Banking and Finance Law Daily Wrap Up, PRUDENTIAL REGULATION—OCC, FDIC propose rulemaking to define 'unsafe or unsound' practices, (Oct. 8, 2025)

Banking and Finance Law Daily Wrap Up

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Acting FDIC Chairman Travis Hill promoted the proposed rulemaking as a refocusing of bank supervision away from process concerns and toward the detection of fundamental financial risks.

The Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation issued a joint notice of proposed rulemaking that, among other things, will attempt to define the term "unsafe or unsound practice" under section 8 of the Federal Deposit Insurance Act, 12 U.S.C. § 1818 (OCC Bulletin 2025-29; FIL-45-2025). There is currently no such definition. The proposed rule would apply to all OCC-supervised institutions. FDIC Acting Chair Travis Hill issued a companion statement suggesting the failure of Silicon Valley Bank (SVB) illustrated a need to shift supervisory focus away from process. He suggested supervisory criticisms of SVB focused on how the bank was modeling interest rate risk, "rather than the hole in the balance sheet." Public comments are due 60 days after publication in the *Federal Register*.

On Aug. 6, 2025, Senator Katie Boyd Britt (R-Ala.), along with her Republican colleagues on the Senate Banking Committee, sent a letter to the Federal Reserve Board (Fed), OCC, and FDIC raising concerns about the "Matters Requiring Attention (MRA)" process. The Senators outlined their view of serious shortcomings in the MRA process. Specifically, the Senators argued a lack of structure, uniformity, and legal foundation for MRAs has led to inconsistencies and inefficiencies across the regulatory system (see *Banking and Finance Law Daily*, Aug. 7, 2025).

Highlights. The agencies suggested a uniform definition will not only improve clarity and certainty but also ensure bank supervisors prioritize concerns about material financial risks over nonfinancial risks, like policies and documentation. The agencies said the proposed rule will also establish uniform standards for how the agencies may communicate Matters Requiring Attention (MRAs), a supervisory tool used to identify deficiencies or legal violations during bank examinations, and non-binding supervisory observations during the examination process. Last, the agencies said the proposal would also facilitate the tailoring of enforcement actions and MRAs.

The proposed rule would, in summary:

- establish a uniform definition of "unsafe or unsound practice" for enforcement and supervisory authority under 12 U.S.C. § 1818;
- define "unsafe or unsound practice" as a practice, act, or failure to act, in any combination with other conduct, that is contrary to generally accepted standards of prudent operation and has materially harmed the institution's financial condition or is likely to cause material harm or present a material risk of Deposit Insurance Fund (DIF) loss;
- establish uniform standards for MRAs and nonbinding supervisory observations as part of the examination process;
- provide that the agencies may only issue an MRA pertinent to an actual violation of a banking or banking-related law or regulation, or is contrary to generally accepted standards of prudent operation and has already caused material harm to institution financial condition or is foreseeably likely to cause material harm or material risk of loss to the DIF;
- clarify that the agencies may communicate other nonbinding suggestions to institutions, all as further specified and discussed in the notice of proposed rulemaking.

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An FDIC staff memorandum to the FDIC Board of Directors suggested the proposed definition would focus examiner attention on potentially harmful practices while providing boards and management with "additional flexibility to enact day-to-day decisions based on their business judgment and risk tolerance."

Nonbinding suggestions. The proposal is said to clarify that the agencies may communicate nonbinding suggestions to institutions orally or in writing to enhance policies, practices, conditions, or operations as long as the agency does not treat the communication like an MRA, for example, through tracking. Again, the agencies claimed this would allow examiners to share expertise with management and board while leaving enhancement decisions to the institution.

Tailoring. The proposed rule requires tailoring of supervision and enforcement actions and MRAs, including with respect to requirements or expectations thereof, based on "capital structure, riskiness, complexity, activities, asset size, and any financial risk-related factor that the agencies deem appropriate."

BPI statement. Bank Policy Institute President and CEO Greg Baer commented favorably that the proposed rule should help refocus the examination process on material risks. He said he also viewed public comment as a benefit in contrast to the "previously opaque process." He said the proposed reforms should include reform of the Large Financial Institution (LFI) rating system for holding companies, as the Federal Reserve Board has already proposed, as well as anticipated revisions of the capital adequacy, asset quality, management, earnings, liquidity, and sensitivity (CAMELS) rating system.

ABA statement. American Bankers Association President Rob Nichols said the ABA welcomes the recent efforts of regulatory leadership to ensure bank supervision is "appropriately tailored and focused on strengthening America's banks and our financial system."

Better Markets statement. In contrast, Better Markets' President, CEO, and Co-founder Dennis Kelleher issued a highly critical response that the proposed rulemaking would "put blindfolds on bank supervisors, forcing them to ignore risks and wrongdoing unless the activities affect a bank's financial condition." Kelleher at least partly attributed the SVB debacle to what might arguably qualify as a process deficiency: its lack of a chief risk officer. SVB benefited from not having one until it did not.

Keller argued the "long history of dangerously poor" bank management calls for supervision that looks "beyond strictly financial matters to determine if there are unacceptable risks arising from reputation and other non-financial facts and circumstances." Unethical and risky activities "can and do lead to significant losses." He concluded the rulemaking will sacrifice the FDIC supervisory "gold standard" and "directly undermine FDIC supervisors from doing their jobs" such that and "all Americans will pay the price."

FSF statement. Financial Services Forum President and CEO Amanda Eversole issued a statement applauding the proposed rulemaking as "[a]nother positive step toward focusing bank oversight on real financial risks."

ICBA statement. Independent Community Bankers of America (ICBA) President and CEO Rebeca Romero Rainey issued a statement commending the FDIC and OCC for proposing to "remove reputation risk from their supervisory programs and to promote greater uniformity regarding their enforcement and supervision standards." She appeared to deprecate the "sometimes arbitrary supervisory concerns related to policies, process, documentation, and other nonfinancial risks" as not especially relevant to the needs of local communities. She concluded ICBA looks forward to the proposed rules to "advance tiered and proportionate regulations that will help ensure community banks continue to meet the needs of local communities — in line with ICBA's 'Repair, Reform, and Thrive' plan and open letter to the 119th Congress."

Companies: American Bankers Association; Bank Policy Institute; Better Markets; Financial Services Forum; Independent Community Bankers of America; Silicon Valley Bank

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