

September 24, 2019

# SEC Proposes Rules to Update Statistical Disclosure Requirements for Banking Registrants

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## **Proposed Rules Would Continue the SEC’s Efforts to Eliminate Disclosure Requirements that Overlap With Other SEC Rules and Accounting Standards by Replacing Industry Guide 3 With Updated Disclosure Rules in a New Subpart of Regulation S-K**

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### **SUMMARY**

On September 17, 2019, the Securities and Exchange Commission proposed rules<sup>1</sup> to update the statistical disclosures that bank holding companies, banks, savings and loan holding companies, and savings and loan associations provide to investors in accordance with Industry Guide 3, *Statistical Disclosures by Bank Holding Companies*.<sup>2</sup> Under the proposal, Guide 3 would be rescinded and replaced with a new Subpart 1400 of Regulation S-K. The proposed rules would codify<sup>3</sup> certain Guide 3 disclosures and eliminate disclosures that overlap with SEC rules, U.S. GAAP or International Financial Reporting Standards (“IFRS”).

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### **BACKGROUND**

The staff of the Division of Corporation Finance first published Guide 3 in 1976 because the “Division believed that disclosure of the same statistical information about [bank holding companies] on a regular, periodic basis would assist in assessing their future earning potential and enable investors to compare [bank holding companies] more easily.” Guide 3 was last substantively revised in 1986 and, since then, new disclosure requirements under SEC rules, U.S. GAAP and IFRS have been introduced that overlap with the disclosures called for by Guide 3. Although Guide 3 applies by its terms only to bank holding companies, other banking registrants provide Guide 3 disclosures. Staff Accounting Bulletin Topic 11:K

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expresses the SEC staff's view that registrants with material lending and deposit activities should provide Guide 3 disclosures.<sup>4</sup> In addition, the FDIC's disclosure rules direct state nonmember banks and state savings associations subject to Exchange Act reporting requirements to provide Guide 3 disclosures in their Exchange Act periodic reports.<sup>5</sup> Similarly, the OCC's Part 16 securities offering disclosure rules direct national banks and federal savings associations to consult Guide 3 for guidance on appropriate disclosures in registration statements and Regulation A offering documents to be filed with the OCC under Part 16.<sup>6</sup> Guide 3 applies to both domestic and foreign registrants, including foreign private issuers, but does not apply to Form 40-F filers, although the SEC notes that its staff has observed that Canadian foreign private issuers that are financial institutions typically provide Guide 3 disclosures in their Form 40-F filings.<sup>7</sup>

Guide 3 constitutes guidance from the Division of Corporation Finance and is not a rule or regulation of the SEC. In practice, however, the disclosures called for by Guide 3 are generally treated as disclosure requirements.

In March 2017, the SEC issued a request for comment on possible changes to Guide 3. In developing the current proposal, the SEC considered comments received in response to the 2017 request for comment, most of which expressed support for an update to Guide 3.

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### PROPOSED RULES

The proposed rules are the latest stage in the SEC's initiative "to review disclosure requirements applicable to issuers to consider ways to improve the requirements for the benefit of investors and registrants."<sup>8</sup> The SEC's proposal is intended to reflect "significant financial reporting changes" not reflected in Guide 3, which "has not been substantively updated for more than 30 years."<sup>9</sup> Consistent with the approach reflected in recent disclosure-related rulemakings, the proposed rules would largely streamline existing Guide 3 disclosures and eliminate overlaps with required GAAP and IFRS disclosures, rather than adding substantial new disclosure requirements. In contrast to the current Guide 3, the proposal would tailor the application of the proposed requirements for registrants that report their financial information pursuant to IFRS, as discussed in further detail below.<sup>10</sup>

Notable aspects of the proposal include the following:

- ***Distributions of Assets, Liabilities and Stockholders' Equity; Interest Rate and Interest Differential (Item 1 of Guide 3; Proposed Item 1402).*** Item 1.A of Guide 3 currently calls for balance sheets that show the average daily balances of significant categories of assets and liabilities, including all major categories of interest-earning assets and interest-bearing liabilities. Item 1.B currently calls for the disclosure of:
  - interest earned or paid on the average amount of each major category of interest-earning asset and interest-bearing liability;
  - average yield for each major category of interest-earning asset;
  - average rate paid for each major category of interest-bearing liability;
  - average yield on all interest-earning assets;

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- average effective rate paid on all interest-bearing liabilities; and
- net yield on interest-earning assets.

In addition, Item I.C of Guide 3 currently calls for a rate and volume analysis of interest income and interest expense for the last two fiscal years, separated by each major category of interest-earning asset and interest-bearing liability into amounts attributable to: (i) changes in volume; (ii) changes in rates; and (iii) changes in rates and volume.

Proposed Item 1402 of Regulation S-K would codify all the disclosures currently called for by Item I of Guide 3. To “provide investors with further detail of the drivers of changes in net interest earnings and the sources of funding,” the proposed rules would further disaggregate the categories of interest-earning assets required for disclosure (separating federal funds sold and securities purchased with agreement to resell) and interest-bearing liabilities (separating federal funds purchased and securities sold under agreements to repurchase, and requiring separate disclosure of commercial paper).

The proposed rules would also codify the current instructions in Guide 3 related to foreign activities that require separation of the information required by Item I between domestic and foreign activities for each significant category of assets and liabilities disclosed pursuant to Item I.A, as well as the percentage of total assets and total liabilities attributable to foreign activities.

- ***Investment Portfolio (Item II of Guide 3; Proposed Item 1403).*** Because U.S. GAAP and IFRS now require disclosures that are similar to many of the investment portfolio disclosures currently called for by Guide 3, the proposed rules would not codify most of the existing Guide 3 investment portfolio disclosures, including book value information, the maturity analysis of book value information, and disclosures related to investments exceeding 10% of stockholders’ equity.

Proposed Item 1403 of Regulation S-K would codify the weighted average yield disclosure for each range of maturities by category of debt securities currently called for under Item II.B of Guide 3, but the categories of debt securities required to be disclosed under the proposed rules would be those required in the registrant’s U.S. GAAP or IFRS financial statements. The proposed rules would apply only to debt securities that are not carried at fair value through earnings because, according to the SEC, these debt securities are often held longer than debt securities carried at fair value (such as trading securities), making the required information more meaningful.

- ***Loan Portfolio (Item III of Guide 3; Proposed Item 1404).*** Because “reasonably similar” disclosures are required by SEC rules, U.S. GAAP or IFRS, the proposed rules would not include the loan category disclosure currently called for by Item III.A of Guide 3, the loan portfolio risk elements disclosure currently called for by Item III.C of Guide 3, or the other interest-bearing assets disclosure currently called for by Item III.D of Guide 3. Proposed Item 1404 of Regulation S-K would codify:

- the maturity by loan category disclosure (currently called for by Item III.B of Guide 3), but according to the loan categories required to be disclosed in the registrants’ U.S. GAAP or IFRS financial statements;
- the existing Guide 3 instruction stating that the determination of maturity should be based on contractual terms. However, the instruction relating to the “rollover policy” for these disclosures would be clarified by stating that, to the extent non-contractual rollovers or extensions are included for purposes of measuring the allowance for credit losses under U.S. GAAP or IFRS, such non-contractual rollovers or extensions should be considered for purposes of the maturities classification (and the policy should be briefly disclosed); and
- the disclosure of the total amount of loans due after one year that have (a) predetermined interest rates and (b) floating or adjustable interest rates (currently called for by Item III.B of Guide 3). However, proposed Item 1404 would specify that this disclosure should be separated by the loan categories disclosed in the registrant’s U.S. GAAP or IFRS financial statements. In contrast to Item III.B of Guide 3, the proposed rules would not provide any exclusion of loan categories or permit the aggregation of any loan categories for purposes of disclosure.<sup>11</sup>

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- **Allowance for Credit Losses (Item IV of Guide 3; Proposed Item 1405).** The proposed rules would not require the analysis of loss experience disclosure currently called for by Item IV.A of Guide 3. Proposed Item 1405 of Regulation S-K would codify:
  - the ratio of net charge-offs during the period to average loans outstanding, but on a more disaggregated basis than the current Guide 3 disclosure, based on the loan categories required to be disclosed in the registrant's U.S. GAAP or IFRS financial statements; and
  - the breakdown of the allowance disclosures called for by Item IV.B, in tabular format (rather than permitting an alternative option to provide a narrative discussion, which, as the proposal notes, is not widely used by registrants), based on the loan categories presented in U.S. GAAP financial statements.
    - The proposal would not apply this requirement to IFRS registrants because IFRS already requires this information at a similar level of disaggregation in financial statements.

The proposal notes that linking the proposed disclosures to the specific loan categories required by U.S. GAAP or IFRS would provide investors with consistent categories of disclosures throughout the filing.

The proposal does not provide for any new disclosures related to the current expected credit loss methodology ("CECL") (Accounting Standards Update ("ASU") 2016-13 – Financial Instruments – Credit Losses (Topic 326)), but instead notes that the SEC "will wait until after the effective date of the new standards before [it assesses] the disclosures provided under the new standards and whether additional material information is necessary." The proposal specifically requests comment on whether there are allowance disclosures under an expected credit loss model (such as CECL) that would be material to an investment decision that are not already required by SEC rules, the proposed rules, U.S. GAAP or IFRS. Notably, the SEC asks whether disclosure of key inputs and assumptions used in an expected credit loss model would provide material information for investors and whether registrants should be required to provide disclosures relating to material adjustments to key inputs or assumptions.

Last month, the Financial Accounting Standards Board ("FASB") issued a proposed ASU that would allow smaller reporting companies ("SRCs") additional time to implement CECL, noting that FASB has "gained a greater understanding about the implementation challenges encountered by all types of entities when adopting a major [ASU]." <sup>12</sup> The January 2020 compliance date for CECL remains unchanged for calendar-year public business entities that meet the definition of SEC filer (other than SRCs).

- **Credit Ratios (Proposed Item 1405).** Proposed Item 1405 of Regulation S-K, in addition to codifying the Guide 3 requirement for disclosure of the ratio of net charge-offs during the period to average loans outstanding (based on the loan categories disclosed in U.S. GAAP or IFRS financial statements), would require disclosure of four additional credit ratios, along with the components used in their calculation:
  - allowance for credit losses to total loans (on a consolidated basis);
  - nonaccrual loans to total loans (on a consolidated basis);
  - allowance for credit losses to nonaccrual loans (on a consolidated basis); and
  - net charge-offs to average loans (by loan category disclosed in the financial statements).

The proposal notes that although SEC rules, U.S. GAAP and IFRS do not currently require disclosure of these credit ratios, banking registrants commonly disclose them, and their components are provided in regulatory reports filed with the U.S. banking agencies (and many of the components are required to be disclosed under U.S. GAAP or IFRS). The proposed rules would also require a discussion of the factors driving material changes in the ratios or the related components during the period presented, to "aid investors' understanding of the drivers of the changes in the ratios, particularly if both the numerator and denominator of the ratio have changed significantly during a period."

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- **Deposits (Item V of Guide 3; Proposed Item 1406).** Because U.S. GAAP and IFRS do not require disclosure regarding deposits at the same level of detail that is currently called for by Item V of Guide 3, Proposed Item 1406 of Regulation S-K would codify the majority of the disclosures currently called for by Item V of Guide 3, with some revisions:
  - The proposed rules would require separate presentation of U.S. time deposits in amounts in excess of the FDIC insurance limit, and time deposits that are otherwise uninsured, by time remaining until maturity (three months or less, over three through six months, over six through 12 months, and over 12 months).
  - The proposed rules would also replace the disclosure in Item V.D of Guide 3 requiring the “amount of outstanding domestic time certificates of deposit and other time deposits equal to or in excess of \$100,000” by maturity with a requirement to disclose the “amount of time deposits in uninsured accounts” by maturity, to accommodate future changes to applicable insurance limits, such as the FDIC’s insurance limit.<sup>13</sup>
  - The proposed rules would require bank and savings and loan registrants to quantify the amount of uninsured deposits at the end of each reporting period, to “provide enhanced information about deposits that are more prone to withdrawals if a registrant experiences financial difficulty, which could help investors better evaluate potential risks related to the registrant’s funding sources.”

Other key items noted in the proposal include the following:

- **Scope.** As noted above, Guide 3 by its terms applies only to bank holding companies, but other banking registrants provide Guide 3 disclosures per guidance from the SEC staff and rules applicable to depository institutions. The proposed disclosure requirements would continue to apply to bank holding companies, as well as “most of the registrants that under existing practice provide the disclosures called for by Guide 3,” including banks, savings and loan associations, and savings and loan holding companies. The proposal would not expand the scope of application to include other registrants, such as online marketplace lenders, but the proposal notes that “additional feedback on how investors of registrants outside of the proposed scope would use the proposed disclosures would be valuable,” including “whether these other registrants are providing similar information in a different format.”
- **Proposed Applicability to Domestic and Foreign Registrants.** The proposed rules would apply to both domestic and foreign registrants, but, to account for significant differences between U.S. GAAP and IFRS, would “provide flexibility in identifying specific categories and classes of instruments that should be disclosed,” link certain requirements to the categories or classes of instruments disclosed in U.S. GAAP or IFRS financial statements, and explicitly exempt foreign private issuers applying IFRS from certain disclosure requirements that are not applicable under IFRS.<sup>14</sup> The proposal notes that foreign bank and savings and loan registrants “typically provide the Guide 3 disclosures.”<sup>15</sup>
- **Reporting Periods.** Guide 3 currently calls for five years of Loan Portfolio and Summary of Loan Loss Experience data and three years of all other information. The proposal would define the term “reported period” for purposes of the new Subpart 1400 of Regulation S-K to mean each annual period required by SEC rules for a registrant’s financial statements—generally, two years of balance sheets and three years of income statements unless the registrant is an emerging growth company or SRC, in which case the registrant may present only two years of income statements. In addition, “insofar as it is known or reasonably available to the registrant,” the proposed rules would require disclosure of credit ratios for each of the last five years in initial registration statements and in offering statements by new bank and savings and loan issuers under Regulation A.<sup>16</sup> The proposal notes that historical information currently required by Guide 3 but that would be omitted from the proposed disclosures would generally be accessible through prior filings on EDGAR.

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- **Guide 3 Items Not Codified.**
  - **Return on Equity and Assets.** The proposed rules would not codify the four specific ratios called for by Item VI of Guide 3—return on assets, return on equity, the dividend payout ratio, and the equity to assets ratio. The proposal notes that these ratios “are not unique to bank and savings and loan registrants” that are the focus of the proposed rules, and that SEC guidance on MD&A regarding key performance indicators would require these disclosures when necessary to an understanding of the registrant’s financial condition and results of operations.
  - **Short-Term Borrowings.** The proposed rules would not codify the Item VII short-term borrowing disclosures currently called for by Guide 3 in their current form. Instead, the proposed rules would require additional information for each major category of interest-bearing liability disclosures, as discussed above with respect to Proposed Item 1402, and would further disaggregate the major categories of interest-bearing liabilities to include those referenced in Article 9 of Regulation S-X.
- **Conforming Changes to Regulation S-X.** Under the proposed rules, conforming changes would also be made to Article 9 of Regulation S-X—which is currently applicable to the consolidated financial statements of bank holding companies and to any financial statements of banks that are included in filings under the Exchange Act—(1) to include savings and loan associations and savings and loan holding companies within the scope of Article 9, and (2) to delete Rule 9-03(7)(a)-(c) because its requirements are addressed under U.S. GAAP and IFRS.<sup>17</sup>
- **Presentation.** Consistent with existing Guide 3, the proposal would not require the disclosures mandated by new Subpart 1400 of Regulation S-K to be presented in the notes to the financial statements, and the proposed disclosures would therefore not be required to be audited or subject to the SEC’s requirements to file financial statements in a machine-readable format using XBRL (although the proposal seeks additional feedback regarding whether the proposed disclosures should be required to be included in financial statement footnotes, as well as whether the tabular disclosures should be required to be submitted in XBRL).
- **Other Regulatory Regimes.** As did the March 2017 request for comment, the proposal asks whether there are additional areas of disclosure, such as information about non-interest income or capital, that should be addressed in the proposed rules. Unlike the March 2017 request for comment, the proposal does not specifically ask whether the SEC should require disclosures relating to resolution planning or stress testing.<sup>18</sup> In its recent proposal to modernize Items 101, 103 and 105 of Regulation S-K, the SEC noted, however, that it is common practice for registrants, including banking registrants, to address applicable laws and regulations that may be material to their business and proposed to revise Item 101(c) of Regulation S-K so the regulatory compliance disclosure requirement covers not only environmental regulations (as is currently the case) but also other material government regulations.<sup>19</sup> In that proposal, the SEC noted that the proposed revision to Item 101(c) “would codify what has become common practice regarding government regulation disclosure.” The commentary regarding the proposed revisions to Item 101(c) together with the absence of any specific questions relating to resolution planning and stress testing in the Guide 3 proposal appears to indicate that the SEC is not considering the adoption of prescriptive disclosure requirements relating to specific regulatory regimes (such as resolution planning or stress testing) in connection with its efforts to modernize Guide 3 and the disclosure requirements that are specific to banking registrants.

**NEXT STEPS**

The proposed rules are available on the SEC's website at <https://www.sec.gov/rules/proposed/2019/33-10688.pdf>. The public comment period will be open for 60 days after publication of the proposed rules in the Federal Register.

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## ENDNOTES

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- 1 Securities and Exchange Commission, Update of Statistical Disclosures for Bank and Savings and Loan Registrants (Sept. 17, 2019), *available at* <https://www.sec.gov/rules/proposed/2019/33-10688.pdf>.
- 2 Securities and Exchange Commission, Securities Act Industry Guides, Statistical Disclosure by Bank Holding Companies, Guide 3, *available at* <https://www.sec.gov/about/forms/industryguides.pdf>.
- 3 The proposal would codify certain disclosures currently called for by Guide 3, consistent with the approach taken by the SEC in updating other Industry Guides. The proposal notes that this approach “would mitigate uncertainty about when these disclosures must be included in Commission filings and enhance comparability across banking registrants, both foreign and domestic.”
- 4 Staff Accounting Bulletin Topic 11:K – Application of Article 9 and Guide 3 (SAB 11:K), *available at* <https://www.sec.gov/interps/account/sabcodet11.htm#K>.
- 5 12 C.F.R. § 335.311(b).
- 6 12 C.F.R. §§ 16.8(b) and 16.15(a).
- 7 Instructions to Item 4 of Form 20-F indicate that the information specified in any industry guide that applies to the registrant should be furnished. Form 40-F does not include a similar requirement.
- 8 Securities and Exchange Commission, Press Release, SEC Proposes Rules to Update Statistical Disclosures for Banking Registrants (Sept. 17, 2019), *available at* <https://www.sec.gov/news/press-release/2019-179>.
- 9 Press Release, at 1.
- 10 The Proposal notes that “In several instances, the proposed rules specifically link the disclosure requirements to the categories or classes of financial instruments disclosed in the registrant’s U.S. GAAP or IFRS financial statements ... [and] explicitly exempt foreign private issuers applying IFRS ... from certain of the disclosure requirements that are not applicable under IFRS.”
- 11 Item III.B of Guide 3 currently permits the exclusion of certain loan categories (real estate-mortgage, installment loans to individuals and lease financing) and the aggregation of other loan categories (foreign loans to governments and official institutions, banks and other financial institutions, commercial and industrial and other loans).
- 12 Under the proposed ASU, private companies, not-for-profit organizations and firms that are eligible to be SRCs under the SEC’s rules would be required to comply with the CECL standard for fiscal years beginning after Dec. 15, 2022 (i.e., by January 2023 for a calendar-year entity). Generally, a company qualifies as an SRC if it (1) has a public float of less than \$250 million or (2) has less than \$100 million in annual revenues and (i) has no public float or (ii) has a public float of less than \$700 million.
- 13 The \$100,000 threshold was established in 1976 when the FDIC insurance limit was \$40,000 and has never changed. The proposed rule would link the disclosure to the FDIC insurance limit (which is currently \$250,000).
- 14 The Proposal also notes that all registrants can request relief from providing information that is “unknown and not reasonably available to the registrant” under Securities Act Rule 409 (17 C.F.R. § 230.409) and Exchange Act Rule 12b-21 (17 C.F.R. § 240.12b-21).
- 15 The Proposal notes that General Instruction 6 to Guide 3, as well as Instructions to Item 4 of Form 20-F, currently indicate that the Guide 3 disclosures generally apply to foreign registrants.
- 16 The Proposal notes that “it is appropriate to require five years of this credit ratio information in initial registration and initial Regulation A offering statements given that investors would be seeing the loan portfolio and related history for the first time, and absent this requirement, investors would not have insight into the registrant’s loan portfolio credit history beyond, at most, the last two years.”
- 17 Staff Accounting Bulletin Topic 11:K directs savings and loan holding companies to apply Article 9. See Staff Accounting Bulletin Topic 11:K – Application of Article 9 and Guide 3 (SAB 11:K), *available at* <https://www.sec.gov/interps/account/sabcodet11.htm#K>. The SEC notes that if the proposed rules are adopted, the SEC staff intends to rescind SAB 11:K.

ENDNOTES (CONTINUED)

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- <sup>18</sup> See Securities and Exchange Commission, Request for Comment on Possible Changes to Industry Guide 3 (Statistical Disclosure by Bank Holding Companies) (Mar. 1, 2017), *available at* <https://www.sec.gov/rules/other/2017/33-10321.pdf>.
- <sup>19</sup> Securities and Exchange Commission, Modernization of Regulation S-K Items 101, 103 and 105, 84 Fed. Reg. 44358, 44368 (Aug. 23, 2019), *available at* <https://www.govinfo.gov/content/pkg/FR-2019-08-23/pdf/2019-17410.pdf>. For further information, please refer to our client memorandum *SEC Proposes Amendments to Regulation S-K Disclosure Requirements: Proposal Would Make Disclosures of Business and Risk Factors More Principles-Based and Update Certain Requirements for Disclosure of Legal Proceedings*, dated August 12, 2019 *available at* <https://www.sullcrom.com/files/upload/SC-Publication-SEC-Proposes-Amendments-to-Regulation-S-K-Disclosure-Requirements.pdf>.

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