

September 25, 2020

# SEC Finalizes Rules Updating Statistical Disclosure Requirements for Banking Registrants

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## Final Rules 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 11, 2020, the Securities and Exchange Commission adopted its previously proposed rules to update and expand 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>1</sup> Under the final rules, which were adopted substantially as proposed, Guide 3 is rescinded and replaced with a new Subpart 1400 of Regulation S-K. The final rules codify and in some cases revise certain Guide 3 disclosures, eliminate disclosures that overlap with SEC rules, U.S. GAAP or International Financial Reporting Standards ("IFRS") and introduce new credit ratio disclosure requirements, though most registrants already disclose these in their SEC filings.

The rules will be effective 30 days after publication in the Federal Register and registrants will be required to apply the final rules for the first fiscal year ending on or after December 15, 2021. Accordingly, for calendar year companies, the rules will first apply for their 2021 annual reports for the year ending December 31, 2021. For non-calendar year companies, the rules will first apply for their annual reports for the fiscal year that includes December 15, 2021. Registrants filing initial registration statements are not required to apply the final rules until making a filing containing financial statements for a period on or after December 15, 2021. Voluntary compliance with the new rules is permitted in advance of the mandatory

compliance date, so long as the final rules are applied in their entirety. The SEC states that registrants should continue to refer to Guide 3 until the final rules apply.

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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.”<sup>2</sup> 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.<sup>3</sup> Although Guide 3 applies by its terms only to bank holding companies, other banking registrants have provided Guide 3 disclosures. Staff Accounting Bulletin Topic 11:K 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 has noted 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> Also, a number of non-U.S. banking organizations that undertake offerings on a non-SEC registered basis (such as pursuant to Rule 144A) also provide Guide 3 disclosures in their offering documents.

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 usually treated in the same manner as disclosures required by a rule or regulation.

In March 2017, the SEC issued a request for comment on possible changes to Guide 3. As described in our [Memorandum to Clients](#), on September 17, 2019, the SEC proposed rules to update the disclosure of information that banks, bank holding companies, savings and loan associations, and savings and loan holding companies provide in order to reflect that, since the last substantive update to Guide 3 in 1986, there have been significant financial reporting changes not reflected in Guide 3.

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### FINAL RULES

The final rules, which were adopted substantially as proposed, codify the updated disclosure requirements in a new Subpart 1400 of Regulation S-K. Consistent with the approach reflected in recent disclosure-related rulemakings, the final rules largely streamline existing Guide 3 disclosures and eliminate overlaps

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with required GAAP and IFRS disclosures, rather than adding substantial new disclosure requirements. The key new disclosure requirement introduced by the final rules are the new credit ratios required by Item 1405(a) of Regulation S-K. The practical impact of this new requirement is likely to be limited because, as the SEC notes in the adopting release, many registrants already disclose these credit ratios.

Notable aspects of the final rules include the following:

- ***Distributions of Assets, Liabilities and Stockholders' Equity; Interest Rate and Interest Differential (Item I of Guide 3; Item 1402).*** Item I.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 I.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;
  - 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.

Item 1402 of Regulation S-K codifies all the disclosures currently called for by Item 1 of Guide 3. The final rules 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). Item 1402 also codifies the current instructions in Guide 3 related to foreign activities that call for 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.

In a revision to the proposal, Item 1402 of Regulation S-K states that the enumerated categories of interest-earning assets and interest-bearing liabilities “must be included, if material,” among the major categories for which disclosure is provided, instead of stating the major categories “must include, at a minimum” those that are enumerated. The SEC explained that this change was intended to permit registrants not to include immaterial information that could make it more difficult to understand the material drivers of business results.

- ***Investment Portfolio (Item II of Guide 3; Item 1403).*** Item 1403 of Regulation S-K, which was adopted as proposed, codifies 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 Item 1403 will be those required in the registrant’s U.S. GAAP or IFRS financial statements. Item 1403 only applies to debt securities that are not carried at fair value through earnings. Because U.S. GAAP and IFRS now require disclosures that are similar to many of the investment portfolios called for by Guide 3, Item 1403 does 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.
- ***Loan Portfolio (Item III of Guide 3; Item 1404).*** Item 1404 of Regulation S-K codifies:

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- the maturity by loan category (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. In a revision to the proposal, the SEC separated the proposed "after five years" maturity category into two categories: (i) after five years through 15 years; and (ii) after 15 years. The SEC noted that these additional maturity categories reflect the maturity periods of commonly offered residential mortgage loan products, such as 15-year and 30-year residential mortgages;
- the existing Guide 3 instructions stating that the determination of maturities should be based on contractual terms. The instructions relating to the "rollover policy" are 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, the non-contractual rollovers or extensions should be included for purposes of the maturities classification and the policy should be 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). The final rules specify that this disclosure should be disaggregated by the loan categories disclosed in the registrant's U.S. GAAP or IFRS financial statements.

Because reasonably similar disclosures are required by SEC rules, U.S. GAAP or IFRS, Item 1404 does 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.

- **Allowance for Credit Losses (Item IV of Guide 3; Item 1405).** Item 1405, which was adopted as proposed, does not require the analysis of loss experience disclosure currently called for by Item IV.A of Guide 3, and codifies:
  - the requirement to disclose 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 requirement to provide a breakdown of the allowance disclosures called for by Item IV.B, in tabular format, based on the loan categories presented in U.S. GAAP financial statements.

Item 1405 does not apply this requirement to IFRS registrants because IFRS already requires this information at a similar level of disaggregation in financial statements.

The SEC noted 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. Consistent with the proposal, Item 1405 does not require any new disclosures related to Current Expected Credit Losses (CECL).

- **Credit Ratios (Item 1405).** 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), Item 1405(a) of Regulation S-K, which was adopted as proposed, requires disclosure of 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); and
  - allowance for credit losses to nonaccrual loans (on a consolidated basis).

Most registrants already include these credit ratios in their SEC filings. Item 1405(a) also requires a discussion of the factors that drove material changes in the ratios, or related components, during the periods presented.

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Item 1405(a) does not require disclosure of the ratio of nonaccrual loans to total loans or the allowance for credit losses to nonaccrual loans for IFRS registrants because there is no concept of nonaccrual loans in IFRS.

- **Deposits (Item V of Guide 3; Item 1406).** Item 1406 of Regulation S-K codifies the majority of the disclosures in Item V of Guide 3, with some revisions:
  - The final rules 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).
  - Foreign registrants are required to disclose the definition of uninsured deposits appropriate for their country of domicile.
  - The final rules 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 time deposits that are “otherwise uninsured.”
  - The final rules require registrants to quantify the amount of uninsured deposits at the end of each reporting period, though estimates of the amount are permitted.

Notable revisions to the proposal include:

- Clarifying that for registrants that are U.S. federally insured depository institutions “uninsured deposits” is defined as the portion of deposit accounts in U.S. offices that exceed the FDIC insurance limit or similar state deposit insurance regime limit, and amounts in any other uninsured investment or deposit accounts that are classified as deposits and not subject to any federal or state deposit insurance regime.
- Directing all registrants to consider the methodologies and assumptions used for regulatory reporting of uninsured deposits in connection with disclosures about uninsured deposits.
- Permitting registrants to disclose uninsured deposits at the reported date based on an estimate of uninsured deposits if it is not reasonably practicable to provide a precise measure of uninsured deposits, so long as the estimates are made based on the same methodologies and assumptions used for the registrant’s regulatory reporting requirements and the registrant discloses that the amounts are based on estimated amounts of uninsured deposits.

Other key aspects of the final rules include the following:

- **Scope.** As noted earlier, 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 final rules will continue to apply to bank holding companies as well as to other bank and savings and loan registrants. The final rules do not expand the scope of the application to include other registrants, such as online lenders and other financial technology companies engaged in the activities addressed by the Guide 3 disclosure areas.
- **Applicability to Domestic and Foreign Registrants.** The final rules apply to both domestic and foreign registrants, accounting for significant differences between U.S. GAAP and IFRS by linking disclosure requirements to categories or classes of financial instruments disclosed in the registrant’s U.S. GAAP or IFRS financial statements, and explicitly exempting foreign private issuers applying IFRS from certain of the disclosure requirements. The final rules do not change the status quo for Form 40-F filers, though the SEC has observed that Canadian foreign private issuers that are financial institutions typically provide Guide 3 disclosures in their Form 40-F filings.
  - The final rules do not codify the undue burden or expense accommodation for foreign registrants in Guide 3’s General Instruction 6, which states that the disclosure items also apply to foreign registrants to the extent the information is available or can be compiled without unwarranted or undue burden and expense. In doing so, the SEC noted that all registrants, not just foreign registrants, can avail themselves of relief from providing information that is “unknown and not

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reasonably available to the registrant” under Securities Act Rule 409 and Exchange Act Rule 12b-21. Although several commenters requested guidance related to the application of Securities Act Rule 409 and Exchange Act Rule 12b-21 by foreign registrants, the SEC did not believe that it was necessary to do so because “registrants have applied these rules for many years in a variety of other contexts without the need for additional guidance” and because such application is “dependent on the registrant’s specific facts and circumstances.”

- **Reporting Periods.** The final rules define the term “reported period” for purposes of Subpart 1400 of Regulation S-K to mean each annual period required by SEC rules for a registrant’s financial statements, as well as any additional interim period subsequent to the most recent fiscal year end if a material change in the information or the trend evidenced by the information. SEC rules generally require two years of balance sheets and three years of income statements unless the registrant is an emerging growth company or smaller reporting company, in which case the registrant may present only two years of income statements.
- **Guide 3 Items Not Codified.**
  - **Return on Equity and Assets.** The final rules do 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 SEC noted that it did not codify the requirement to disclose these ratios in Subpart 1400 of Regulation S-K because these ratios are not unique to bank and savings and loan registrants and because the SEC’s guidance on MD&A already requires registrants to identify and discuss key performance measures when they are used to manage the business and would be material to investors.
  - **Short-Term Borrowings.** The final rules do not codify the Item VII short-term borrowing disclosures currently called for by Guide 3 in their current form. Instead, the final rules require additional information for each major category of interest-bearing liability disclosures, as discussed above with respect to Item 1402, and 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 final rules, conforming changes are 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), which requires disclosure of loans by category, because its requirements are addressed under U.S. GAAP and IFRS.<sup>8</sup>
- **Presentation.** Consistent with existing Guide 3, Subpart 1400 of Regulation S-K does not require mandated disclosures to be presented in the notes to the financial statements, and the 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, unless the registrant elects to include the disclosures within the financial statements.

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ENDNOTES

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- 1 Securities and Exchange Commission, Press Release, SEC Modernizes Disclosures for Banking Registrants (Sept. 11, 2020), *available at* <https://www.sec.gov/news/press-release/2020-205>.
- 2 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>.
- 3 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>.
- 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 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 staff intends to rescind SAB 11:K.

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