New FDIC and OCC Rule Goes Into Effect November 2, 2026

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On September 1, 2026, the Federal Deposit Insurance Corporation ("FDIC") and Office of the Comptroller of Currency ("OCC") (together, the "Agencies") issued a new rule defining "unsafe or unsound" practices and overhauling notice procedure for regulators, which is codified at 12 C.F.R. §§ 4.92; -305.1 and is effective November 2, 2026 (the "Rule"). In this article, we focus on the Rule's updated scheme for issuing Matters Requiring Attention and Supervisory Observations.

Defining Unsafe and Unsound Practices

The Rule codifies the definition of an "unsafe and unsound practice" for purposes of enforcement activity under the Federal Deposit Insurance Act. An unsafe or unsound practice is defined as a practice, pattern of practices, or a failure to act (a "Practice") that "is contrary to generally accepted standards of prudent operation" and -

1. Is likely to cause material harm to a bank's financial condition;
2. Is likely to present a material risk of loss to the Deposit Insurance Fund ("DIF"); or
3. Already caused material harm to a bank's financial condition.

Therefore, when an Agency determines that a Practice is *likely* to cause the above circumstances, enforcement action may be taken under the Federal Deposit Insurance Act, including without limitation cease-and-desist proceedings.

Matters Requiring Attention

The Rule also establishes new guidelines for regulators to issue "Matters Requiring Attention" ("MRA"), which are notices of practices that must be presented to a bank's board of directors and corrected under threat of sanction. Prior official guidance suggested that regulators should issue MRAs in response to practices that deviate from sound governance and have the potential to adversely affect the bank's condition or result in substantive non-compliance with the law. However, MRAs were also issued for technical violations or to provide notice of preferred practices and, therefore, became a source of enforcement creep. MRAs were criticized for operating as notice of agency preference or providing non-binding guidance, rather than as notice of violative practices that needed remediation.

Under the Rule, Agencies will now issue MRAs only in response to a Practice that "is contrary to generally accepted standards of prudent operation" and -

1. Could reasonably cause material harm to a bank's financial condition;
2. Could reasonably be expected to present a material risk of loss to DIF;
3. Already caused material harm to a bank's financial condition; or
4. Is an "actual violation" of banking-related laws or regulations.

The Agencies' definitions of a Practice that is unsafe and unsound and a Practice that gives rise to an MRA primarily differ in the standard applied. The Rule defines an unsafe or unsound practice as one where the "material harm" or "risk of loss" is *likely*, whereas a Practice may give rise to an MRA if the material harm or risk of loss *could reasonably be expected*. Furthermore,

the Rule provides that MRAs may be issued for an "actual violation" of banking-related laws, but such an "actual violation" is not an "unsafe or unsound practice".

These definitions raise important questions. First, how will Agencies determine what constitutes "material harm" or "material risk of loss"? Second, what are "actual" violations of banking-related law as compared to "other" violations?

"Material" Harm or Risk of Loss

The Rule provides that a Practice that could reasonably cause material risk of harm to a bank's financial condition is one that may cause "financial losses or other negative impacts to an institution's capital, asset quality, earnings, liquidity, or sensitivity to market risk." A Practice that could reasonably be expected to present material risk of loss to the DIF is one that "increases the probability that an institution would fail" and therefore increases the likelihood that the DIF would have to disburse funds.

These standards differ - an analysis of material risk of harm to an institution's financial condition considers the magnitude of financial loss or other negative impacts at risk against the bank's financial health, whereas an analysis of a material risk of loss to the DIF considers only the probability that a bank will fail and require the DIF to disburse funds.

In determining when a violation may constitute a "material risk of harm" for the purposes of issuing an MRA, the Rule provides that the threshold for "materiality" may be tailored to the size and scale of risk involved in a particular institution based on risks associated with the institution's capital structure, complexity, activities, and asset size.

While the Agencies stress that they are determined not to develop explicit tiers based on bank size or asset complexity, they explained in their comments to the Rule that "as the risk [of harm] increases: the threshold for materiality of the harm to the financial condition of an institution that … warrants an MRA decreases; the assessment of the harm to the financial condition of an institution becomes more granular (*e.g.,* specific business lines, products, or services); and the requirements under [a] … MRA relating to remediation, and the expectations regarding prudent operation, increase. Similarly, the inverse is true."

For example, "the agencies would not expect that a particular projected percentage decrease in capital or liquidity that rises to the level of materiality for the largest institutions would necessarily also be material for community banks." Therefore, the tailoring provision alters the risk of enforcement activity based upon the size, complexity, and activities of a particular institution.

However, when determining whether a Practice constitutes a material a risk of loss to the DIF, the Agencies only consider the probability that a bank may fail and be placed in FDIC receivership. The Agencies offer the following example to contrast the two standards: "The failure of an institution to implement appropriate contingency funding arrangements might not pose a risk of material harm to the financial condition of the institution, but could impair the institution's liquidity under stress and thus present an increased risk to the DIF."

"Actual Violations" of Banking-Related Law

The Agencies have specified that the following are "actual violations" of banking-related law for which an MRA may be issued:

1. Repeated or systemic violations, in number of violations and or length of time in which the violations occurred;
2. Violations which cause or may cause more than minimal damage to a bank's financial condition, accuracy of records, or to its customers;
3. Violations which may require restitution payments to damaged parties; and
4. Violations which indicate self-dealing or other insider misconduct.

Therefore, an "actual violation" of banking-related law may arise when a Practice indicates serial non-compliance, a risk of harm to a bank or others, or insider misconduct. The Agencies further define a Practice that violates banking-related law but does not meet the above criteria as an "other violation."

When a Practice constitutes an "other violation," the Agencies have discretion to issue a notice of "other violations" and require the Practice to be remediated. However, no presentation to the board is explicitly required and nothing beyond remediation is necessary unless required by other law. The Agencies commented that "[w]hile not every violation may be correctable, and while some de minimis violations may not warrant corrections, the agencies believe that they should retain the discretion to require institutions to correct violations of law or regulation through means other than the issuance of an MRA." However, the Agencies "will not direct an institution to take any action other than to remediate the violation, unless such other actions are required by applicable state or Federal law."

In sum, when the Agencies find a Practice is an "actual violation" of banking-related laws, the Agencies will issue an MRA requiring a bank's board of directors be presented with notice of the actual violation prior to remediation. Whereas when an "other violation" occurs, they may provide notice of the technical violation and require it to be remedied without a presentation to the board.

Supervisory Observations

In order to permit regulators to notify banks of concerning Practices that do not yet constitute a material risk or a violation of law, the Rule institutes new standards for the issuance of "supervisory observations." Unlike MRAs, supervisory observations may be issued for identifications of "weaknesses in an institution's policies, practices, condition, or operations." These may be helpful to institutions in determining Practices that warrant improvement, but do not yet constitute a material risk to a bank or its stakeholders, or a violation of law. Further, to reduce the regulatory burden of these supervisory observations, the new rule expressly states that no response to a supervisory observation is required from institutions nor any coordination with regulators to improve processes.

However, the Agencies may use information that supported the issuance of a supervisory observation to inform risk-calculation ratings for an institution, such as CAMELS ratings, which could lead to increased insurance premiums and related risk management costs.

The Rule indicates a shift towards more streamlined enforcement action by the Agencies focusing more invasive enforcement on substantive violations. The Rule also suggests reduced regulatory burden for banks when remediating technical violations.

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