concept of "unsafe or unsound" and would establish a clear standard for issuance of MRAs by the agencies. Accordingly, we encourage the agencies to adopt the proposed changes without delay, with the refinements discussed below.

Part II of this letter discusses the evidence supporting the proposed reforms, the expected benefits of adopting them, and the cost of continuing current examination practices without these reforms. **Part III** provides recommendations on the proposed definition of "unsafe or unsound practices." **Part IV** provides recommendations on the proposed standards for MRAs and informal supervisory communications. **Part V** provides recommendations on additional regulatory reforms, including reforms to the CAMELS rating system, that are necessary for the proposed changes to be fully effective. **Appendix A** to this letter provides direct responses to the questions raised by the agencies in the proposed rule. **Appendix B** to this letter provides legal background and analysis on the meaning of "unsafe or unsound practices." **Appendix C** to this letter provides legal background and analysis on the agencies' authority to issue MRAs.

II. Background and the Need for Supervisory Reform

A. Evidence shows supervision has become focused on immaterial risks, not on risks to the financial condition of institutions

The specifics of bank examination are unknown to the public because the entire process and all related communications are deemed by the agencies to constitute confidential supervisory information. However, meaningful evidence shows that examination as a whole has

[2] *See* Appendix B for legal background and analysis on the meaning of "unsafe or unsound practices" and the statutory text and case law interpreting this term.

[3] Unsafe or Unsound Practices, Matters Requiring Attention, 90 Fed. Reg. 48,835, 48,840 (Oct. 30, 2025) (hereinafter, "Proposed Rule").

become focused on immaterial issues and compliance demands that do not promote or correlate with financial soundness.

- **Federal banking agency data on supervisory findings.** Reports published by the Federal Reserve show that at least two-thirds of outstanding issues (unresolved supervisory findings) reported over the past several years relate to Governance & Controls.[4] Similarly, a November 2024 report from the Government Accountability Office (GAO) reveals that the majority of MRAs relate to non-financial risks. For example, the GAO found that, between 2018 and 2023, less than half of the matters requiring board attention issued by the FDIC related to capital, earnings, interest rate risk, investments, lending, and liquidity.[5] The same report indicated that less than half of OCC supervisory concerns were in the categories of asset management, capital, capital markets, commercial credit, earnings, and retail credit. MRAs are just one tangible manifestation of a broader set of burdens that institutions face due to their examiners' excessive focus on immaterial issues; these burdens also manifest in banks' day-to-day interactions with examiners, which include meeting with agency staff, responding to detailed information requests, and communicating with multiple agencies with concurrent jurisdiction over a single issue.

- **Federal banking agency data on supervisory ratings.** Prior to the Federal Reserve's recent changes to the Large Financial Institution rating system, two-thirds of large banks were deemed less-than-satisfactory and not "well managed." Similarly, media reports indicate about half of the largest banks supervised by the OCC scored as inadequate in their management of operational risk, with roughly one-third receiving unsatisfactory marks on the Management component of the CAMELS framework.[6] At the same time, however, regulators have continued to acknowledge that the stability and integrity of large financial institutions, and the banking system as a whole, remain strong and resilient.[7] This discrepancy is explained by the fact that non-financial or immaterial issues are often mischaracterized as "safety and soundness" issues even

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[4] *See, e.g.*, *Supervision and Regulation Report*, FRB (Dec. 2025), https://www.federalreserve.gov/publications/files/202512-supervision-and-regulation-report.pdf; *Supervision and Regulation Report*, FRB. (Nov. 2024), *https://www.federalreserve.gov/publications/files/202411-supervision-and-regulation-report.pdf*; *Supervision and Regulation Report*, FRB (May 2024), *https://www.federalreserve.gov/publications/files/202405-supervision-and-regulation-report.pdf*; *Supervision and Regulation Report*, FRB (Nov. 2023), *https://www.federalreserve.gov/publications/files/202311-supervision-and-regulation-report.pdf*.

[5] Government Accountability Office, *Bank Examinations: Improvements Needed in Agencies' Examination Information* (Nov. 2024), https://www.gao.gov/assets/gao-25-106771.pdf.

[6] Stephen Scott, *Leaked OCC 'CAMELS' Report Puts Bad Policy on Public Display*, The Banker (Sept. 3, 2024), https://www.thebanker.com/content/db994e3e-405e-52ee-9684-b969327f827c.

[7] See, *e.g.*, *FDIC Quarterly Banking Profile Second Quarter 2025*, FDIC (Aug. 26, 2025) ("[T]he banking industry continued to show strength in second quarter 2025."), https://www.fdic.gov/news/speeches/2025/fdic-quarterly-banking-profile-second-quarter-2025; *Semiannual Risk Perspective*, OCC (Fall 2025) ("The strength of the federal banking system remains sound."), https://www.occ.treas.gov/publications-and-resources/publications/semiannual-risk-perspective/files/pub-semiannual-risk-perspective-fall-2025.pdf.

though such issues do not rise to the level of unsafe or unsound practices under binding case law. The supervisory focus on issues that are not material to the financial condition of the firm often translates to downgrades through the ratings framework.

- **Silicon Valley Bank case study.** The 2023 failure of Silicon Valley Bank (SVB) illustrates that regulators' focus on non-financial risks resulted in a failure to identify and address financial weaknesses. SVB accumulated significant interest rate risk in its government and agency securities portfolio that called into question its solvency. SVB was reliant on large uninsured deposits from a single business sector for funding and lacked an adequate liquidity strategy to survive a run on those deposits once questions about its solvency became pronounced. The Federal Reserve examiners could have identified those risks and required management to take steps to reduce interest rate risk, buttress liquidity, and diversify funding sources. That did not occur; instead, examiners were largely focused on non-financial risks. Of the 31 MRAs and MRIAs that remained open at the end of 2022, only six directly concerned management of liquidity risk, only three related to lending and credit risk management, and only one concerned management of interest rate risk. The remainder concerned non-financial risks.[8]

- **Academic Research.** One academic study found that roughly half of supervisory rating variance stems from differences among individual examiners rather than from banks' fundamentals.[9] Another study has shown that subjective management considerations overrode tangible liquidity considerations in determining institutions' composite CAMELS ratings during the monetary tightening that preceded the 2023 banking turmoil.[10]

- **BPI Member Survey.** Our members' own data confirm that their examiners have become excessively focused on immaterial risks. A 2024 survey conducted by BPI revealed that, between 2016 and 2023, employee hours dedicated to complying with financial regulations and examiner mandates increased by 61%, even though aggregate employee hours increased only 20% in the same period. Nearly half of bank management and board time was devoted to compliance with regulation and supervision, including examiner mandates and recommendations, instead of strategic

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[8] *See* BPI, A Failure of Self-Examination: A Thorough Review of SVB's Exam Reports Yields Conclusions Very Different from Those in the Fed's Self-Assessment (Sept. 28, 2023), https://bpi.com/a-failure-of-self-examination-a-thorough-review-of-svbs-exam-reports-yields-conclusions-very-different-from-those-in-the-feds-self-assessment/. The other MRAs and MRIAs concerned information technology and security (13), broad programmatic concerns about governance, audit, and risk management (3), vendor management (2), BSA/AML (2), and trust and fiduciary risk management (1). *See* FRB, *Review of the Federal Reserve's Supervision and Regulation of Silicon Valley Bank* (April 2023). As a footnote in this report notes, this excludes four consumer compliance issues that were open at the time, which presumably would further skew supervisors' lack of appropriate focus.

[9] Sumit Agarwal et al., *Noisy Experts? Discretion in Regulation*, NBER Working Paper No. w32344, at 4 (Apr. 16, 2024, revised Nov. 16, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4794393.

[10] Yadav Gopalan and João Granja, *How (In)Effective Was Bank Supervision During the 2022 Monetary Tightening?*, Becker Friedman Institute for Economics at UChicago, Working Paper No. 2023-130 (Sept. 2023), https://bfi.uchicago.edu/wp-content/uploads/2023/09/BFI_WP_2023-130.pdf.

planning, business planning, material risk management, and other traditional management and board functions. Over that same time, the portion of bank IT budgets devoted to compliance and non-financial risks grew by 40%.[11]

In summary, this evidence shows that the supervisory process is in need of reform.

B. Expected benefits of the proposed reforms

The revisions to the definition of unsafe or unsound practices and standards for issuing MRAs can be expected to have several benefits. These revisions will focus examiners on material risks to the financial condition of an institution rather than risks that may not have a financial impact, such as those solely related to policies, processes, and documentation. The proposed revisions will direct the finite resources of both the agencies and banks toward identifying and mitigating the actual risks within the financial system, thereby enhancing safety and soundness. The proposal will also align the agencies' rules and practices with binding case law interpreting the statutory term "unsafe or unsound practice" and with the agencies' statutory authorities.[12]

Further, the proposal will provide a more objective basis for engaging with examiners and appealing supervisory decisions. Today, banks rarely appeal supervisory findings and, when they do, they are exceedingly unlikely to prevail.[13] This is likely because the agencies have historically failed to recognize any objective standard by which to evaluate examination feedback, which oftentimes is based on idiosyncratic views or assessments of best practices. The codification of more objective standards – standards that already exist in the case law – together with the codification of process reforms will facilitate consistent application of these standards. This will promote the use of those standards as a yardstick, preventing conclusory allegations and allowing institutions and agency appeals decision-makers to better evaluate supervisory determinations.

Importantly, the proposed definition of unsafe or unsound practices and proposed standards for issuing MRAs would not prevent examiners from redressing practices that present material risks to the financial condition of an institution. Agencies would continue to have the ability to remediate material risks that, if left unaddressed, may escalate into more significant supervisory concerns. Specifically, the proposal explicitly maintains the following:

- Examiners will continue to have the ability to identify practices as unsafe or unsound if they present material risk to the financial condition of an institution. As explained below, this emphasis will improve the supervisory process by focusing examiners on actual threats to an institution's financial condition like those that led to the failures exemplified by SVB.

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[11] BPI, *Survey Finds Compliance Is Growing Demand on Bank Resources* (Nov. 13, 2024), https://bpi.com/survey-finds-compliance-is-growing-demand-on-bank-resources/.

[12] *See* Appendix B and Appendix C.

[13] *See* BPI, Comment Letter on Proposed Changes to Guidelines for Appeals of Material Supervisory Determinations, 2 (Sept. 16, 2025), https://bpi.com/wp-content/uploads/2025/09/BPI-AABD-Letter-on-Proposed-FDIC-Supervisory-Appeals-Guidelines.pdf ("Based on experience and precedent, banks generally believe there is little likelihood of success in appealing a material supervisory determination[.]"); *see also id.* at 12 ("Over time, the number of appeals filed with the FDIC have been few – reflecting the reality that many banks do not believe the process afford[s] any reasonable chance of success[.]").

- Examiners will continue to have the authority to issue MRAs for imprudent practices that either materially harmed the financial condition of an institution or, if continued, could reasonably be expected to, under current or reasonably foreseeable conditions, materially harm the financial condition of the institution or present a material risk of loss to the DIF. Further, examiners will continue to have the authority to issue MRAs for violations of banking and banking-related laws and regulations.

- The agencies will continue to have the authority to adopt rules for bank activities through notice and comment rulemaking and will continue to have the authority to enforce these rules. By adopting these rules and standards through notice and comment rulemaking, the agencies can ensure that the supervisory and enforcement regime is based on objective and legally enforceable standards.

- Examiners will continue to have the ability to identify non-financial and non-material financial risks through informal supervisory communications. While these communications would not be binding on institutions, they would nonetheless allow examiners to lend their expertise to help institutions improve their internal operations. Further, as noted in the proposed rule, non-financial risks may, in certain circumstances, be so severe as to result in material harm to the financial condition of an institution. For example, the agencies note that deficiencies in critical infrastructure or cybersecurity could be so severe as to threaten the financial stability of an institution.[14] We agree that in these circumstances such non-financial risks could rise to the level of an unsafe or unsound practice.

In sum, the proposal would strengthen supervision and the financial stability of the banking system by focusing examiners and banks on material risks.

C. Failing to reform these supervisory standards could damage individual institutions and economic growth

The meaning of the term "unsafe or unsound practices" and the standards for issuing an MRA are not theoretical issues – they have concrete effects on institutions' ability to serve customers and support economic growth. Examiners' individual, subjective judgments of what constitutes an unsafe or unsound practice or an MRA can result in institutions spending countless hours on remediation and implementation of the examiners' directives. MRAs based on ill-defined "safety and soundness" concerns often result in downgrades through the equally opaque and subjective bank ratings framework.[15] This, in turn, can result in legal restrictions on a bank's ability to do business.

MRAs are often entirely process-oriented and unrelated to an institution's financial condition and fail to identify any substantive issue or concern with specificity. MRAs generally

[14] Proposed Rule at 48,839. With that said, the circumstances that could result in a non-financial risk meeting the MRA threshold should not include anti-money laundering or sanctions compliance deficiencies, unless those deficiencies are so severe as to result in a criminal conviction or guilty plea for the financial institution.

[15] *See* Part V.A below for a discussion of the interconnections between the standards for unsafe or unsound practices and MRAs and the ratings framework.

require a bank to (i) develop a detailed "remediation plan," often requiring involvement of a third-party consultant, (ii) have that plan approved by the agency, (iii) complete implementation of that plan, (iv) have its own internal compliance and audit functions review implementation to ensure it is "sustainable" for a period of time after completing all of that work, and (v) obtain a final determination from the regulator that all of the foregoing has been successfully completed. Each of these steps must be completed before the MRA may be closed. Furthermore, the agencies generally expect the bank's board of directors to oversee the remediation process. For more complex MRAs, it frequently takes more than a year after the bank completes all of its work for an agency to close an MRA, and on many occasions multiple years. This entire process often emphasizes process over results, with no clear standard for success in resolving the issue and evolving agency expectations that often further delay progress.

The consequences of failing to resolve an MRA can be severe. Unresolved MRAs are frequently the basis for a downgrade of the bank's examination rating, including its CAMELS Management component or composite rating.[16] That downgrade, in turn, may result in an automatic halt on most types of expansion and other consequences, including, but not limited to, the following:

- **Loss of authority to engage in financial activities**. Under section 4(k) of the Bank Holding Company Act, bank holding companies (BHCs) that meet certain criteria, including being well managed, may elect treatment as a financial holding company (FHC) and engage in a wide range of permissible activities that are "financial in nature," or incidental or complementary to a financial activity. FHCs that fail to meet the criteria to maintain FHC status—including well managed status for both the BHC and its insured depository institution subsidiaries—are subject to automatic consequences under section 4(m) of the Bank Holding Company Act. This limits the holding company's ability to engage in a variety of markets and investment activities including securities underwriting and dealing, insurance, and merchant banking.

- **Loss of ability to engage in banking M&A activity**. The agencies take an institution's supervisory ratings and unresolved MRAs into account when evaluating the financial and managerial resources of the institution involved in an M&A transaction. The agencies view an unresolved MRA or enforcement order as a red flag that would preclude merger approval. For example, the OCC's Licensing Manual for Business Combinations states that the OCC considers a bank's BSA/AML compliance when determining whether to approve an application for a transaction. In reviewing BSA/AML compliance, the manual states that the OCC reviews MRAs and considers the nature and duration of the issues and the institution's progress in remediating identified program deficiencies.[17] In addition, the

[16] With respect to bank holding companies, unresolved MRAs have frequently been the basis for a downgrade in one or more of the bank holding company's Large Financial Institution component ratings.

[17] OCC, Licensing Manual for Business Combinations (rev. July 2018), https://www.occ.gov/publications-and-resources/publications/comptrollers-licensing-manual/files/bizcombo.pdf. Similarly, under Federal Reserve guidance, banks with a less-than satisfactory rating are essentially barred from mergers and acquisitions. Supervisory Letter 14-2, issued in 2014, describes factors the Federal Reserve will consider in acting upon bank applications to engage in a wide range of proposed transactions, including mergers, acquisitions, asset purchases, investments, new activities, and branching. The letter states that banking

banking agencies generally suggest that banks with a CAMELS rating of 3 for management or composite rating of 3 for safety and soundness (ratings that are commonly based on MRAs or enforcement orders) should not pursue acquisitions to avoid diverting management resources from remediation.[18] A less-than satisfactory composite rating also limits a bank's ability to establish a de novo interstate branch or to control or hold an interest in certain subsidiaries.[19]

- **Loss of general consent to make investments that promote America's interest**. Under OCC regulations, a national bank with a less-than-satisfactory management or composite CAMELS rating must obtain prior approval before it can make investments that promote economic development and the public welfare in the United States.[20] Under the Federal Reserve's Regulation K, to make investments under the general consent procedures, a holding company must be well capitalized and well managed.[21] Applications to establish branches in new foreign jurisdictions are also generally not approved if the bank is not considered well managed.

- **Increased FDIC assessments and fees**. A bank's CAMELS rating factors into the FDIC's calculation of the bank's assessment rate, leading to tangibly higher costs to banks in the event of a ratings downgrade, even if the issue resulting in the downgrade is unrelated to the bank's financial condition or risk presented to the DIF.[22] In addition, a downgrade in a national bank's or federal savings association's composite rating results in substantially higher OCC assessment fees.[23]

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organizations "are generally expected to resolve their outstanding substantive supervisory issues" prior to filing an application.

[18] In 2024, the agencies formalized this "penalty box" in a final rule that amended the agencies' procedures for reviewing applications under the Bank Merger Act. *See* Business Combinations Under the Bank Merger Act, 89 Fed. Reg. 78,207 (Sept. 25, 2024); Final Statement of Policy on Bank Merger Transactions, 89 Fed. Reg. 79,125 (Sept. 27, 2024). These final rules expressly stated that the agencies would be "unlikely to find the statutory factors under the BMA to be consistent with approval" if, among other things, "the acquirer has UFIRS or ROCA composite or management ratings of 3 or worse." 89 Fed. Reg. at 78,218. The agencies issued an interim final rule in 2025 rescinding these rules. Business Combinations Under the Bank Merger Act; Rescission, 90 Fed. Reg. 20,561 (May 15, 2025); FDIC, Statement of Policy on Bank Merger Transactions: Rescission and Reinstatement (May 20, 2025).

[19] *See* 12 U.S.C. § 24a; 12 U.S.C. § 36(g); 12 U.S.C. § 1831u; 12 U.S.C. § 1843(m). Further, in our members experience, regulators effectively apply the prohibition to interstate mergers and branching to certain in-state mergers and branching actions. *See, e.g.*, Federal Reserve SR Letter 13-07, State Member Bank Branching Considerations (Apr. 5, 2013) (clarifying the Federal Reserve's policy concerning the application process for a state member bank in less-than-satisfactory condition for the establishment of a de novo branch).

[20] 12 C.F.R. § 24.2(e).

[21] 12 C.F.R. § 211.9(b).

[22] *See generally* 12 C.F.R. Part 327.

[23] *See* 12 C.F.R. § 8.2(d) (imposing a 50 percent surcharge on a national bank or federal savings association with a composite rating of 3 and a 100 percent surcharge on a national bank or federal savings association with a composite rating of 4 or 5).

- **Loss of ability to pursue internal corporate reorganizations**. To satisfy the exemption from quantitative limits under Regulation W for a corporate reorganization transaction, a holding company and all its subsidiary depository institutions must be well capitalized and well managed.[24]

Each of the costs and consequences described above can, and often do, flow from a subjective and effectively unappealable supervisory determination that a practice warrants an MRA.[25] Restricting banks' ability to engage in these activities and imposing additional costs limits their capacity to serve their customers and compete in the dynamic and evolving financial services landscape. Adopting the proposal would promote economic growth by allowing institutions more latitude to direct and invest resources to serve customers and to compete within the financial sector.

III. Definition of Unsafe or Unsound Practices

We support the agencies' proposal to define unsafe or unsound practices, subject to the clarifications set forth below. As described in Part II of this comment letter, the lack of a definition often leads to unwarranted focus by the agencies on immaterial and process-based issues rather than core financial risk. We have suggested revisions to the rule to ensure that the focus of the agencies in supervising institutions is on quantifiable material financial risks and observable management practices. The proposed rule is also necessary to align the definition of unsafe or unsound practices used by the agencies with the meaning that federal courts have given such term.[26] Therefore, we support the proposed definition because it will improve the transparency and accuracy of bank supervision and will bring supervisory practices into conformance with the law. The recommendations set forth below are aimed at providing objective measures that will help ensure that the rule is applied consistently and transparently over time.

A. Imprudent practice

The proposed regulatory text states that an unsafe or unsound practice is one that is contrary to generally accepted standards of prudent operation. This language could result in inconsistent application based on a given examiner's interpretation of an "imprudent practice" and "generally accepted standards of prudent operation." "Prudence" is a vague and potentially expansive term that does not appear in section 1818; thus, further detail is required if an objective standard is to be adopted.

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[24] 12 C.F.R. § 223.41(d).

[25] *See, e.g.*, BPI, Comment Letter on Proposed Changes to Guidelines for Appeals of Material Supervisory Determinations (RIN 3064-ZA50) (Sept. 16, 2025), https://bpi.com/wp-content/uploads/2025/09/BPI-AABD-Letter-on-Proposed-FDIC-Supervisory-Appeals-Guidelines.pdf (supporting and providing recommendations to the FDIC's proposed revisions to its supervisory appeal process); Julie A. Hill, *When Bank Examiners Get it Wrong: Financial Institution Appeals of Material Supervisory Determinations*, 92 Wash. U. Law Rev. 1101 (describing the appeals process as a "dysfunctional and seldom-used system").

[26] Appendix B to this letter sets forth the judicial precedent interpreting the term unsafe or unsound practices, which the agencies are bound to apply.

1. Clarify that the material harm prong is a condition precedent to the imprudent practice prong

We support the agencies aligning the definition of unsafe or unsound practice with the case law by requiring that the practice be contrary to generally accepted standards of prudent operation. However, a precondition to the analysis of whether an imprudent practice has occurred is that the practice, if continued, either has or will materially harm the financial condition of the institution or presents a material risk of loss to the DIF. Absent such harm, it is not necessary for examiners to determine whether a practice is contrary to generally accepted standards of prudent operation. To incorporate this point, the agencies should include the harm prong as (a)(1) of the rule and the imprudent practice prong as (a)(2).

There is more than semantics at stake. We are concerned that placing imprudent practices as the first prong could tend to result in examiners first identifying a practice with which they may have subjective concerns and then searching to identify a potential material harm to support the finding of an unsafe or unsound practice (or MRA). Reframing the definition by clearly requiring that the occurrence of material harm be a precondition is a step in avoiding this result.

2. Clarify that horizontal reviews and best practices are not relevant to determining the existence of an imprudent practice

The agencies should clarify that the term "generally accepted standards of prudent operation" does not equate to an agency's view of "best practices" (or the most favored practice identified in a horizontal review) and should not result in examiners substituting their judgment for that of an institution's management or board. The final rule should make clear that banks should be able to operate within a range of acceptable practices without being criticized simply because their approach differs from some of their peers or from an examiner's preferences. Further, the final rule should clearly establish that examiners should generally defer to bank management's prudent risk taking and that it is a high bar to conclude that a bank is engaged in imprudent practices. Any suggestions that are nonbinding, such as general "observations" or a single set of "best practices" identified through horizontal reviews, should not be the basis for findings of unsafe or unsound practices or issuing MRAs.

B. Practice

We agree with the agencies' determination that, for a practice to be unsafe or unsound, the practice must have already materially harmed the financial condition of the institution or, if continued, would be likely to materially harm the financial condition of the institution.[27]

The language of the rule text, however, requires further refinement. At the outset, the definition of an unsafe or unsound practice should be revised to align with the unambiguous text of the underlying statute. Section 8 of the FDI Act refers to "unsafe or unsound practices" and

[27] *Id.*

"unsafe or unsound conditions."[28] The word "practice" requires a pattern of conduct.[29] The word "condition" implies the relevant financial state of the institution in question.[30] Neither of these terms suggest that Congress intended for a single act, or failure to act, to be an unsafe or unsound practice or condition. To align the regulation with the plain language of section 8 of the FDI Act, the agencies should remove "act or failure to act" from the definition of unsafe or unsound practice.

Consistent with this approach, the rule should specify that a discrete occurrence made in good faith and corrected, is not a "practice" for purposes of this section. A practice implies a pattern of conduct or systematic issue, not isolated incidents that have been corrected. Disclosure, reporting, and other singular occurrences would not constitute a "practice" for purposes of section 8 of the FDI Act.

In addition, the regulatory text should clarify that an act or practice that an institution has self-identified and is in the process of remediating does not constitute an unsafe or unsound *practice*, so long as such act or practice has not already materially harmed the financial condition of the institution. Banks should be encouraged to identify and correct issues proactively without fear that such identification will be used against them in supervisory or enforcement actions or supervisory ratings.

C. Likely

The proposed regulatory text states that it must be "likely" that the relevant practice, if continued, would materially harm the financial condition of the institution or present a material risk of loss to the DIF. We support this standard and recommend two additional changes to provide clarity and consistency going forward.

First, we recommend that the agencies clarify that the "likely" standard is intended to reflect the standard established in binding case law. As discussed in Appendix B, the D.C. Circuit's decision on this point – *Johnson v. Office of Thrift Supervision* – held that the practice must "pose[] an abnormal risk to the financial stability or integrity of the institution."[31] This is the formulation used by a majority of the federal appellate circuits that have addressed this issue. This "abnormal" language indicates the risk to the institution must be likely to occur. Similarly, in *Michael v. FDIC*, the U.S. Court of Appeals for the Seventh Circuit held that for a practice to be unsafe or unsound, an institution must have either suffered "or will probably" suffer a financial loss.[32] The term "will

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[28] 12 U.S.C. § 1818.

[29] *See, e.g.*, *Practice*, American College Dictionary 951 (1970) (defining a "practice" as a "habitual or customary performance"); *Practice*, American Heritage Dictionary of the English Language 1028 (1973) (defining a "practice" as a "habitual or customary action or way of doing something").

[30] *See, e.g.*, *Condition*, Webster's New International Dictionary 473 (3d ed. 1965) (defining a "condition" as the "financial position or state of a person or company"); *Condition*, Webster's New International Dictionary 556 (2d ed. 1961) (defining a "condition" as a "mode or state of being").

[31] *Johnson v. OTS*, 81 F.3d 195, 204 (D.C. Cir. 1996); *see also Simpson v. OTS*, 29 F.3d 1418, 1425 (9th Cir. 1994) (defining an unsafe or unsound practice in part as a practice "the possible consequences of which, if continued, *would be abnormal* risk or loss or damage to an institution").

[32] 687 F.3d 337, 349 (7th Cir. 2012).

probably" implies that the risk of loss is more likely than not.[33] As such, the agencies should affirmatively state that the "likely" standard is intended to reflect the standard established in binding case law.

Second, the rule should require that for a practice to be *likely* to materially harm the financial condition of the institution, examiners must establish by *demonstrable and quantifiable* evidence or analysis that such practice, if continued, would materially harm the financial condition of the institution or present a material risk of loss to the DIF. Specifically, we recommend that the agencies add the following bolded language to subsection (a)(2)(i) of the proposed rule text: "if continued, is likely, **based on demonstrable and quantifiable evidence or analysis**, to . . . ." The final rule and the relevant agency examination manuals should state that the burden of producing this evidence falls solely on examiners and does not impose any requirement that institutions prepare this evidence or analysis. This evidence should, among other things, explain the risk to the financial condition of the institution that the practice creates. Further, the final rule should require that the agencies present this evidence and analysis to the institution before pursuing any enforcement action. This requirement would ensure that determinations of unsafe or unsound practices are based on objective facts or analysis rather than subjective judgments or hypothetical scenarios.

D. Financial condition

The preamble explains that harm to an institution's "financial condition" includes actions that are likely to "directly, clearly and predictably impact an institution's capital, asset quality, earnings, liquidity or sensitivity to market risk."[34] The agencies should codify this language in the rule text to provide clarity and consistency. Without codification, there is a risk that the preamble language will be overlooked or interpreted inconsistently. This codification would also ensure that the definition is focused on objective and quantifiable financial metrics rather than subjective assessments of governance or process.

E. Material harm

The proposed regulatory text requires that the act or practice, if continued, is likely to materially harm the institution's financial condition or present a material risk of loss to the DIF. The proposed regulatory text does not define or describe the types of financial harm that may qualify as "material." As set forth below, the agencies should refine the meaning of material harm in the rule text to ensure it is applied consistently and in accordance with the intent of the proposed rulemaking.

First, the agencies should rely on established judicial precedent defining "material harm." Existing binding case law provides that an unsafe or unsound practice is a practice that (i) presents a threat to the financial integrity or stability of the institution and (ii) is sufficient to call into question the ability of the bank to continue to conduct its business.[35] This standard has been

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[33] *See Probably*, Cambridge Dictionary (defining "probably" as "something [that] is very likely").

[34] Proposed Rule at 48,838.

[35] *See Johnson*, 81 F.3d at 204 (stating that an unsafe or unsound practice must "threaten[] the financial integrity of the institution"); *Gulf Fed.*, 651 F.2d at 264 (stating that an unsafe or unsound practice is one "the

applied by a majority of federal circuit courts, including the Court of Appeals for the District of Columbia, for decades and provides an objective benchmark for determining materiality. We urge the agencies to incorporate that standard into the regulatory text or by reference.

Second, use of the word "material" with respect to harm may create confusion because securities law disclosure requirements use the word "material," as do many firms' internal risk escalation standards. Under binding case law, an unsafe or unsound practice is a practice that threatens the financial integrity of an institution—this is a much higher standard than the materiality standard under securities law disclosure requirements. Clarifying, as recommended above, that the harm must present a threat to the financial integrity or stability of the institution will clearly distinguish this regulatory standard.

Third, we strongly support the language in the preamble that "the agencies expect that it would be rare for an institution to exhibit unsafe or unsound practices, as defined in the proposed rule, based solely on the institution's policies, procedures, documentation or internal controls, without significant weaknesses in the institution's financial condition (i.e., weaknesses that caused material harm to the financial condition of the institution, or were likely to materially harm the financial condition of the institution or likely to present material risk of loss to the DIF)."[36] We recommend incorporating this statement into the rule text to ensure consistent application and to make clear that process deficiencies alone, without actual or likely material financial harm, do not constitute unsafe or unsound practices.

Fourth, we support the language in the preamble that "harm" for this purpose refers to financial losses.[37] We recommend incorporating this statement into the rule text to prevent the definition from being applied to reputational concerns or other non-financial impacts that do not directly affect the institution's financial condition.

Fifth, the final rule should explicitly acknowledge that the definition of an unsafe or unsound practice codified by the regulation reflects the appropriate legal meaning of that statutory term (consistent with our comments above), and not merely a policy choice of the agencies. This acknowledgment is important for ensuring that the definition is consistently applied and that courts recognize and enforce the regulation as implementing a statutory standard defined by the courts themselves.[38]

F. Tailoring

We agree that the regulation's standards would apply differently in practice to each institution based on the relevant characteristics of the institution. As such, we support the language in the proposed rule that the agencies will tailor their "supervisory and enforcement actions under 12 U.S.C. § 1818 and issuance of [MRAs] based on the capital structure, riskiness, complexity, activities, asset size and any financial risk-related factor that the agencies deem

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possible consequences of which, if continued, created an abnormal risk or loss or damage to the financial stability of [a bank]").

[36] Proposed Rule at 48,839.

[37] *Id.*

[38] *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

appropriate."[39] We do not agree, however, with the statement in the preamble that it would be a "much higher bar" for the agencies to conclude that a community bank has engaged in an unsafe or unsound practice or warrants an MRA than a larger institution – a proposition that has no grounding in the text of section 1818 or any of the case law interpreting it and is not supported by economic data. In many cases the opposite of the agencies' statement may be true. For example, a risk specific to a local geographic market is far less likely to threaten the financial condition of an institution that operates nationally or globally than an institution that operates solely in that market.

The agencies should clarify this and other related language in the preamble to the final rule to strengthen the regulation's alignment with the governing law. This language introduces undue subjectivity for unsafe or unsound determinations, which is contrary to the intent of the rule. Rather than suggesting that there may be a different bar to clear in determining if the "unsafe or unsound" standard is met for larger or smaller institutions, we recommend that the agencies clarify that the standards will be implemented consistent with risk-based supervision, meaning the standard for determining whether a particular practice is unsafe or unsound will be tailored to each bank's size, complexity, and business model. Similarly, the rule should provide that the agencies will consider the strength of the institution's capital and liquidity and whether the institution has buffers over and above regulatory requirements when deciding whether a practice meets the defined standard.

IV. MRA Standard

We support the agencies' proposed reforms to the standard for issuing MRAs. As outlined in Part II above and consistent with the agencies' description in the proposed rulemaking, there are significant problems with current MRA practices. We support the agencies' approach for defining the MRA standard as set forth in the proposed rule because it would focus supervisory actions on issues that can materially harm the firm's financial condition. Below, we recommend several adjustments to the proposed standard to make it more objective and to align with the relevant statutory authorities.

Based on our members' experience, MRAs have been used as a vehicle for examiners to recommend best practices or enhancements to already acceptable standards. As the proposed rule notes, examiners have frequently used MRAs to communicate purported deficiencies that are not relevant to an institution's financial condition.[40]

This has resulted in a proliferation of supervisory criticisms for immaterial procedural, documentation, or other deficiencies that diverts management from conducting business and that do not clearly improve the financial condition of the institution. As described in Part II above, this dynamic places additional demands on limited examination and bank resources and distracts from true safety and soundness. In practice, institutions must address MRAs regardless of whether management considers the examiner's concerns to be accurate or material, and failure to remediate MRAs often results in ratings downgrades or enforcement actions.

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[39] Proposed Rule at 48,849.

[40] *Id.* at 48,841.

A. Recommendations for the MRA standard

We support the proposal's approach to permitting MRAs for a practice that (i) could reasonably be expected to become an unsafe or unsound practice (as defined in the proposed rule) under current or reasonably foreseeable conditions, or (ii) is an actual violation of a banking or banking-related law or regulation. This standard would appropriately require a clear nexus to the statutory standard for agency action under 12 U.S.C. § 1818 for unsafe or unsound practices or violations of law.[41]

We recommend the revisions below to ensure that MRAs are issued in a manner consistent with the agencies' intent. Specifically, the agencies should revise the MRA standard as follows:

- **Clarify "generally accepted standards of prudent operation."** The rule text should clarify the meaning of "generally accepted standards of prudent operation" to align the phrase with the definition of unsafe or unsound practices and to make clear that this term does not require institutions to adapt to the subjective notion of a "best practice" or to conform their practices to those of peers.[42] This would prevent examiners from issuing MRAs based on horizontal reviews or individual, subjective preferences for particular practices.

- **Require demonstrable and quantifiable evidence.** We support the "could reasonably be expected to" language in the proposed regulation. However, the rule text should be revised to require demonstrable and quantifiable evidence to support an MRA in a manner consistent with the suggested revisions to the definition of unsafe or unsound practices.[43] As with the definition of unsafe or unsound practices, the burden of collecting such evidence or analyses should fall on examiners. Further, this evidence should explain the risk to the financial condition of the institution that the practice creates. In addition, as with enforcement actions for unsafe or unsound practices, the final rule should require that the agencies provide an institution with a copy of this evidence and analysis before issuing an MRA. These revisions would help ensure that MRAs are based on objective analysis rather than speculation about hypothetical future conditions.

- **Clarify the meaning of "material."** The rule text should include language clarifying the meaning of "material" to align the term with the definition of unsafe or unsound practice and to ensure that MRAs are issued only for deficiencies that pose a genuine threat to the institution's financial condition.[44] Minor or isolated deficiencies or errors that do not materially affect financial condition should be addressed through informal supervisory communications, not MRAs.

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[41] Appendix C sets forth the case law and legal analysis establishing that MRAs must have a clear nexus to the statutory standard for agency action under 12 U.S.C. § 1818 for unsafe or unsound practices or violations of law.

[42] *See supra* Part III.A.

[43] *See supra* Part III.C.

[44] *See supra* Part III.D.

- **Exclude self-identified and remediated issues.** To align with the revisions to the definition of unsafe or unsound practice, the rule text should clarify that acts or practices that an institution has legitimately self-identified (including, but not limited to, identification through its internal audit program or otherwise) and has an action plan, with reasonable time frames, to remediate may not form the basis for an MRA.[45] This would encourage institutions to identify and remediate problems proactively and report them to their examiners without fear that such efforts will be used against them in the examination process.

- **Exclude matters already identified by another agency.** The rule text should establish that MRAs should not be issued when an institution has received an MRA from another agency that substantially covers the matter.[46]

B. Scope of banking and banking-related laws

We support limiting the second prong of the MRA definition to "banking and banking related laws." The final rule text should specify that "banking and banking related laws" include only those laws and regulations that the agency has specific statutory authority to enforce. This approach creates clear guardrails and ensures that the agencies operate in accordance with their statutory authority. Under this approach, the agencies would not be permitted to issue an MRA for consumer financial laws that are within the statutory authority of another agency. The agencies could, however, issue MRAs for consumer financial laws that the agencies have the statutory authority to enforce.[47] Similarly, the agencies would not be permitted to issue an MRA related to state laws that are outside the scope of the agencies' statutory supervisory and enforcement authority. That is not to say that banks should be permitted to violate those laws. Rather, it is to say that those laws carry their own enforcement regimes, which apply equally to banks and non-banks and that the examination process should not result in undue focus on laws the agencies have no authority to enforce.

To comport with current practice, the agencies should also clarify within the rule text that an MRA may only be issued for a substantive violation of a banking or banking-related law.[48]

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[45] *See supra* Part III.B.

[46] This problem should be mitigated in part by the Federal Reserve's recent supervisory operating principles, which provide in part that Federal Reserve supervisory staff should not conduct their own examination of national banks or state nonmember banks unless it is impossible for the Federal Reserve to rely on the examination of such institutions' state or federal supervisor. *See* Statement of Supervisory Operating Principles, FRB Division of Supervision and Regulation (Oct. 29, 2025), https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20251118a1.pdf (hereinafter "Federal Reserve Statement of Supervisory Operating Principles").

[47] For institutions with more than $10 billion, the agencies would not have the statutory authority to enforce federal consumer financial laws. *See* 12 U.S.C. § 5515(b) (providing that for banks with assets greater than $10 billion the Consumer Financial Protection Bureau shall have "exclusive authority to receive reports and conduct examinations on a periodic basis . . . for purposes of . . . (A) assessing compliance with the requirements of Federal consumer financial laws; [and] (B) obtaining information about the activities subject to such laws and the associated compliance systems or procedures of such persons").

[48] *See* OCC, Policies and Procedures Manual (PPM 5310-3), https://www.occ.gov/news-issuances/bulletins/2023/ppm-5310-3.pdf ("Deficient practices are practices or lack of practices that . . .

Further, and consistent with the approach that MRAs only be issued for a *practice*, the rule text should provide that isolated and immaterial violations of law would not be a substantive violation warranting an MRA.[49] While this sensible approach is currently reflected in certain agency guidance, the absence of a clear and binding standard like the one in the proposal may result in the agencies issuing MRAs for non-substantive violations of law.[50] In addition, for laws that are principles-based and not prescriptive, the final rule should specify in the rule text that examiners may not cite violations of such principles-based laws and regulations for risks that are not material to the financial condition of the institution. For example, immaterial deficiencies in compliance programs that do not pose a material financial risk to the institution (whether individually or in the aggregate) should not be the basis of a violation of a law or regulation that requires a reasonably designed compliance program.

The agencies should also clarify within the rule text that an MRA may not be based on guidelines, principles, or other statements that are neither a law nor a regulation adopted through notice and comment rulemaking. For example, "banking and banking related laws" should not include guidelines like the OCC's heightened standards under 12 C.F.R. Part 30, Appendix D because those guidelines are neither laws nor regulations.[51] We support the OCC's reconsideration of aspects of the Part 30 heightened standards. The OCC should ensure heightened standards align with this proposal's stated objective of focusing examination on material risks to the financial condition of an institution. Further, the OCC should ensure that the Part 30 heightened standards do not provide an alternative basis for examiners to focus on granular, process-related requirements that do not pertain directly to material risks to the financial condition of an institution.

C. Codify key preamble provisions

To ensure that MRAs are issued in a manner consistent with the agencies' intent, the regulation should include additional language addressing the issuance of MRAs in practice.

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result in *substantive* noncompliance with laws, enforcement actions, or conditions imposed in writing in connection with the approval of any applications or other requests by banks.") (emphasis added).

[49] To this end, MRAs related to anti-money laundering should be rare and issued only for systemic problems in an institution's AML system, rather than the frequently immaterial process-oriented MRAs issued with respect to AML.

[50] OCC, Comptroller's Handbook – Bank Supervision Process at 48, https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/bank-supervision-process/pub-ch-bank-supervision-process.pdf ("Substantive OCC-identified violations must be cited in an ROE or supervisory letter, whereas less substantive violations may be cited in a separate document.").

[51] Under the proposed rule, MRAs are tied to actual violations of banking law or regulation. Guidelines are neither laws nor regulations. Under 12 U.S.C. § 1831p-1, the OCC could have issued the heightened standards as regulations but opted to issue them as "guidelines," which are statutorily distinct from regulations. *See* 12 U.S.C. § 1831p-1(d)(1) ("Standards . . . shall be prescribed by regulation or guideline."). Accordingly, a violation of guidelines should not support the issuance of an MRA under the proposed rule's banking and banking-related laws prong. This distinction is supported by the fact that violations of law and regulation independently give rise to legal consequences, whereas violations of guidelines do not. Thus, a breach of the heightened standards should not be considered a violation of law or regulation that could give rise to an MRA.

1. No criticism for declining to remediate suggestions

The preamble of the proposed rule states that the agencies should not be permitted to criticize an institution for declining to remediate a concern or weakness identified by a supervisory communication or escalate the communication into an MRA on the sole basis of an institution's lack of adoption of an examiner's suggestion offered in multiple examination cycles.[52] The agencies should codify this language in the rule text. This codification is essential to prevent examiners from effectively requiring institutions to address informal communications by threatening to escalate them to MRAs.

2. No MRAs for policies and procedures alone

The preamble states that the "agencies would not issue an MRA solely to address an institution's policies, procedures, or internal controls, unless those policies, procedures, or internal controls otherwise satisfied the standard for an MRA, even if those policies, procedures, or internal controls could lead to a violation of law or regulation."[53] The agencies should codify this language in the rule text. This is critical to ensure that MRAs are issued only when there is an actual threat to an institution's financial condition or a reasonable expectation of such a threat, not merely because policies or procedures are viewed as incomplete or differ from examiner preferences.

3. Clarify that MRAs are not binding orders but instead constitute warnings of potential enforcement action

The agencies should make clear in the rule text that an MRA is not a binding order but a warning of potential enforcement action if the practice or violation is not corrected within a specified time. Further, the agencies should state in the rule that a failure to remediate an MRA, in and of itself, would not result in an unsafe or unsound practice. Doing so would be consistent with binding case law and relevant legislative intent and would ensure that MRAs are not treated as de facto enforcement actions with binding legal effect.[54]

4. Prompt closure of MRAs

The preamble notes that MRAs are often kept outstanding for a prolonged period after an institution has fully completed its remediation.[55] The agencies should make clear in the rule text that MRA verification and validation procedures should be lifted as soon as reasonably practicable after the institution completes corrective actions.[56] MRAs should be closed when management successfully completes the actions specified in the agency-accepted remediation plan. Further, closure of MRAs should not be delayed by minor errors or discrepancies or process or governance issues if the institution has substantially addressed the identified issues. The rule text should further provide that examiners may not require that an institution show that its remediation is

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[52] Proposed Rule at 48,841.

[53] *Id.*

[54] *See* Appendix B.

[55] Proposed Rule at 48,841.

[56] To ensure prompt verification and validation, the agencies should consider establishing a policy that examiners must do so within an established time frame (*e.g.*, 30 days).

"sustainable" beyond what the institution's internal audit requires. As the agencies note in the preamble to the proposal, the practice of requiring institutions to demonstrate sustainability inflates the number of MRAs that have already been remediated. More fundamentally, whether remediation is "sustainable" is a subjective and ill-defined standard that results in MRAs being held open far longer than necessary. This practice effectively converts MRAs from warnings of potential enforcement action into ongoing supervisory mandates.

5. Rely on internal audit for validation

For banks with a Satisfactorily-rated internal audit function, the agencies should rely on the internal audit function to validate MRA closure, rather than repeating and duplicating the validation process. This would recognize the important role that internal audit plays in bank governance and would avoid unnecessary duplication of effort between examiners and internal auditors. In addition, this approach would align with the Federal Reserve's recently announced requirement that examiners rely on an institution's internal audit for validations when that function is rated satisfactory.[57] This reliance on internal audit for validation should be codified in the rule text.

D. Informal supervisory communications

We support maintaining the agencies' ability to issue informal, nonbinding supervisory communications as outlined in the proposal. With that said, it is important that informal supervisory communications do not take on greater significance and become de facto MRAs or the bases for finding an unsafe or unsound practice. To support consistency and administrability, the agencies should incorporate the following preamble provisions into the final rule text:

- An institution's composite or component CAMELS ratings may not be downgraded to "3" or lower based on informal supervisory communications.
- The agencies may not require an institution to submit an action plan to address supervisory communications.
- The agencies may not require an institution's management to present informal supervisory communications to the institution's board of directors.
- Examiners may not criticize an institution for declining to remediate a concern or weakness identified by a supervisory communication and may not issue an MRA on the sole basis of an institution's lack of adoption of an examiner's suggestion. Further, examiners may not issue an MRA solely on the basis that there are numerous supervisory communications or extrapolate that the existence alone of numerous supervisory communications supports the issuance of an MRA.
- The circumstances underlying the supervisory communication may later be the basis for an MRA or enforcement action, but only if the criteria for an MRA or enforcement action under the rule are met, and not solely on the basis of failing to respond to the supervisory communication.

[57] *See* Federal Reserve Statement of Supervisory Operating Principles.

These clarifications will preserve the nonbinding nature of informal supervisory communications and prevent them from becoming de facto MRAs in practice. Further, and in addition to codifying the items above into the rule text, the agencies should implement formal internal oversight by agency leadership of informal supervisory communications. This will help to ensure that informal supervisory communications are used consistently with the rule's intent and that the volume of such communications is consistent with supervisory objectives. Review and oversight of these communications will also help to identify areas for future examination guidance.

V. Other Considerations

This section sets forth additional considerations related to the unsafe or unsound practices and MRA proposed rule. While these considerations are important and necessary to ensure the full intent of the proposed rule is implemented, the agencies should not delay adopting a final rule with respect to unsafe or unsound practices and MRAs.

A. Connection to ratings reform

The proposal correctly indicates that the supervisory ratings framework is integral to the agencies' goal to prioritize attention on material risks to the financial condition of a firm and legal compliance.[58] With that said, the rule as proposed would allow examiners to downgrade an institution's composite supervisory rating on the basis of an MRA, which we believe is too low a bar given the attendant consequences of a composite rating downgrade.

The proposal states that any downgrade to an institution's composite supervisory rating to "3" would only occur in circumstances in which the institution receives an MRA that meets the standards outlined in the proposal or an enforcement action pursuant to the agencies' enforcement authority.[59] This standard would allow for downgrades (and the attendant legal consequences) to occur for actions that are not "unsafe or unsound" within the meaning of 12 U.S.C. § 1818 as proposed. Downgrades to a "3" or lower should be limited to actions that meet the statutory unsafe or unsound standard and not the lower proposed MRA standard, given that ratings downgrades have negative and concrete legal consequences.

As discussed above in Part II, loss of well-managed status results in severe restrictions on a banking organization's ability to engage in financial activities, pursue mergers and acquisitions, and make investments. These restrictions should be reserved for institutions with actual material safety and soundness concerns, not institutions that have received MRAs for deficiencies that could, under hypothetical future conditions, potentially lead to material harm.

Most importantly, the agencies should prioritize reform of the CAMELS rating system in the near term to ensure the proposed changes are effective. Absent corresponding reforms to the ratings framework, the standards set for unsafe or unsound practices and MRAs in this proposal can be circumvented. Institutions are likely to continue to receive ratings downgrades, and experience attendant legal restrictions, for issues identified by supervisors that do not meet either the standard for an unsafe or unsound practice or an MRA. Reforming CAMELS, therefore, is

[58] Proposed Rule at 48,842.

[59] *Id.*

essential to the overarching goal expressed in the proposal to "prioritize material financial risks over concerns related to policies, process, documentation, and other nonfinancial risks."[60]

B. MRA process reforms

The following comments focus on reforms to the process for issuing and remediating MRAs. These procedural improvements would support the substantive reforms in the proposal by ensuring that MRAs are issued and remediated in a fair, transparent, and efficient manner.

1. Review of existing MRAs

The agencies should permit an institution to request that any "unresolved" MRA issued prior to the adoption of the final rule be reviewed to determine whether the MRA meets the new standard. If the MRA does not meet the new standard, then the relevant agency should reclassify the MRA to a supervisory observation. Further, to the extent an MRA that no longer meets the new standard was the basis for a CAMELS composite or component rating downgrade, the agencies should reconsider the composite or relevant component rating. This review of existing MRAs and CAMELS ratings is essential to ensure that institutions are not held indefinitely to the dated and more expansive MRA standard simply because the MRA was issued before the new rule took effect.

2. Opportunity to address concerns before MRA issuance

Management should have an opportunity to address identified concerns with which management concurs before any MRA is issued. To facilitate this, and consistent with recommendations concerning the unsafe or unsound practices definition, the final rule should require that the agencies present this evidence and analysis to the institution before issuing any MRA. As part of this process, examiners and other supervisory staff should promptly respond to any questions from the institution and invite feedback as to whether a particular MRA is justified or lacks clarity as to supervisory expectations or the path to remediation. This would allow institutions to remediate issues promptly and avoid the burdens and consequences associated with formal MRAs. It would also serve as a necessary check on examiners to ensure that they are issuing MRAs consistent with the intent of the rule. Further, this approach would be consistent with the approach that the Federal Reserve has recently announced.[61] The agencies should codify this process into the rule.

3. Specificity without over-prescription

When issuing an MRA, the agencies should identify the deficiency that needs to be addressed, and what is necessary to close the MRA, with as much specificity as possible. With that said, management should retain discretion to determine the most appropriate means of

[60] Proposed Rule at 48,836.

[61] *See* Federal Reserve Statement of Supervisory Operating Principles.

addressing supervisory concerns based on the institution's particular circumstances and business model.

4. Reform the OCC appeals process

In July of this year, the FDIC issued proposed revisions to its Guidelines for Appeals of Material Supervisory Determinations.[62] These proposed amendments reflect thoughtful improvements to the unfortunately seldom-used formal appeals process that is in need of thorough reform.[63] BPI also provided specific recommendations to further improve the FDIC's proposal.[64] The OCC should adopt similar reforms to its appeals process, including creating an independent, standalone office of supervisory appeals. The agencies should ensure that supervisory findings, enforcement decisions (including business restrictions), and ratings are appealable. In so appealing, institutions should have direct access to agency attorneys and any appeal denials should be subject to independent review or judicial review, without the need for the institution to obtain consent for disclosure of confidential supervisory information.

C. Enforcement process reforms

The following comments focus on reforms to the process for issuing and remediating enforcement actions. These procedural improvements would support the substantive reforms in the proposal by ensuring that enforcement actions are issued and remediated in a fair, transparent, and efficient manner.

- First, before proceeding with any enforcement action based on alleged unsafe or unsound practices, the applicable supervisory or enforcement team should provide the institution or institution-affiliated party and their counsel with a copy of the demonstrable and quantifiable evidence and analysis prepared by the examination team supporting a finding of an unsafe or unsound practice. The institution or institution-affiliated party should have a reasonable time frame in which to respond to the analysis.
- Second, the agency body charged with authorizing an enforcement notice or settlement demand should evaluate the supervisory or enforcement team's analysis, the supporting evidence, and the institution's response. If the agency decides to proceed with an enforcement action, then it should provide a written response to the institution or institution-affiliated party identifying the legal and factual bases that the agency is relying upon for satisfaction of each element of an unsafe or unsound practice.
- Third, absent the discovery of new facts, the agency's written response should form the basis of any notice of charges that it may file.

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[62] Proposed Amendments to FDIC Guidelines for Appeals of Material Supervisory Determinations, 90 Fed. Reg. 33,942–49 (July 19, 2025).

[63] BPI, Comment Letter on FDIC Supervisory Appeals Process (Aug. 12, 2025), https://bpi.com/wp-content/uploads/2025/08/BPI-comment-letter-FDIC-Supervisory-Appeals-Process.pdf.

[64] *Id.*

These procedural safeguards will establish a reasonable mechanism to ensure that agency staff adhere to the requirements set forth in section 1818(b) when alleging an unsafe or unsound practice.[65]

D. Other implementation considerations

Following adoption of the proposed rule, the agencies should take the following additional steps to translate these new standards into practice:

- First, the agencies should join the NCUA by adopting a policy against regulation-by-enforcement.[66] Doing so is consistent with the intent of the proposed rule and ensures that changes in policies and regulatory priorities of the agencies are adopted through the proper channel of notice-and-comment rulemaking.

- Second, the agencies should provide examiner training on the rule and how the new standards should be applied. Absent these steps, examiners may continue to apply the new standards in an inconsistent way.

- Third, the agencies should ensure that there is broad interagency alignment with respect to the new standards. For example, we support the recent supervisory operating principles issued by the Federal Reserve, including the Federal Reserve's intent to focus examination on material financial risks rather than procedural or documentation shortcomings, to discourage the use of horizontal reviews, to rely on an institution's internal audit for validations, and to encourage dialogue regarding the justification of MRAs.[67] The agencies should take additional steps, jointly when possible, to seek notice and comment on these supervisory practices and ensure that such practices are properly formalized and all conflicting guidance is rescinded.

VI. Conclusion

We appreciate the agencies' efforts to refocus supervision on material financial risks through this rulemaking. With the clarifications and refinements recommended in this letter, the final rule will provide much-needed clarity and consistency in the supervisory process, allowing both banks and examiners to focus their resources on issues that genuinely matter to financial stability. We encourage the agencies to adopt the proposal without delay and to pursue the complementary reforms discussed in Part V to ensure the changes have their intended effect. If

[65] *See* 12 U.S.C. § 1818(b)(1) (requiring that the agencies provide an institution or institution-affiliated party with a "notice . . . contain[ing] a statement of facts constituting the alleged violation or violations or the unsafe or unsound practice" and "shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the depository institution or the institution-affiliated party").

[66] *See* NCUA, *No Regulation-by-Enforcement Policy Statement*, https://ncua.gov/about/open-government/ombudsman/no-regulation-enforcement-policy-statement.

[67] *See* Federal Reserve Statement of Supervisory Operating Principles.

you have any questions, please contact Tabitha Edgens (Tabitha.Edgens@bpi.com) and Jeffrey Luther (Jeffrey.Luther@bpi.com).

Respectfully submitted,

/s/

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Appendix A: BPI Responses to Questions from Notice of Proposed Rulemaking

Below are responses to the questions raised by the agencies in the proposed rulemaking. Many of the questions raised by the agencies are addressed in BPI's response to the agencies' proposed rulemaking defining "unsafe or unsound practices" and the standards for issuing MRAs (the Comment Letter). To the extent addressed in the Comment Letter, this Appendix provides cross references to the relevant section(s) of the Comment Letter. The agencies' questions are reproduced in boldface below, with BPI's response immediately following.

Question 1: What effect would the proposed rule have on the agencies' ability to address misconduct by institutions under their enforcement and supervisory authority? What effect would the proposed rule have on the agencies' ability to address misconduct by institution-affiliated parties under their enforcement and supervisory authority?

> See Part II.B of Comment Letter for a discussion of the agencies' continued ability to address misconduct by institutions and institution-affiliated parties under the agencies' enforcement and supervisory authority.

Question 2: Does the proposed definition of unsafe or unsound practice appropriately capture the types of objectionable practices, acts, or failures to act that should be captured? Please explain.

> See Part II.B and Part III of the Comment Letter for a discussion of how the proposed definition of unsafe or unsound practices, as revised based on the comment letter, will appropriately capture the types of objectionable practices, acts, or failures to act that should be captured.

Question 3: Does the proposed definition of unsafe or unsound practice provide the agencies with adequate authority to proactively address risks that could cause a precipitous decline in an institution's financial condition, such as a liquidity event or a cybersecurity incident?

> See Part II.B and Part III of the Comment Letter for a discussion of the agencies' continued authority to proactively address these risks.

Question 4: Other than "material," are there terms that the agencies should consider to specify the magnitude of the risk required for a practice, act, or failure to act, to be considered an unsafe or unsound practice, e.g., "abnormal," "significant," or "undue"?

> See Part III.E of the Comment Letter for a discussion of needed refinements to the "material harm" prong of the definition of unsafe or unsound practices. See Part IV.A of the Comment Letter for a related discussion of needed revisions to the "material" language in the MRA standard.

Question 5: Is "likely" the appropriate standard to specify the probability of risk required for a practice, act, or failure to act, to be considered an unsafe or unsound practice? Is another term more appropriate, e.g., "reasonably foreseeable," "could reasonably," "imminent,"

"abnormal probability''? Should the agencies specify a minimum percentage of likelihood? If so, what would be an appropriate minimum percentage of likelihood? Should the agencies consider a standard that does not imply an assessment of a forward-looking probability?

See Part III.C and Part IV.A of the Comment Letter for a discussion of needed refinements to the likelihood standard in the proposed rule.

Question 6: Should the agencies consider specifying one or more quantitative measurements to define or exemplify "material harm'' to the financial condition of the institution?

See Part III.E and Part IV.A of the Comment Letter for a discussion of needed refinements to the "material harm" language in the proposed rule.

Question 7: Should the agencies define "materially'' in the regulation? If so, how?

See Part III.E and Part IV.A of the Comment Letter for a discussion of needed refinements to the materiality concept in the proposed rule.

Question 8: Should the agencies define harm to the financial condition of an institution in the regulation? If so, how? Should this include specific indicators or thresholds, or adverse effects to capital, liquidity, or earnings?

See Part III.D and Part IV.A of the Comment Letter for a discussion of needed refinements to the meaning of harm to the financial condition of an institution in the proposed rule.

Question 9: Section 8 of the FDI Act uses the term "unsafe or unsound practice'' numerous times and in different contexts. Should the proposed definition of unsafe or unsound practice apply to all uses of the term within section 8 of the FDI Act? If not, what provisions should be excluded? Should the agencies have a uniform definition for purposes of section 8, as proposed, or should there be nuances depending on the context?

The proposed definition of unsafe or unsound practice, as revised based on the Comment Letter, should apply to all uses of the term within Title 12 of the United States Code and Title 12 of the Code of Federal Regulations, including section 8 of the FDI Act. Federal appellate courts do not make any distinction or apply nuance to the meaning of "unsafe or unsound practice" depending on the context in which an agency has claimed that an institution or institution-affiliated party was engaged in an unsafe or unsound practice.[1] The agencies are bound by this approach.[2]

Question 10: Should the proposed definition of unsafe or unsound practice apply to other uses of the term or references to section 8 of the FDI Act within Title 12 of the CFR? If so, what

[1] *See* Appendix B.

[2] *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) (holding that an agency is bound by a court's interpretation of the best reading of a statute).

provisions should be included? What, if any, effect would the proposed definition have on the agencies' ability to engage in rulemaking?

For the reasons discussed in BPI's response to Question 9, the proposed definition of unsafe or unsound practice, as revised based on the Comment Letter, should apply to all uses of the term within Title 12 of the United States Code and Title 12 of the Code of Federal Regulations.

Question 11: Should the proposed definition of unsafe or unsound practice apply to uses of the term beyond section 8 of the FDI Act? If yes, what provisions should be included? For example: —Tier 2 and Tier 3 Civil Money Penalty provisions (12 U.S.C. 93, 504, 1817, 1972). —Capital standards in 12 U.S.C. 1464(t). —Definition of institution-affiliated party in 12 U.S.C. 1813(u). —Grounds for appointing a conservator or receiver in 12 U.S.C. 1821(c)(5).

For the reasons discussed in BPI's response to Question 9, the proposed definition of unsafe or unsound practice, as revised based on the Comment Letter, should apply to all uses of the term within Title 12 of the United States Code and Title 12 of the Code of Federal Regulations.

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?

See Part III.A and Part IV.A of the Comment Letter for a discussion of needed refinements to the term "generally accepted standards of prudent operation" in the proposed rule.

Question 13: Other than "could reasonably be expected,'' are there terms that the agencies should consider to specify the probability of risk required for a practice, act, or failure to act, to be communicated as an MRA, e.g., "could possibly,'' "could foreseeably,'' "would"? Is this standard sufficiently distinct from the likelihood requirement for unsafe or unsound practices so as to convey a lower bar?

See Part IV.A of the Comment Letter for a discussion of the likelihood standard for MRAs in the proposed rule.

Question 14: The proposal would allow the agencies to issue MRAs based on "reasonably foreseeable conditions.'' Is "reasonably foreseeable'' the right standard? As an example, at what point in Silicon Valley Bank's timeline would an MRA for weaknesses in interest rate risk management have been (1) appropriate and (2) permissible under the proposal? If another standard would be more appropriate, please explain.

See Part IV.A of the Comment Letter for a discussion of the likelihood standard in the proposed rule. See Part II.A of the Comment Letter for a discussion of the supervisory issues that contributed to the failure of Silicon Valley Bank.

Question 15: If the agencies adopt the proposed standard for the issuance of an MRA, how should the agencies determine when to close an MRA? Should the agencies provide additional clarity in a final rule? Are there unique verification and validation concerns associated with the proposed standard that the agencies should consider? Should verification and validation procedures be tailored for different types of institutions, considering factors like the sophistication of an institution and the frequency of examinations? Should there be a limit (e.g., one or two quarters; one examination cycle) to the duration that an MRA may remain open after an institution corrects the practice resulting in the MRA? If an MRA is not remediated for a certain period of time, what steps should the agencies take?

See Part V.B of the Comment Letter for a discussion of needed MRA process reforms.

Question 16: Should the proposal provide any clarity around timeframes for remediating MRAs? If so, should small institutions (and those with limited resources) be provided with longer timeframes to address MRAs? Should institutions with more severe vulnerabilities (such as 5-rated institutions) be provided shorter timeframes?

See Part V.B of the Comment Letter for a discussion of needed MRA process reforms. See Part III.F of the Comment Letter for a discussion of tailoring.

Question 17: Should the proposed standard for issuing MRAs also apply to issuing violations of law? Why or why not? If a different standard should apply, please describe the standard and explain why. If the agencies did not use MRAs for violations of law, how should the agencies approach violations of law?

See Part IV.B of the Comment Letter for a discussion of the portion of the proposed MRA standard concerning violations of law.

Question 18: Under the proposal, the agencies could cite violations of banking and banking-regulated laws or regulations as MRAs. Is "banking and banking-related" the right universe? Should the agencies provide additional clarity on what constitutes banking and banking-related laws? If so, what should be included? Should the agencies limit the scope of banking and banking-related laws to federal banking and banking-related law? Why or why not?

See Part IV.B of the Comment Letter for a discussion of needed refinements to the portion of the proposal concerning banking and banking-related laws or regulations.

Question 19: Should the agencies provide additional clarity on the interplay between MRAs and CAMELS ratings? If so, how?

See Part V.A of the Comment Letter for a discussion of needed ratings reform, including the interplay between MRAs and CAMELS ratings. See Part V.B of the Comment Letter for a discussion of MRA process reforms, including with respect to CAMELS ratings.

Question 20: Should the agencies require any downgrade to a CAMELS composite rating of 3 or below to be accompanied by an MRA or enforcement action? Are there instances in which, for

example, general economic conditions or idiosyncratic risk factors could cause financial deterioration without evidence of objectionable practices, acts, or failures to act? Could such a provision incentivize issuing more MRAs? Please explain.

> See Part V.A of the Comment Letter for a discussion of needed ratings reform, including the interplay between MRAs and CAMELS ratings. See Part V.B of the Comment Letter for a discussion of MRA process reforms, including with respect to CAMELS ratings.

Question 21: To what extent should the agencies use MRAs to address banks that are vulnerable to potential economic or other shocks? For example, before the Federal Reserve began raising interest rates in 2022, or shortly after it began raising interest rates, at what point, if any, would it have been appropriate for a banking agency to issue MRAs to institutions that were vulnerable to a rise in interest rates? Does the proposal appropriately allow MRAs in such cases, if applicable? Under the proposal, are there other supervisory tools to address such risks?

> See Part II.B of the Comment Letter for a discussion of the expected benefits of the proposed reforms, including the agencies' ability to address material risks, and Part IV of the Comment Letter for a discussion concerning the use of MRAs by the agencies.

Question 22: How should the agencies tailor the framework for community banks? For example, should there be different standards for institutions of different sizes and complexity? Please explain.

> See Part III.F of the Comment Letter for a discussion of tailoring.

Question 23: Should the proposal tie material harm to the financial condition of an institution more specifically to the impact of a practice, act or failure to act on the institution's capital? Should there be a higher standard for large banking organizations compared to all other banking organizations? Should the potential or actual harm to an institution's financial condition be tied to the capital standards in the prompt correction action framework set forth in 12 U.S.C. 1831o?

> See Part III.D of the Comment Letter for a discussion of the "financial condition" prong of the proposed definition of "unsafe or unsound practice." See Part III.E of the Comment Letter for a discussion of needed refinements to the material harm prong of the proposal. See Part III.F of the Comment Letter for a discussion of tailoring, including whether there should be a higher standard for large banking organizations compared to all other banking organizations.

Question 24: Should the proposed regulation tie material harm to the financial condition of an institution more specifically to the impact of a practice, act or failure to act on the institution's liquidity? Should there be a threshold for a liquidity event, such as an outflow of a

hypothetical percentage of an institution's short-term deposits or other short-term liabilities over a defined period?

See Part III.D of the Comment Letter for a discussion of the "financial condition" prong of the proposed definition of "unsafe or unsound practice." See Part III.E of the Comment Letter for a discussion of needed refinements to the material harm prong of the proposal.

Question 25: How should the proposed regulation interact with the Interagency Guidelines Establishing Safety and Soundness Standards promulgated under 12 U.S.C. 1831p–1 (e.g., 12 CFR part 30) (Safety and Soundness Standards)? Should the agencies similarly revise the Safety and Soundness Standards in a manner consistent with the proposed regulation? Should a violation of the Safety and Soundness standards be considered a violation of banking or banking-related law or regulation for purposes of the proposed regulation?

See Part IV.B of the Comment Letter for a discussion of the scope of banking and banking-related laws, which includes a discussion of the interaction between the proposed regulation and the agencies' guidelines, principles, and other statements.

Question 26: What additional steps should the agencies consider to reform supervision, consistent with the goals of the proposal? The agencies have an extensive supervisory framework including examination manuals, regulations, guidance, and internal procedures governing how banks are supervised. What modifications to these various documents are warranted? How should the agencies sequence these actions?

See Part IV.B of the Comment Letter for a discussion of the scope of banking and banking-related laws, which includes a discussion of the interaction between the proposed regulation and the agencies' guidelines, principles, and other statements. See Part V of the Comment Letter for a discussion of other considerations, including with respect to supervision reform.

Appendix B: Legal Background and Analysis on the Term Unsafe or Unsound Practices

I. Introduction

A. The Federal Deposit Insurance Corporation, the Federal Reserve, and the Office of the Comptroller of the Currency regularly engage in supervisory and enforcement activities based on alleged "unsafe or unsound practices"—a standard that derives from the primary enforcement statute for the federal banking agencies (the "Agencies"), 12 U.S.C. § 1818 ("Section 8"). The proposed rule *Unsafe or Unsound Practices; Matters Requiring Attention* is the first regulatory effort to define this term by rulemaking.

B. This appendix examines four sources of authority that give meaning to the statutory term "unsafe or unsound practices": (1) the text of Section 8; (2) case law that is binding on the Agencies; (3) the legislative history of the Financial Institutions Supervisory Act of 1966 ("FISA"), which first granted the Agencies enforcement authority over unsafe or unsound practices; and (4) pre-FISA state and federal practice. Each source indicates that the statutory "unsafe or unsound practices" standard has a specific meaning: it only applies to conduct that departs from "generally accepted standards of prudent operation," where such departure poses a reasonably foreseeable threat to the financial integrity or stability of a banking institution or the Deposit Insurance Fund.

C. As a matter of law, the Agencies are required to conform any supervisory and enforcement activities tied to the term "unsafe or unsound practices" to this specific, legally-binding meaning of the term. Following the Supreme Court's 2024 decision in *Loper Bright Enterprises v. Raimondo*,[1] any court reviewing whether an agency has overstepped its statutory authority must exercise its "independent judgment" and determine the "best" reading of the statute. Here, courts have already determined the best meaning of Section 8 over several decades of cases. As a result, any interpretation that departs from the courts'—even a reasonable one—would be unlawful.

D. For the reasons described in the main body of our comments, the agencies should adopt the revisions to the proposed rule noted in BPI's comment letter. Adopting these revisions will ensure that the definition of unsafe or unsound practices comports with the text of Section 8, the interpretation of this statute adopted by the majority of federal circuit courts, including the D.C. Circuit, and the original, historical meaning of "unsafe or unsound practices."

[1] 603 U.S. 369 (2024).

II. Textual Analysis

A. The first source courts consult when interpreting a statute is the text.[2] Where the meaning of the text is plain and unambiguous, "the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."[3]

B. Section 8 does not supply a definition of the term "unsafe or unsound practices." However, dictionary definitions contemporaneous with FISA's passage provide helpful guidance as to the likely understanding of the term at that time. Those definitions illustrate that the terms "unsafe" and "unsound" describe conditions that, at a minimum, pose a threat to the stability or health of a system or body as a whole.[4] The adjectives used to define the terms—*e.g.*, "insecure," "not healthy or whole," "diseased," "decayed or impaired"—describe serious threats, not minor issues that pose no risk to the health or stability of a larger system.

C. In addition to dictionary definitions, reference to common usage is a standard approach to determining the meaning of undefined statutory language.[5] As relevant here, in the century leading up to FISA's passage, courts and litigants regularly combined the terms "unsafe" and "unsound" in tort cases to describe public facilities, common carriers, and physical objects that were in a state of significant disrepair and either posed a serious risk of harm or had already caused grievous harm.[6]

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[2] *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (internal citations omitted).

[3] *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (internal citations omitted).

[4] *See, e.g.*, UNSAFETY, Random House (1966) ("unsafe state or condition; exposure to danger or risk; insecurity"); UNSAFETY, Webster's New Collegiate (7th ed. 1967) ("want of safety; insecurity"); UNSOUND, *Random House* (1966) ("1. not sound; diseased, as the body or mind. 2. decayed or impaired, as timber, foods, etc.; defective. 3. not solid or firm, as foundations. . . . 5. easily broken; light: *unsound slumber*. 6. not financially strong; unreliable: *an unsound corporation*"); UNSOUND, *Webster's New Collegiate* (7th ed. 1967) ("not healthy or whole").

[5] *See, e.g.*, *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 568 (2012) (interpreting a term by reference to its dictionary definition and common usage); *Abuelhawa v. United States*, 556 U.S. 816, 820 (2009) (same).

[6] *See, e.g.*, *Claitor v. City of Comanche*, 271 S.W.2d 465, 466 (Tex. Civ. App. 1954) (city park claimed exemption "from liability for negligent injury to persons resulting from any defective, unsound or unsafe condition of its park or the equipment therein"); *Brown v. Shelby Cnty.*, 85 So. 416, 417 (Ala. 1920) ("[T]he defendant negligently suffered or allowed said bridge to be in an unsafe, unsound, and defective condition, which [consisted of a] large hole in the floor of said bridge, which said hole was, to wit, twelve inches wide and, to wit, twenty-four inches long."); *Devou v. Hughes*, 106 N.E. 1053 (Ohio Ct. App. 1914) (finding that the plaintiff failed to establish that the covering of a cistern was in an "unsafe, unsound, rotten and dangerous condition"); *Shanke v. U.S. Heater Co.*, 84 N.W. 283, 284 (Mich. 1900) (recounting allegation that certain boards over which trucks were wheeled were "uneven, unsound, rotten, unsafe, and defective, in consequence of which the place was unsafe"); *Lemon v. Chanslor*, 68 Mo. 340, 344 (Mo. 1878) (recounting

D. Accordingly, dictionary definitions and common usage suggest that Congress did not intend the term to encompass inconsequential errors—such as deficiencies in an institution's policies, procedures, or other documentation—that pose no risk to the financial integrity or stability of the institution as a whole (*i.e.*, do not risk making the institution "insecure," "not healthy or whole," or "decayed or impaired").

E. The text of Section 8 also supports an inference that any alleged threat to the institution must bear a sufficient causal nexus to the institution's alleged misconduct. Section 8 explicitly limits the Agencies' authority to issue cease and desist orders to correcting conditions "resulting from" an unsafe or unsound practice or violation of law.[7] In other words, the harm must be reasonably foreseeable in light of the conduct alleged. This suggests that Congress would not have expected the "unsafe or unsound practices" standard to permit enforcement action based on unlikely or unforeseeable risks, however material.

III. Binding Case Law

A. Binding case law interpreting a particular statutory provision is controlling in subsequent disputes about the provision's meaning.[8]

B. Relevant judicial precedent regarding the meaning of "unsafe or unsound practices" within Section 8 affirms the textual meaning of the term, as presented above.

C. Reviewing the text and history of Section 8, a majority of federal circuit courts that have decided the issue—the D.C., Third, Fifth, Ninth, and Tenth Circuits—have held that a practice is only "unsafe or unsound" if it departs from generally accepted standards of prudent operation, where such departure poses a threat to the relevant institution's "financial stability" or "financial integrity."[9]

1. *D.C. Circuit*. The D.C. Circuit has held that "[t]he 'unsafe or unsound practice' provision . . . refers only to practices that threaten the financial integrity of the institution."[10] The D.C. Circuit's interpretation of this language

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plaintiff's allegation that a hack used to carry passengers to a railroad depot, which broke and injured the plaintiff, was "unsound, unsafe and unfit for use").

[7] Section 8 permits the Agencies to require an institution "to cease and desist from [or] take affirmative action to correct the conditions *resulting from*" any unsafe or unsound practice. 12 U.S.C. § 1818(b)(1) (emphasis added). It also limits the Agencies' authority to issue orders requiring an institution to correct "conditions *resulting from* any violation [of law] or [unsafe or unsound] practice with respect to which such order is issued." 12 U.S.C. § 1818(b)(6) (emphasis added). *See also* 12 U.S.C. § 1818(e)(1)(B) ("by reason of"); 12 U.S.C. § 1818(i)(2)(B)(ii)(II) ("causes").

[8] *Neal v. United States*, 516 U.S. 284, 295 (1996) ("Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of stare decisis.").

[9] *See, e.g.*, *Johnson v. OTS*, 81 F.3d 195, 201–04 (D.C. Cir. 1996); *Gulf Fed. Sav. & Loan Ass'n v. FHLBB*, 651 F.2d 259, 264 (5th Cir. 1981); *Frontier State Bank Okla. City v. FDIC*, 702 F.3d 588, 604 (10th Cir. 2012); *In re Seidman*, 37 F.3d 911, 928 (3d Cir. 1994); *Simpson v. OTS*, 29 F.3d 1418, 1425 (9th Cir. 1994).

[10] *Johnson*, 81 F.3d 195.

is binding on the Agencies because every final enforcement decision the Agencies issue is appealable to that circuit, as well as to the institution's home circuit.[11]

a) In *Johnson v. OTS*, the OTS had found that a thrift's decision to appeal the denial of a charter change application (and incur the costs of an appeal with low likelihood of success) constituted an unsafe or unsound practice, a breach of fiduciary duty, and a violation of an agency regulation. The thrift sought review of that decision, and the D.C. Circuit reversed. It concluded that insufficient evidence supported the OTS determination. The court explained that the "weight of the case law" established that an unsafe or unsound practice refers only to one that "threaten[s] the financial integrity of the institution." Clarifying that an actual loss by itself cannot constitute an unsafe or unsound practice, the court held that OTS had not established that the thrift directors' decision to appeal the charter change application posed such a financial risk.[12]

2. *Fifth Circuit*. Decisions in the Fifth Circuit, including the often cited *Gulf Federal* decision, have similarly emphasized that an unsafe or unsound practice is one that has a "reasonably direct effect on an institution's financial soundness."[13] The Ninth Circuit and Tenth Circuit have adopted the

[11] 12 U.S.C. § 1818(h)(2). The Agencies have previously taken the position that they are *not* bound by the *Johnson* standard because, under *Chevron v. Natural Resources Defense Council* and *National Cable & Telecommunications Association v. Brand X Internet Services*, a court might defer to them if they interpreted "ambiguous" statutes differently from interpretations supplied in judicial precedent. *See In re Adams*, Final Decision Terminating Enforcement Action, No. OCC-AA-EC-11-50, at 5 (O.C.C. Sept. 30, 2014), https://www.occ.gov/static/enforcement-actions/ea2014-126.pdf. In light of the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, which expressly overruled both *Chevron* and *Brand X*, that position is no longer tenable. 603 U.S. 369 (2024). As the Court held in *Loper Bright*, Article III courts are responsible for determining the "best reading" of statutory language, and will not defer to a federal administrative agency's interpretation of that language, even if the statute is ambiguous and the agency's interpretation is reasonable. *Id.* at 373.

[12] *See also Kaplan v. OTS*, 104 F.3d 417, 422 (D.C. Cir. 1997) (concluding that for conduct to constitute an unsafe or unsound practice, the agency must show that there is some "undue risk to the institution" that is "reasonably foreseeable").

[13] *Gulf Fed.*, 651 F.2d at 264.

Fifth Circuit's approach.[14] The Third Circuit has adopted an interpretation similar to *Gulf Federal*.[15]

a) In *Gulf Federal*, the Federal Home Loan Bank Board (FHLBB) asserted that a bank had engaged in unsafe or unsound practices by paying loan interest using a 360 days in a year calculation, while the bank's loan contracts set forth a 365-day standard, which resulted in the bank breaching its loan contracts with customers. In rejecting the FHLBB's position that creating a risk of reputational harm and immaterial financial harm constituted unsafe or unsound practices, the Fifth Circuit explained that the risks the FHLBB had identified bore only a "remote relationship to Gulf Federal's financial integrity."[16] The court also explained, at length, the reasons why granting the agencies unfettered discretion to deem practices unsafe or unsound would undermine the rule of law:

> Approving intervention under the [FHLBB's] 'loss of public confidence' rationale would result in open-ended supervision. The loss of confidence identified by the [FHLBB] is unlike the loss of confidence which engendered the bank failures of the 1930s. The [FHLBB's] rationale would permit it to decide, not that the public has lost confidence in Gulf Federal's financial soundness, but that the public may lose confidence in the fairness of the association's contracts with its customers. If the [FHLBB] can act to enforce the public's standard of fairness in interpreting contracts, the [FHLBB] becomes the monitor of every activity of the association in its role of proctor for public opinion. This departs entirely from the congressional concept of acting to preserve the financial integrity of its members.[17]

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[14] *See, e.g.*, *Frontier State Bank Okla. City*, 702 F.3d at 604 (explaining that an unsafe or unsound practice is one 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 agencies administering the insurance funds and that it is a practice which has a reasonably direct effect on an association's financial soundness").

[15] *See In re Seidman*, 37 F.3d 911, 928–29 (3d Cir. 1994) (holding that an unsafe or unsound practice "must pose an abnormal risk to the financial stability of the banking institution" and that "[i]mprudence standing alone . . . is insufficient to constitute an unsafe or unsound practice").

[16] *Id.*

[17] *Id.*; *see also First Nat'l Bank of Bellaire v. Comptroller of the Currency*, 697 F.2d 674, 681 (5th Cir. 1983) (holding that unsafe or unsound practices are "limited to practices with a reasonably direct effect on a bank's financial stability" and that a bank's capital level being lower than that of peer banks was not sufficient to prove that the bank had engaged in unsafe or unsound practices) (citing *Gulf Federal*).

3. A minority of federal circuit courts—the Second, Seventh, Eighth, and Eleventh—interpret "unsafe or unsound practices" to mean conduct that departs from generally accepted standards of prudent operation, but they do not require a showing that the institution's financial integrity is imperiled; rather, the relevant risk need only be abnormal and "reasonably foreseeable."[18]

    a) For example, in *Doolittle v. NCUA*, the president of a credit union sought review of an NCUA finding that he had committed unsafe or unsound practices under a parallel provision to section 1818(e) when he failed to make proper allowances for loan losses.[19] Explaining that an unsafe or unsound practice is "conduct deemed contrary to accepted standards of banking operations which might result in abnormal risk or loss to a banking institution or shareholder," the Eleventh Circuit held that the president had not committed an unsafe or unsound practice, because after he learned about the problem loans, he immediately took remedial action, which was "not conduct contrary to accepted standards of banking operations which might result in an abnormal risk to a banking institution."[20]

D. The Agencies have routinely (but not always)[21] taken the position that unsafe or unsound practices need not threaten the financial integrity of a bank. This approach is not tenable. As established under *Loper Bright*, the Agencies may not adopt a regulation interpreting unsafe or unsound practices in a manner that contradicts the courts' interpretation of that term. A majority of federal circuit courts have interpreted unsafe or unsound practice to mean practices that depart from generally accepted standards of prudent operation and which pose a threat to the relevant institution's "financial stability" or "financial integrity." Among the courts that have adopted this interpretation is the D.C. Circuit—the interpretation of the D.C. Circuit is binding on the Agencies because every final enforcement decision the Agencies issue is appealable to that circuit. Therefore, the Agencies should (and must) adopt

[18] *See Michael v. FDIC*, 687 F.3d 337, 352 (7th Cir. 2012); *Gully v. NCUAB*, 341 F.3d 155, 165 (2d Cir. 2003); *Doolittle v. NCUA*, 992 F.2d 1531, 1538 (11th Cir. 1993); *First Nat'l Bank of Eden v. Dep't of the Treasury*, 568 F.2d 610, 611 n.2 (8th Cir. 1978).

[19] *Doolittle*, 992 F.2d at 1538–39 (11th Cir. 1993).

[20] *Id.*; *see also Oberstar v. FDIC*, 987 F.2d 494, 503 (8th Cir. 1993) (rejecting the FDIC's claim that acquisition of a proxy to vote shares of a bank in spite of a previous denial of such control under the CIBCA was an unsafe or unsound practice because there was no evidence that the individual's conduct in attending the shareholders' meeting and voting to reelect incumbent directors resulted in an "abnormal risk of loss" for the bank).

[21] For example, the FDIC has on multiple occasions applied the *Gulf Federal* interpretation, or a variant of it. *See, e.g.*, *In re Frontier State Bank Okla. City*, 2011 WL 2411399, at *3–4 (F.D.I.C. Apr. 12, 2011); *In re *** Bank*, 1988 WL 583069, at *19 (F.D.I.C. Oct. 18, 1988).

the interpretation of unsafe or unsound practices that the majority of federal circuit courts have adopted.

IV. Legislative History

A. The text of Section 8 and case law interpreting that text point to a clear definition of the term "unsafe and unsound practices" that binds the Agencies.[22] Nevertheless, in the interest of completeness we note that the legislative history of Section 8 confirms that Congress understood the term to prohibit a departure from generally accepted standards of prudent operation where such departure poses a reasonably foreseeable threat to a banking institution's financial integrity or stability.

B. During deliberations over the bill that would become FISA, the Chair of the Senate Banking Committee sought and received unanimous consent to enter into the Congressional Record a memorandum drafted by John Horne, the then-Chair of the Federal Home Loan Bank Board.[23] The so-called "Horne Memorandum," which courts have treated as the "authoritative definition of an unsafe or unsound practice,"[24] offered the following definition of the standard:

> "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*."[25]

C. The Horne Memorandum then offers specific examples of the types of conduct that might qualify as "unsafe or unsound," each of which involves instances of serious financial mismanagement.[26] These examples, and the Horne Memorandum's definition, demonstrate that an Agency alleging unsafe or unsound conduct must establish that the relevant institution or IAP has breached a generally recognized standard of prudent operation, and that such breach poses a serious, abnormal financial risk to the institution or the Deposit Insurance Fund.

D. The Horne Memorandum then makes clear that the "unsafe or unsound practices" standard is the Agency's burden to establish in each case, and that the Agency's conclusions on the issue must be supported by "a factual showing on the record which succeeds in convincing the hearing examiner or the [banking agency], and

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[22] *See, e.g.*, *NLRB v. SW General, Inc.*, 580 U.S. 288, 298–300 (2017) (finding that, because the "text is clear," the Court "need not consider . . . extra-textual evidence," including legislative history and purpose").

[23] Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 Before the H. Comm. on Banking and Currency, 89th Cong., 2d Sess. 49, 112 Cong. Rec. 26,474 (1966) ("Horne Memorandum").

[24] *Gulf Fed. Sav. & Loan Assoc. v. FHLBB*, 651 F.2d 259, 264 (5th Cir. 1981).

[25] Horne Memorandum at 26,474 (emphasis added).

[26] *Id.* These include "[s]olicitation of capital on the basis of dividend rates in excess of the association's ability to pay except by resorting to high-risk loans"; "[i]nvestments in loans on the basis of overappraisals of the security property"; "careless physical control of [] assets"; and "failure to provide for adequate liquidity." *Id.*

then the reviewing court, that the particular practice in the particular case should be characterized as 'unsafe or unsound.'"[27]

E. The Horne Memorandum's definition of "unsafe or unsound practices" was also read into the Congressional Record during proceedings in the House of Representatives.[28] Also during those proceedings, the Chair of the House Committee on Banking and Currency endorsed the Horne Memorandum's view of the "unsafe or unsound practices" standard as focused on material financial threats, noting that "it should be clear to all" that any enforcement authority the Agencies would have under the unsafe or unsound practices standard "relate[d] strictly to the insurance risk and to assure the public of sound banking facilities."[29]

V. Established Law Under State and Federal Practice

A. The Horne Memorandum did not propose a novel standard but drew on decades of federal practice—the "unsafe or unsound practices" standard had been available as a means of removing bank officers and terminating deposit insurance since the early to mid-1930s[30]—and over a century of state judicial and legislative practice. As the Memorandum itself recognized, "[t]he words 'unsafe' or 'unsound' as a basis for supervisory action [at that time] appear[ed] in the banking or savings and loan laws of 38 States."[31]

B. These laws are relevant to understanding the scope of Section 8 because "Congress legislates against the backdrop of existing law."[32] Indeed, "[w]ell-settled state law can inform [a court's] understanding of what Congress had in mind when it employed a term it did not define."[33] Congress drafted Section 8 against the backdrop of widespread state and federal-level legislative and judicial practice that existed prior to the passage of FISA and supported the Horne Memorandum's definition.

C. State laws using the term "unsafe or unsound practices" or its variants date back to the "free banking" era of the 1830s and 1840s—a time when states permitted private individuals and investors to charter banks, and imposed minimal chartering requirements.[34] In light of these lax entry standards, state legislatures began to

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[27] Horne Memorandum at 26,474.

[28] 112 Cong. Rec. 25,008 (1966).

[29] 112 Cong. Rec. 24,984 (1966) (statements of Rep. Patman).

[30] *See* Banking Act of 1933, ch. 89, § 30, 48 Stat. 193–94; Banking Act of 1935, ch. 614, § 101, 49. Stat. 690–91.

[31] Horne Memorandum at 26,474.

[32] *McQuiggin v. Perkins*, 569 U.S. 383, 398 n.3 (2013).

[33] *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 47 (1989).

[34] *See* Edward L. Symons, Jr., *The "Business of Banking" in Historical Perspective*, 51 Geo. Wash. L. Rev. 676, 690 (1983).

develop laws meant to prevent widespread bank failures and protect depositors from the errors of unskilled or unscrupulous bankers.[35]

D. State statutes passed during the "free banking" period demonstrate that concerns over bank failures animated early unsafe or unsound practices standards.

1. For example, a statute passed by New Hampshire's legislature in 1837 directed the state's commissioners to determine whether a bank's continued operation would be "unsafe or hazardous to the public interest."[36]

2. The New York legislature passed a statute in 1847 instructing the state's comptroller to evaluate whether the bank as a whole was "in an unsound or unsafe condition to do banking business."[37] In 1897, New York's highest court applied this statute, and determined that a New York-state bank was "in an unsound and unsafe condition" because it was no longer solvent—that is, "[i]ts capital of $100,000 was exhausted and there was a deficiency of about $260,000."[38]

E. State banking statutes passed in the early twentieth century adhered to this focus on bank failure and insolvency.

1. A statute passed in California permitted the state's banking superintendent to "take possession of the property and business of [a] bank" when the superintendent had "reason to conclude that [the] bank [was] in an unsound or unsafe condition to transact the business for which it is organized, or that it is unsafe or inexpedient for it to continue business."[39]

2. A statute passed in Nevada similarly focused on whether the bank as a whole was "in an unsafe or unsound condition," and Nevada's Supreme Court determined in a 1936 decision that the statute's "legislative intent

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[35] *See* Lev Menand, *Why Supervise Banks? The Foundations of the American Monetary Settlement*, 74 Vand. L. Rev. 951, 991 & n.185 (2021) (explaining that New York established safety and soundness standards after 43 of its 117 free banks had been closed); Arthur J. Rolnick & Warren E. Weber, Fed Rsrv. Bank of Minneapolis, *The Free Banking Era: New Evidence on Laissez-Faire Banking* 8 (1982) (explaining that regulation and supervision were considered necessary to prevent the "self-destruct[ion]" of banking in light of depositor losses during the free banking era).

[36] Act of July 5, 1837, ch. 321, § 8, *in* Revised Statutes of the State of New Hampshire 291.

[37] Act of Dec. 4, 1847, ch. 419, § 3, 1847 N.Y. Laws 519. *See also* Act of Feb. 23, 1838, ch. 14, § 5, *in* Supplements to the Revised Statutes: General Laws of the Commonwealth of Massachusetts 302 (1849) (requiring that banking commissioners "be of [the] opinion that the [bank] is insolvent, or, that its condition is such as to render its further progress hazardous to the public, or to those having funds in its custody" before enforcing the law against a bank); An Act Concerning Banks, § 14, *in* Public Statute Laws of the State of Connecticut 17 (1837) (addressing situations where the public was "in danger of being defrauded" by the bank).

[38] *In re Murray Hill Bank*, 47 N.E. 298 (N.Y. 1897).

[39] *State Sav. & Comm. Bank v. Anderson*, 132 P. 755, 756 (Cal. 1913) (quoting the state's banking law).

[was] that when [a bank acting as a] trustee became unsafe or unsound, the superintendent of banks should step in and protect the [beneficiary]."[40]

3. Wisconsin's Supreme Court evinced a similar understanding of the "unsafe or unsound" standard in the 1930s, when it described the idea "[t]hat a reserve below the legal limit of itself renders a bank unsafe and unsound" as "fallacious."[41] In other words, the Wisconsin Supreme Court recognized that, in the absence of some demonstration of likely material financial harm, technical legal violations alone do not meet the high bar set by the "unsafe or unsound" standard.

F. Statutes promulgated across a litany of other states before FISA's passage permitted the applicable state banking authority to take possession of or appoint a receiver for institutions deemed to be in an "unsafe or unsound" condition; these states include, but are not limited to, Pennsylvania, Ohio, Florida, North Carolina, Minnesota, Georgia, Arizona, South Dakota, Michigan, and Louisiana.[42]

G. Federal application of the "unsafe or unsound practices" standard prior to 1966 reflected a similar understanding that unsafe or unsound practices involved serious threats to an institution's integrity. In fact, the Horne Memorandum includes an appendix that lists specific insurance termination cases brought by the Federal Home Loan Bank Board against "problem institutions," which was meant to "provide[] specific examples of the type of activities which have formed the basis of the Board's charges of 'unsafe or unsound practices' in actual cases."[43] The list consists of instances where institutions engaged in severe financial mismanagement, including by making large payments that benefitted the bank's own chairman; engaging in "hazardous lending" that resulted in borrower bankruptcy and default; and making loans "without regard for the financial responsibility of the borrowers"; among other things.[44]

H. Congress incorporated this pre-existing understanding of the term, as it existed under the general law, when it passed FISA.[45]

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[40] *Lyon Cnty. Bank v. Lyon Cnty. Bank*, 60 P.2d 610, 611 (Nev. 1936).

[41] *Humbird Cheese Co. v. Fristad*, 242 N.W. 158, 160 (Wis. 1932).

[42] *See, e.g.*, *Vecchio v. Glassburn*, 172 A. 129, 129 (Pa. 1934); *State ex rel. Fulton v. Achey*, 1932 WL 1953, at *2 (Ohio Ct. Com. Pl. Oct. 18, 1932); *Amos v. Conkling*, 126 So. 283 (Fla. 1930); *State v. Mitchell*, 163 S.E. 581, 581 (N.C. 1932); *Aichele Bros. v. Skoglund*, 260 N.W. 290, 292 (Minn. 1935); *McGinty v. Gormley*, 183 S.E. 804, 807 (Ga. 1935); *First State Bank of Herrick v. Conant*, 221 N.W. 691, 692 (Neb. 1928); *Stewart v. Algonac Sav. Bank*, 248 N.W. 619, 620 (Mich. 1933); *In re Union Bank & Tr. Co.*, 163 So. 97, 98 (La. 1935).

[43] Horne Memorandum at 26,474.

[44] *Id.* at 26,474–75.

[45] *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 47–48 (1989).

VI. Conclusion

A. In short, the Agencies lack discretion to apply a conception of the "unsafe or unsound practices" standard that is contrary to the text of Section 8, binding judicial interpretations, and the standard's original, historical meaning.

B. All of the relevant legal authority points in the same direction: an act or practice is only "unsafe or unsound" if it violates a generally accepted standard of prudent operation and creates a reasonably foreseeable threat to the financial integrity or stability of the relevant institution.

C. Therefore, the Agencies should adopt a regulatory definition and framework that gives effect to this understanding, as proposed.

Appendix C: Legal Background and Analysis of Agency MRA Authority

I. Introduction

A. Matters Requiring Attention, Matters Requiring Immediate Attention, and Matters Requiring Board Attention (collectively referred to herein as MRAs) are written communications from bank examiners to a bank's or bank holding company's management or board conveying a supervisory finding and requiring that certain identified practices change.[1] MRAs are frequently the basis for a downgrade of a bank's or bank holding company's examination rating, which can lead to a host of negative regulatory consequences. As such, MRAs, as used currently and under the proposed rule, have legal consequences and materially affect the rights and property interests of institutions.

B. Despite the significance of MRAs, there is no explicit legal authority for the agencies to issue them.

C. Congress has authorized the FDIC, the Federal Reserve, and the OCC to examine insured depository institutions and bank holding companies. These examination authorities contemplate formal communication between *bank examiners* and the *applicable agency*—the statutes do not contemplate formal communication, much less formal direction, between *bank examiners* and the *bank itself*.

D. Congress has also authorized the agencies to institute enforcement actions against banks for engaging in unsafe or unsound practices or violating the law. This statutory authorization contemplates formal communication between the agencies and banks but also provides banks with certain due process protections, including notice and an opportunity for a hearing.

E. There are no other statutes authorizing the agencies to require a bank to take or refrain from taking an action. As the Supreme Court has stated, "an agency literally has no power to act . . . unless and until Congress confers power upon it."[2] Further, "[a]gencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency [may] add pages and change the plot line."[3]

F. MRAs, as they are used in practice, operate as binding legal requirements. Moreover, they are often issued for practices that are neither unsafe or unsound nor

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[1] The OCC communicates concerns about an institution's "deficient practices" through Matters Requiring Attention, or MRAs. Unsafe or Unsound Practices, Matters Requiring Attention, 90 Fed. Reg. 48,835, 48,840 (Oct. 30, 2025) (hereinafter, "Proposed Rule"). The FDIC issues Matters Requiring Board Attention, or MRBAs, as part of its supervisory process to communicate supervisory concerns. *Id*. The Federal Reserve communicates its supervisory findings through MRAs and, for more significant issues that must be corrected on a priority basis, Matters Requiring Immediate Attention, or MRIAs. *Understanding Federal Reserve Supervision*, Board of Governors of the Federal Reserve System (Apr. 27, 2023), https://www.federalreserve.gov/supervisionreg/how-federal-reserve-supervisors-do-their-jobs.htm. This memorandum refers to all such communications as MRAs.

[2] *La. Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355 (1986).

[3] *W. Virginia v. EPA*, 597 U.S. 697, 723 (2022).

a violation of law. MRAs, used in this manner, circumvent the process Congress has authorized for the agencies to compel bank action. As such, these MRAs run afoul of the longstanding principle that agencies may not act outside of their statutory authority.

G. On the other hand, MRAs for bank activities that would otherwise warrant an enforcement action (*i.e.*, activities that represent an unsafe or unsound practice or a violation of law) are entirely consistent with the agencies' enforcement authority under 12 U.S.C. 1818(b). This form of informal communication in lieu of formal enforcement action is an important part of the examination process and is appropriate given the "frequent and intensive" nature of bank examinations.[4]

H. Lacking explicit statutory authorization to issue MRAs that would not warrant an enforcement action, the agencies have argued for a broad reading of certain cases that have tangentially addressed the supervisory process for banking organizations.[5] However, as addressed below, these cases do not support the agencies' broad reading. Rather, the cases cited by the agencies support only the premise that the agencies may seek to do informally that which they are legally authorized to do through formal means.

I. We support the agencies' proposed MRA standard because it would require a showing that a practice could reasonably be expected to become an unsafe or unsound practice (as defined under the NPR) under current or reasonably foreseeable conditions.

J. Any MRA that is not connected to the agencies' statutory enforcement authority would lack legal basis and would not be effective. The agencies should acknowledge this within the final rule. An inappropriately broad articulation of the agencies' authority would inject uncertainty into the proposed framework and depart from the law, thereby undercutting the intent and benefits of the proposal.

II. MRAs generally

A. An MRA is a written communication from bank examiners to a bank's or bank holding company's management or board conveying a supervisory finding and requiring that certain identified practices change.[6] MRAs are typically conveyed in a formal examination report or supervisory letter. Each agency has its own definition of what constitutes an MRA.

B. Under the proposed rule, the agencies "may only" issue an MRA for a practice, act, or failure to act, alone or together with one or more other practices, acts, or failures to act, that (1) could *reasonably be expected* to become an unsafe or unsound

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[4] *U.S. v. Phila. Nat. Bank*, 374 U.S. 321, 329 (1963).

[5] *See* Proposed Rule at 48,840 n.32 (citing the U.S. Supreme Court decisions in *Cuomo v. Clearing House Association*, *U.S. v. Gaubert*, and *U.S. v. Philadelphia National Bank* in support of the proposition that the "Supreme Court has indicated support for a broad reading of certain visitorial powers").

[6] *See* Proposed Rule at 48,838 n.23 ("[T]he agencies identify unsafe or unsound practices as supervisory findings in other communications, including reports of examination, supervisory letters, MRAs, and informal enforcement actions.").

practice (as defined under the NPR) *under current or reasonably foreseeable conditions*, or (2) is an *actual violation* of a *banking or banking-related* law or regulation.

C. In discussing their authority to issue MRAs, the issuing agencies stated in the NPR the following:

> Through various statutory examination and reporting authorities, Congress has conferred upon the agencies the authority to exercise visitorial powers and examination authorities with respect to supervised institutions. The Supreme Court has indicated support for a broad reading of certain visitorial powers. Examination and visitorial powers of the agencies facilitate early identification of supervisory concerns that may not rise to a violation of law, unsafe or unsound practice, or breach of fiduciary duty under section 8 of the FDI Act. These powers provide the agencies with authority to issue MRAs and supervisory ratings.[7]

D. Under current practice, unresolved MRAs are frequently the basis for a downgrade of the bank's or bank holding company's examination rating, which can lead to a host of negative regulatory consequences. Therefore, MRAs, as used currently and under the proposed rule, have legal consequences and materially affect the rights and property interests of institutions. This is the case even if the practices "may not rise to a violation of law, unsafe or unsound practice, or breach of fiduciary duty under section 8 of the FDI Act."[8]

III. The examination authorities cited by the agencies do not provide statutory authority to issue MRAs

A. The proposed rule states that, "through various statutory examination and reporting authorities, Congress has conferred upon the agencies the authority to exercise visitorial powers and examination authorities with respect to supervised institutions."[9] The agencies contend that "[t]hese powers provide [them] with authority to issue MRAs and supervisory ratings."[10]

B. The statutes on which the agencies rely are as follows: 12 U.S.C. 481 (Appointment of examiners; examination of member banks, State banks, and trust companies; reports); 12 U.S.C. 1463 (Supervision of savings associations); 12 U.S.C. 1464 (Federal savings associations); 12 U.S.C. 1820 (Administration of corporation); 12 U.S.C. 1867 (Regulation and examination of bank service companies); 12 U.S.C. 3105(c) (Authority of Federal Reserve System—Foreign Bank Examinations and Reporting); and 12 U.S.C. 5412(b) (Powers and duties transferred—functions of the Office of Thrift Supervision).

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[7] Proposed Rule at 48,839.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 48,840.

C. Each of these statutes provides the agencies with authority to examine the relevant banks over which the agency has authority. These authorities provide that the results of such examination are to be reported to the relevant head of the agency.[11] These authorities *do not* contemplate communication to the institution examined—rather, the authorities contemplate communication between the examiner and the Comptroller of the Currency or the FDIC Board of Directors, as applicable.

D. In sum, none of the statutes on which the agencies rely contemplate formal communication between *bank examiners* and the *examined banks*. Therefore, under a textual analysis, none of these statutes provide the agencies with authority to issue MRAs that require banks to take or refrain from taking actions.

IV. The legislative history establishes that the agencies' statutory examination authority does not provide authority to issue MRAs

A. The agencies did not have the authority to pursue enforcement actions for unsafe or unsound practices until 1966, when Congress enacted the Financial Institutions Supervisory and Insurance Act (FISA).

B. FISA provides, in part, as follows:

> If, in the opinion of the appropriate Federal banking agency, any insured depository institution . . . is engaging or has engaged, or the agency has reasonable cause to believe that the depository institution . . . is about to engage, in an unsafe or unsound practice . . . or is violating or has violated, or the agency has reasonable cause to believe that the depository institution . . . is about to violate, a law, rule, or regulation, or any condition imposed in writing by a Federal banking agency . . . the appropriate Federal banking agency for the depository institution may issue and serve upon the depository institution or such party a notice of charges in respect thereof. . . . [A] hearing will be held to determine whether an order to cease and desist therefrom should issue against the depository institution[.][12]

C. Prior to FISA, the agencies' only way to take corrective action under then-existing law was the drastic step of terminating an institution's insured status for engaging in "continued" unsafe or unsound practices or violations of law or regulation. The Senate Banking Committee Report makes clear that Congress enacted section

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[11] *See, e.g.*, 12 U.S.C. § 481 (stating that the OCC is authorized to "make a thorough examination of all the affairs of [any national] bank" and its affiliates and "shall make a full and detailed report of the condition of said bank *to the Comptroller of the Currency*") (emphasis added); 12 U.S.C. § 1820 (stating that the FDIC is authorized to examine "any insured State nonmember bank or insured State branch of any foreign bank . . . whenever the Board of Directors determines an examination of such depository institution is necessary" and requiring that examiners "shall make a full and detailed report of condition . . . examined *to the Corporation*") (emphasis added).

[12] 12 U.S.C. § 1818(b)(1).

1818(b) as part of FISA to provide the agencies with less-drastic means to obtain corrective action at an institution:

> The Federal supervisory agencies in varying degrees have been seriously handicapped in their efforts to prevent irresponsible and undesirable practices by deficiencies in the statutory remedies. Experience has often demonstrated that the remedies now available to the federal supervisory agencies are not only too drastic for use in many cases, but are also too cumbersome to bring about prompt correction and promptness is very often vitally important . . . . The committee concluded that the administration's request for additional flexible and effective supervisory powers should be granted, within carefully guarded limits, in order to make sure our banks and savings and loans associations would continue to serve the nation effectively and well.[13]

D. This legislative history makes clear that the agencies' examination authority did not include any means to *require* banks to take or refrain from taking actions. If the examination statutes (which were enacted prior to FISA) did provide the agencies with such authority, then section 1818(b) would have been unnecessary.

E. In sum, the agencies' reliance on their examination authority to issue MRAs is not supported by the plain text of those statutes or the subsequent legislative history when Congress enacted FISA.

V. The agencies' purported "visitorial powers" do not provide them with authority to issue MRAs

A. In the proposed rulemaking, the agencies claim that their authority to issue MRAs is supported by Congressionally conferred visitorial powers.[14] Notably, none of the statutes that the agencies cite in support of this assertion include the word "visitorial powers" or similar phrases. Moreover, no statute affirmatively confers on the agencies "visitorial" powers.[15]

B. The only statute including this language is section 484 of the National Bank Act ("NBA"), which states that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized."[16]

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[13] S. Rep. No. 89-1482, at 5, 6 (1966). *See also* H.R. Rep. No. 89-2077, at 4–5 (1966); 112 Cong. Rec. 20,081 (1966) (statements of Sen. Proxmire); 112 Cong. Rec. 24,983–84 (1966) (statements of Rep. Patman).

[14] *See* 90 Fed. Reg. at 48,839 (citing 12 U.S.C. §§ 481, 1463, 1464, 1820, 1867, 3105(c), 5412(b)).

[15] Legislatures know how to expressly confer visitorial powers upon a person or entity. *See, e.g.*, *Illinois Hosp. Serv., Inc. v. Gerber*, 165 N.E.2d 279, 282 (Ill. 1960) (discussing a statute that gives a state director of insurance "the power of visitation and examination"); Act of Feb. 23, ch. 14, § 2, 1838 Mass. Acts p. 303 (authorizing banking commissioners to "visit" a bank and "examine all [its] affairs" to determine whether it had "complied with the provisions of law applicable to [its] transactions"). Congress did not do so here.

[16] 12 U.S.C. § 484(a).

C. To the extent this statute could be interpreted as affirmatively granting visitorial powers (rather than simply limiting the visitorial powers to which a national bank may be subject), it applies only to the OCC. There is no statute with respect to the FDIC or the Federal Reserve that uses the phrase "visitorial powers."

D. The seminal decision interpreting the meaning of "visitorial powers" under section 484(a) is *Cuomo v. Clearing House Association LLC*.[17] In determining the outer limits of the term "visitorial powers" within the NBA, the Court stated that the term does "not include, as the Comptroller's expansive regulation would provide, ordinary enforcement of the law."[18] Further, *Cuomo* did not address whether the OCC affirmatively possesses "visitorial powers." Rather, the issue in *Cuomo* was whether section 484(a) preempted attempts by state attorneys general to enforce state laws. With regard to the scope of visitorial powers at issue, the Court in *Cuomo* held that this term refers to "any form of administrative oversight that allows a sovereign to inspect books and records on demand."[19]

E. Based on this language in *Cuomo*, it is unclear how any "visitorial" powers that the OCC may possess would differ from the OCC's examination authority. Per *Cuomo*, section 484(a) establishes that only the OCC, not state authorities, can examine national banks. It does not provide any clear basis for the OCC to require banks to take actions or refrain from taking actions outside of its explicitly granted enforcement authority.

VI. The enforcement authority enacted under FISA provides the agencies with limited authority to issue MRAs

A. In the proposed rulemaking, the agencies correctly acknowledge that section 1818(b) grants authority to take formal enforcement actions against institutions that have engaged, are engaging, or are about to engage in an "unsafe or unsound practice" or violation of law.[20]

B. Section1818(b) establishes certain procedural protections for institutions in connection with an enforcement action for an unsafe or unsound practice or violation of law. These protections include "a notice of charges [that] contain[s] a statement of the facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and . . . fix[es] a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the depository institution[.]"[21]

C. The best legal argument supporting the agencies' authority to issue MRAs is that MRAs are essentially non-binding warnings that an enforcement order would be forthcoming if the practice or violation is not corrected, akin to a Wells notice in the

[17] 557 U.S. 519 (2009).

[18] *Id.* at 524.

[19] *Id.* at 535.

[20] *See* Proposed Rule at 48,836.

[21] 12 U.S.C. § 1818(b)(1).

SEC enforcement context.[22] However, any MRA issued for an activity that the agencies' could not bring an enforcement action to correct (*i.e.*, an activity that was neither a violation of law nor an unsafe or unsound practice) would be both non-binding and groundless.

VII. Case law cited by the agencies does not provide them with authority to issue MRAs that are outside the agencies' express statutory authority

A. The agencies contend that certain case law supports their authority to issue MRAs, regardless of whether such MRA is within the agencies' express statutory authority. The two decisions primarily relied upon by the agencies are *U.S. v. Philadelphia National Bank* and *U.S. v. Gaubert*.[23] Neither of these decisions, however, support the agencies' contention.

B. *U.S. v. Philadelphia National Bank*

1. The Supreme Court's decision in *U.S. v. Philadelphia National Bank* addressed the application of the antitrust laws to the commercial banking industry.[24] In this decision, the Supreme Court referred to the federal banking agencies' visitorial powers as "broad," but it describes them by clear reference to the various examination powers granted to the agencies by statute, and not as anything separate and apart from them.[25] The decision does not include any language supporting the agencies' contention that they have the authority to issue MRAs absent statutory authorization. Indeed, *Philadelphia National Bank* clearly endorses the

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[22] *See* Securities and Exchange Commission, Enforcement Manual § 2.4 (Nov. 28, 2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf. There are significant differences between an MRA and a Wells notice, owing largely to the significant differences between bank regulation and securities regulation. A Wells notice comes if the SEC staff has completed an investigation and intends to recommend an enforcement action to the Commission. The notice gives the affected party a chance to argue against enforcement action to the staff or the Commission. An MRA provides the bank with an opportunity to correct the unlawful act or practice prior to any recommendation of formal enforcement action. As documented above, however, an MRA comes with significant consequences even if no formal enforcement action is taken, without the agency head or board even being aware of it.

[23] Proposed Rule at 48,839.

[24] 374 U.S. 321, 324 (1963).

[25] *See U.S. v. Philadelphia Nat'l Bank*, 374 U.S. at 329–30 ("But perhaps the most effective weapon of federal regulation of banking is the broad visitorial power of federal bank examiners. . . . In this way the agencies maintain virtually a day-to-day surveillance of the American banking system. And should they discover unsound banking practices, they are equipped with a formidable array of sanctions. If in the judgment of the [Federal Reserve] a member bank is making undue use of bank credit, the Board may suspend the bank from the use of the credit facilities of the [Federal Reserve]. The FDIC has an even more formidable power. If it finds unsafe or unsound practices in the conduct of the business of any insured bank, it may terminate the bank's insured status. Such involuntary termination severs the bank's membership in the [Federal Reserve], if it is a state bank, and throws it into receivership if it is a national bank. Lesser, but nevertheless drastic, sanctions include publication of the results of bank examinations. As a result of the existence of this panoply of sanctions, recommendations by the agencies concerning banking practices tend to be followed by bankers without the necessity of formal compliance proceedings.") (internal quotation marks and citations omitted).

dichotomy between the agencies' "surveillance" powers (*i.e.*, the power to examine and require reports) and their enforcement powers.

2. Accordingly, the best reading of the Court's references to "visitorial" powers is that the Court was speaking descriptively when using the term "visitorial" and only intended to describe the agencies' power to examine the banks they regulate as visitorial in nature. The Court did not endorse the notion that the agencies have a visitorial power distinct from the express statutory examination authorities they possess.

C. *U.S. v. Gaubert*

1. In *U.S. v. Gaubert*, the Supreme Court addressed whether certain informal actions by the FHLBB and Federal Home Loan Bank-Dallas with respect to a federal savings and loan association supported waiver of sovereign immunity under the Federal Tort Claims Act.[26]

2. Accordingly, *Gaubert* was not a decision about whether the FHLBB had exceeded its statutory authority. Rather, it was a decision about whether the actions by the FHLBB in supervising an institution were "operational actions" (rather than "policy decisions") such that they warranted a waiver of sovereign immunity under the FTCA. Thus, *Gaubert* is inapposite.

3. The subsequent decisions interpreting *Gaubert* are also inapposite. *Vander Zee* similarly dealt with whether actions by the OCC supported a waiver of sovereign immunity under the FTCA, not the permissible scope of the federal banking agencies' authority. And *Holmes* dealt with the tolling of the statute of limitations for a claim against a bank in receivership. As far as we are aware, there is no case law supporting the proposition that the agencies may issue MRAs to require a bank to take or refrain from taking an action where such MRA would not be within the statutory authority of the agencies, namely their authority to take enforcement actions.

4. Fundamentally, the Supreme Court in *Gaubert* did not address the permissibility of an MRA or other binding action by the FHLBB against the institution. All the communications discussed in *Gaubert* were informal. In *Gaubert*, the institution chose to adopt these informal recommendations, though it was not required to do so. This is consistent with the agencies' proposal that the proposed rule would not prohibit examiners from continuing to provide non-binding, informal supervisory communications.

    i. Indeed, Justice Scalia in his concurrence in *Gaubert* found the fact that the FHLBB was only providing informal, nonbinding recommendations dispositive: "The alleged misdeeds complained of here were not actually committed by federal officers. Rather, federal officers 'recommended' that such actions be taken, making it clear

[26] 499 U.S. 315 (1991). Specifically, *Gaubert* addressed whether the actions taken by these agencies were within the "discretionary function" exception to the liability of the United States under the FTCA.

that if the recommendations were not followed the bank would be seized and operated directly by the regulators. In effect, the [FHLBB] imposed the advice which Gaubert challenges as a condition of allowing the bank to remain independent."[27]

ii. Ultimately, even though the agencies raised the threat of formal action, they did not take any formal action. Had the FHLBB done so, then such action would have binding effect and would be subject to challenge by the institution.

D. The best reading of the cases cited by the agencies is that the agencies may seek to do informally that which they are legally authorized to do through formal means. These cases also support the ability of the agencies to provide informal, non-binding recommendations to institutions where the agencies lack statutory authority to require the institution to adopt such recommendations.

VIII. Conclusion

A. In sum, the only statutory authority supporting the agencies' ability to issue MRAs is their authority to take formal enforcement actions against institutions that have engaged, are engaging, or are about to engage in an unsafe or unsound practice or violation of law.

B. Under the proposed rule, the agencies may issue an MRA if an institution is engaged in a practice that either (1) is contrary to generally accepted standards of prudent operation and, if continued, could reasonably be expected to, under current or reasonably foreseeable conditions, be an unsafe or unsound practice or (2) is an actual violation of a banking or banking-related law or regulation.

C. This proposed MRA standard is consistent with the agencies' statutory authority under 12 U.S.C. 1818(b). Further, the proposed standard is consistent with Supreme Court precedent establishing that the agencies may seek to require institutions to adopt informal agency recommendations where the underlying practice would otherwise support a formal enforcement action.

D. With that said, and as the agencies should acknowledge in the final rule, any MRA that is not connected to the agencies' statutory enforcement authority would lack legal basis and would not be effective. Failure by the agencies to acknowledge this would result in an inappropriately broad articulation of the agencies' authority. This would inject uncertainty into the proposed framework and depart from the law, thereby undercutting the intent and benefits of the proposal.

[27] *Id.* at 338.