Crowe

SEC comment letters in the banking industry: 2023 edition

Introduction

Liquidity, interest rates, market disruptions, and inflation – 2023 has had no shortage of emerging risks in the banking sector. The Division of Corporation Finance (CorpFin) of the Securities and Exchange Commission (SEC) continues to communicate the importance of evolving disclosures to address emerging risks.[1] CorpFin continues to execute its *Sarbanes-Oxley Act of 2002* mandate by reviewing filings of each registrant at least once every three years, and we are now beginning to see publicly released comment letters on 2023's emerging risks.

CorpFin's mandated *Sarbanes-Oxley Act* reviews include filings under both the *Securities Act* and the *Exchange Act*, and each review might or might not result in a comment letter. Historically, CorpFin has released banking-specific observations from its filing reviews,[2] and while prior themes can remain conceptually relevant when material, the topics on which the CorpFin staff issues comments continually evolve.

This report identifies themes from publicly available SEC comment letters for registrants in the banking industry, and each section includes example SEC comments. This edition includes new or enhanced sections to address comments on areas of recent staff focus (for example, emerging risks, risk concentrations, and corporate governance), new rules (for example, statistical disclosures for banks and savings and loan registrants), and high-volume banking comment areas (for example, current expected credit losses (CECL), income taxes, and non-GAAP). We provide our observations and links to relevant Crowe resources.

We hope that you find this publication useful as you consider enhancements to your periodic disclosures.

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[1] A list of formal CorpFin messages include: https://www.sec.gov/corpfin/cfdisclosure#cfguidancetopics

[2] See, for example, https://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic5.htm

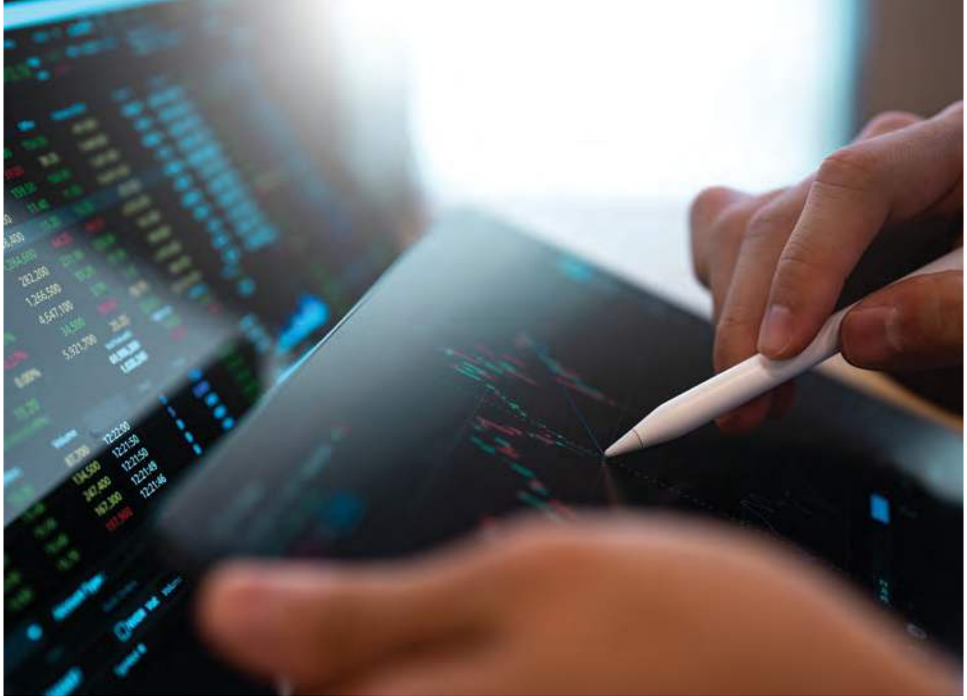
Emerging risks

The business environment is dynamic, and CorpFin staff frequently asks registrants to enhance or modify disclosures to help investors assess the nature and impact of changes in the business environment on the company.

Example SEC comments:

In light of recent market events and activities within the banking sector, please revise the business, risk factors, management's discussion and analysis (MD&A), and other sections, where appropriate, to address any material impact these events and activities have had on your financial condition, operations, customer base, liquidity, capital position, and risk profile. Provide quantitative and qualitative disclosure as appropriate and clarify what actions management is undertaking in response to market events and activities. In this regard, examples of expanded disclosure may include but are not limited to the following:

- Provide an update on your liquidity management and capital position. Include qualitative and quantitative information about your cash position, investment securities, deposits, borrowings, and sources of available but unused borrowings. Any such revised disclosures should include identifying and discussing material stress-testing scenarios, metrics, or measures that you have used to evaluate, monitor, and manage your liquidity and capital position.
- Discuss material trends and recent activities, as of a more recent date, in your deposit balance, such as deposit inflows, withdrawals, uninsured versus insured deposits, and average rates offered by type of deposit (for example, demand deposits, time deposits, etc.).
- Disclose and discuss any significant market, industry, or individual concentrations in your deposit balance and how you manage the concentration risk, if applicable. For example, revise to disclose if there are any significant industries or other concentrations within the population of depositors with any deposits in excess of the Federal Deposit Insurance Corp. insurance limit of $250,000.
- In regard to your quantitative and qualitative disclosures about market risk, expand your discussion of interest-rate risk and interest-rate sensitivity to help readers better understand and assess potential impacts to various financial statement line items affecting your financial condition and results of operations.



We note that your asset and liability committee manages interest-rate sensitivity “by changing the mix, pricing and re-pricing characteristics of its assets and liabilities, through the management of its investment portfolio, its offerings of loan and selected deposit terms and through wholesale funding.” Explain and quantify the existence of material asset liability mismatch, if applicable, for the periods presented or as of a more recent date, and discuss how the committee considers, measures, and manages mismatch and related risks, including what information it has considered related to recent market events. Please disclose whether you have a chief risk officer, which individuals or committees are responsible for “risk management practices,” and the frequency of meetings by the relevant individuals and committees.

We note that you have a significant volume of uninsured deposits as a percentage of your total deposits. Are there any industry concentrations among your noninsured deposits? The revised discussion should indicate the extent to which your board’s asset and liability committee has made adjustments to address recent events that impacted the banking industry or your market areas.

CROWE PRACTICE NOTE

As market events of early 2023 progressed, many investors brought renewed focus to fair value disclosures, and banks should be prepared for continued scrutiny.

Allowance for credit losses (ACL) under CECL

The ACL often is one of a bank's most material accounting estimates, and accounting policy and footnote disclosures provide users critical information including about management's key accounting decisions. CorpFin frequently comments on material accounting estimates such as CECL when disclosures are incomplete or inconsistent with other information contained in the filing.

Example SEC comments:

Please revise future filings to discuss the reasonable and supportable forecast used in your current estimate of credit losses. Refer to Accounting Standards Codification (ASC) 326-20-50-11B for guidance.

You disclose your election to exclude accrued interest receivable on loans from your estimate of expected credit losses. Please represent to us that in future filings that you will specifically indicate that you made this election because you write off uncollectible accrued interest in a timely manner and what time periods you consider timely at the individual class of loan level as required under ASC 326-20-50-3C. In your response tell us those time periods or tell us where you have made the required disclosure in your filing or why it is not warranted.

Please tell us in detail why your adoption of ASC 326 and continuing application of that guidance results in an accrual for credit losses on off-balance sheet exposure that is not material when you have over $XX billion in loan commitments and stand-by letters of credit outstanding at Dec. 31, 20XX. In your response, tell us the historic rate of these off-balance sheet exposures converting to actual loans and funding and how you can manage the extension of credit and apparently avoid material future credit losses. Reference for us the specific authoritative literature you relied upon to support your accounting.

You disclose that you consider the period of time a security has been in an unrealized loss position in assessing credit losses or other factors. As the length of time a security is in an unrealized loss position is not a factor in assessing whether credit losses exist as stipulated in ASC 326-30-55-1, please tell us whether a change to your allowance for credit losses on debt securities results from removing the length of time from your assessment. Separately represent to us that you will modify your policy disclosure in future filings to remove the length of time a security is in an unrealized loss position from the factors considered in your credit loss assessment.

You disclose aggregate interest income reversal for loans being placed on nonaccrual status. Please tell us whether this disclosure is intended to represent your election under ASC 326-20-35-8A. If so, represent to us that in future filings you will disaggregate the amounts reversed against interest income by loan portfolio segment as required by ASC 326-20-50-3D.

Please represent to us that you will provide discussion of the risk characteristics relevant to each of your loan portfolio segments as required by ASC 326-20-50-11. Otherwise, tell us where you have made these disclosures in your filing or why they are not warranted.

You provide detail of your collateral dependent loans. Please represent to us that in future filings you will disclose, by class of receivable, the extent to which collateral secures your collateral-dependent loans and any significant changes therein as required by ASC 326-20-50-20. Otherwise, tell us where you made these disclosures in your filing or why they are not warranted.

CROWE PRACTICE NOTE

Historically, CorpFin has commented on various matters related to acquired loans, whether acquired separately in pools of loans or as part of a whole bank or branch acquisition. For example, CorpFin staff has requested that registrants disaggregate, in both footnote disclosures and MD&A,[3] information related to originated loans and acquired loans, when material to an understanding of the entity's results of operations. On June 27, 2023, the Financial Accounting Standards Board (FASB) issued a proposed accounting standards update (ASU) on purchased financial assets (PFAs) based on stakeholder feedback received during the post-implementation review of the CECL standard. The proposed ASU would change how entities initially record an ACL on PFAs subject to Topic 326, which likely would impact comment letter themes.

[3] See Item 303 of Regulation S-K.

Concentrations of credit risk

Registrants often provide disclosures required under GAAP,[4] risk factor disclosures,[5] MD&A,[6] and other disclosures related to concentrations of credit risk within their loan portfolio. CorpFin seeks additional or clarifying disclosure if the disclosure is unclear or the staff believes additional quantitative or qualitative disclosures are necessary to adequately inform investors.

CROWE PRACTICE NOTE

In March 2022, the FASB issued ASU 2022-02, which, along with other requirements, enhances disclosures for certain loan refinancings and restructurings by creditors when a borrower is experiencing financial difficulty. In the near term, staff comments on concentrations of credit risk related to loan refinancings and restructurings are likely to focus on compliance with the new standard. Refer to our ASU 2022-02 webinar and frequently asked questions, which include illustrative disclosures, for more information.

Example SEC comments:

We note that you have a large amount of commercial real estate loans. Considering recent concerns about the quality of commercial real estate loans, including even well-financed commercial property management firms defaulting on properties with lower occupancy, please tell us how you concluded that your investors do not require a risk factor to discuss the current condition of your portfolio, including any particular concentrations of performing loans on properties that have lower occupancy.

Please revise this section and MD&A as appropriate in future filings to quantify the amount of loans at each period end presented that cause a concentration of credit risk (interest-only loans, no-income-verification loans, etc.) and to clearly describe the terms of the loans that cause the concentrations. Refer to ASC 825-10-50-20 for guidance. Additionally, revise MD&A to discuss material trends in these loans and impact on credit risk. In your response, please provide a draft of your disclosure for the periods presented in the current Form 10-K.

Your risk factor disclosure indicates greater seasoning of your loan portfolio could increase the risk of credit defaults in the future. To better assess this risk, please expand to disclose the average age of loans in each major lending category or advise how it was determined not to include such disclosure.

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4 See ASC 825-10-50-2

5 See Item 105 of Regulation S-K

6 See Item 303 of Regulation S-K

MD&A

Item 303 of Regulation S-K requires disclosure of information that allows investors to assess the entity's financial condition, changes in financial condition, and results of operations. Among other disclosures, MD&A includes:

- Information about financial condition and results of operations, including discussion of the entity's liquidity
- Known trends or uncertainties that are reasonably likely to cause current reported financial information to be not necessarily indicative of the future
- Quantitative and qualitative information about the entity's critical accounting estimates

MD&A is typically one of the most frequent areas of staff comment because its objective is to allow investors to understand management's views on the entity's short-term results and future prospects.[7]

Example SEC comments:

We note your presentation of the allowance for credit losses activity at the loan portfolio level and your related discussion of changes in the provision for credit losses. We also note that you present aging and risk information by class of loan. In future filings, please expand your discussion to identify and quantify any changes or known trends in the activities (that is, provision, charge-offs, recoveries) impacting the allowance for credit losses by class of loan, where significant. Refer to Item 303(b)(2) of Regulation S-K.

We note you attribute the negative provision of $A million for the quarterly period ended March 31, 20XX, due to the annual model recalibration, the removal of two qualitative factors that are no longer applicable, and lower loss rates. Please revise your disclosures, in future filings, to address the following:

- Describe the annual model recalibration process, including more specific details regarding the updating of "delay periods" and "qualitative factor scorecard ranges" and how these incremental changes impacted overall trends in the model and provisioning process.
- Identify and describe the two qualitative factors and explain why they were determined to no longer be applicable.
- Quantify and discuss changes in the loss rates between the periods being compared, including if those changes are concentrated in any specific class of loans.
- Quantify the impact on the provision associated with each of the attributed factors above.

[7] See Item 303(a) of Regulation S-K

CROWE PRACTICE NOTE

The SEC's final rule "Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information" was effective for annual reports for fiscal years ending on or after Aug. 9, 2021. The final rule added Item 303(b)(3) of Regulation S-K, which requires disclosure of critical accounting estimates including, if material and reasonably available, information about estimation uncertainty, how the estimate has changed over time, and a sensitivity analysis. Prior to the final rule, critical accounting estimate disclosures were not explicitly required; rather, they were encouraged in staff interpretive guidance.

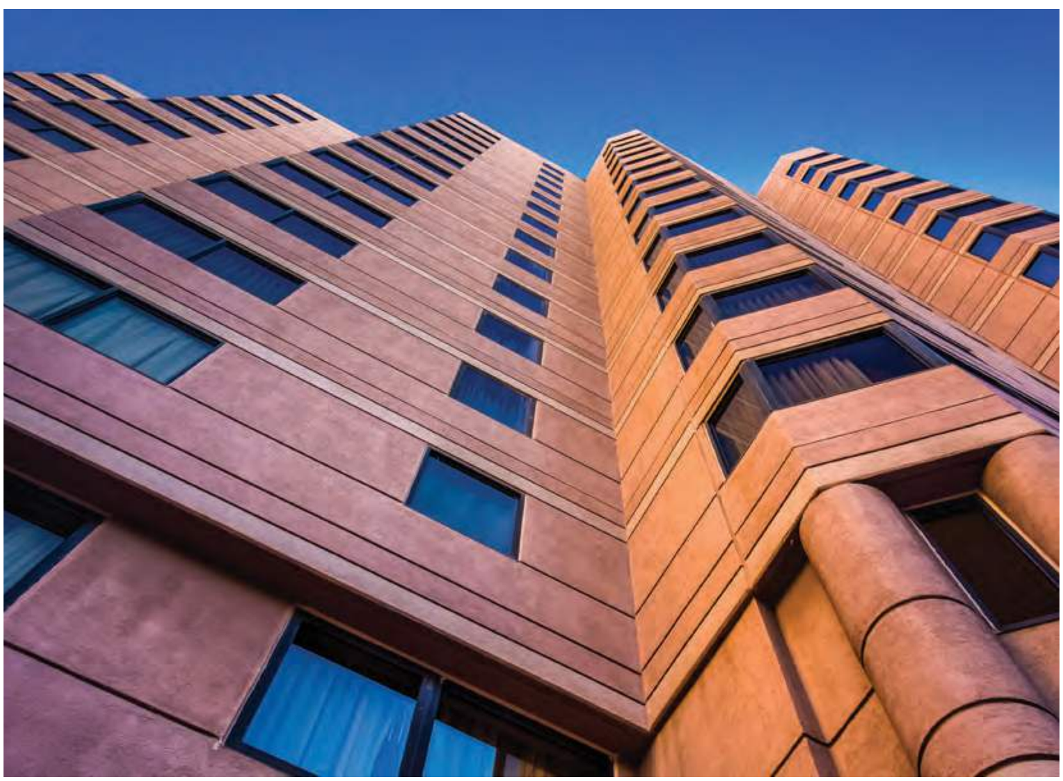
We note that you do not include disclosure of any critical accounting estimate(s). Provide this disclosure in future filings. Your disclosures should explain why each critical accounting estimate is subject to uncertainty and, to the extent the information is material and reasonably available, how much each estimate and/or assumption has changed over a relevant period as well as the sensitivity of the reported amounts to the material methods, assumptions, and estimates underlying its calculation. Ensure that the disclosure of your critical accounting estimate(s) is not a repetition of your significant accounting policies. Refer to Item 303(b)(3) of Regulation S-K.

You disclose that your allowance is estimated using a historical loss percentage based on losses arising specifically for each respective loan category, adjusted for various economic and environmental factors that are considered reasonable and supportable related to the underlying loans. Please provide a proposed revised disclosure to be included in future filings:

- Identify key quantitative inputs used in your estimate of the allowance for credit losses.
- Indicate and quantify how these key quantitative inputs changed period to period.
- Quantify the qualitative component of your estimate and how it interacts with the quantitative component during the period.
- Summarize the information requested above and clarify the length of time in your reasonable and supportable forecasts and the reversion method you applied after the reasonable and supportable forecast period. See Item 303(b)(3) of Regulation S-K and ASC 326-20-50-11.

You disclose that your allowance for credit losses on loans estimate is not limited to current and projected economic conditions, the adequacy of and value of underlying collateral on real estate loans, the financial strength of the borrower, qualitative assessments, and other factors. Please provide a proposed revised disclosure to be included in future filings:

- Identify the key quantitative inputs used in your estimate for allowance for credit losses and unfunded commitments.
- Indicate and quantify how these key quantitative inputs changed from period to period.
- Quantify the qualitative component of your estimate and how it interacts with the quantitative component during the period.
- Provide a sensitivity analysis of the impact on the current estimate of reasonably likely changes in the key quantitative inputs. In your response, provide the key quantitative inputs you used from the Moody's consensus scenario at Dec. 31, 20XX, and its baseline scenario at Dec. 31, 20YY. Clarify whether you consider the identified GDP, unemployment rates, interest rates, and commercial real estate prices to be your key quantitative inputs. See Item 303(b)(3) of Regulation S-K.



Statistical disclosures for bank and savings and loan registrants

The SEC's revised statistical disclosures for bank and savings and loan registrants included in subpart 1400 of Regulation S-K required compliance for fiscal years ending on or after Dec. 15, 2021. CorpFin often comments if disclosures do not materially comply with subpart 1400.

Example SEC comments:

Please tell us the amounts of fees included in interest income for each period presented. Tell us your consideration for disclosing these amounts as required by Instruction 3 to Item 1402 of Regulation S-K.

Please represent to us that, in future filings, you will disaggregate your disclosure of your loans due after one year that have predetermined interest rates and those with adjustable rates for each loan category presented in your table as required by Item 1404(b) of Regulation S-K.

Please represent to us that, in future filings, you will provide the maturity disclosures, including providing an over-15-year category, if appropriate, for each loan category presented in your financial statements as required by Item 1404(a) of Regulation S-K. Otherwise, tell us why it is appropriate to include this information for only your commercial and industrial loans and leases and your construction loans and leases.

We note that you provide aggregated fixed rate versus variable rate information for the loan categories presented in Table X. Please represent to us that, in future filings, you will provide this disclosure for each category of loans presented in your financial statements as required by Item 1404(b) of Regulation S-K.

We note the disclosure of various asset quality ratios. We also note that some of these ratios are specifically required to be disclosed by Item 1405(a) of Regulation S-K and that the net charge-offs to average loans outstanding by financial statement loan category is provided. Please represent to us that, in future filings, you will specifically discuss the factors that drove material changes in the required ratios as stipulated in Item 1405(b) of Regulation S-K, or tell us where you have disclosed this information or why it is not warranted.

Please tell us what basis you used to calculate the average balances and yields/rates presented here. If other than on a daily basis, tell us why the average you used is appropriate. In any regard, represent to us that, in future filings, you will disclose the basis for your average computations as required by Item 1401(c) of Regulation S-K.

Revenue recognition

Adoption of ASC Topic 606 was largely a scoping, documentation, and disclosure exercise with minimal impact on recognition and disclosure of revenue for the banking industry. When material revenue streams within the scope of ASC 606 are included in a bank's financial statements, CorpFin staff often will comment on revenue recognition disclosures that are incomplete or unclear.

Example SEC comments:

Please tell us which streams of the company's revenue are within the scope of ASC 606 and how you addressed the requirement in ASC 606-10-50-4 to disclose revenue recognized from contracts with customers separately from other sources of revenue.

Please revise future filings to include the disclosure requirements in ASC 606-10-50 in the Summary of Significant Accounting Policies and Notes to the Consolidated Financial Statements.

Given the significance of noninterest income to your operations, please revise future filings to include disclosure requirements in ASC 606-10-50 in the Summary of Significant Accounting Policies and Notes to the Consolidated Financial Statements.

Income taxes

Income taxes historically have been and continue to be a staff focus area because income taxes are generally complex and material to most entities. Income taxes become increasingly complex when an entity operates in multiple jurisdictions (for example, federal, state, or foreign) and is subject to differing risks, taxing regimes, and uncertainties. CorpFin issues comments when the disclosures included in the document are not transparent or do not appear to provide sufficient information (for example, rate reconciliation matters) in the footnotes or MD&A for an investor to understand the entity's tax exposure.

CROWE PRACTICE NOTE

The FASB voted to finalize a proposed ASU on Aug. 30, 2023, that will improve income tax disclosures. The final standard will provide financial statement users with information regarding cash taxes paid by jurisdiction along with more granular information in the rate reconciliation. Issuance of the final ASU on this topic could affect future comment letter themes. For more information on this proposal, refer to the Crowe article "FASB to Enhance Income Tax Disclosure Requirements."

Example SEC comments:

Please revise future filings to disclose in greater detail the nature of each significant reconciling item per the guidance in ASC 740-10-50-12. Please disaggregate by county and subsector to the extent necessary. Specifically, and for each significant reconciling item, please consider the following:

- How and when these items were originated
- Significant changes to these items from period to period and the reasons for the changes
- Any unique features of each noted material reconciling item

Please tell us why state income taxes net of the federal tax benefit resulted in a reduction in income tax expense in 20XX. Please also tell us if you paid or expect to pay any state income taxes in 20YY.

Please tell us about the nature of the income tax receivable true-ups of $AA million and the return to provision adjustments of ($BB) million in 20XX. Please also tell us the factors that resulted in the true-up adjustments in 20YY.

Net deferred tax assets decreased $AA million in 20XX driven by the recognition of deferred tax liabilities of $BB million related to deferred income and $CC million of insurance premiums offset by an increase in deferred tax asset net operating losses of $DD million and the recognition of $EE million of tax credit carryovers. Additionally, you incurred excise taxes of $FF million. Please tell us – and enhance future filings to disclose – what gave rise to these changes. Refer to ASC 740-10-50.

According to the disclosure, your 20XX income tax benefit from continuing operations was $AA million, which was largely attributed to a $BB million deferred income tax benefit as a result of an equity investment in a wholly owned subsidiary. Please address the following:

- Tell us the facts and circumstances related to the recognition and measurement of the deferred tax asset ($CC million) and valuation allowance ($DD million) attributable to this transaction, including specific accounting guidance supporting your treatment.
- Revise Management's Discussion and Analysis of Financial Condition and Results of Operations and the notes to your financial statements in future filings to provide additional details regarding this transaction. Please refer to Item 303 of Regulation S-K and ASC 740-10-50-14.

The table on page XX indicates that you recognized a $AA million deferred tax liability at Dec. 31, 20XX, compared to $BB million at Dec. 31, 20YY, related to deferred real estate investment trust dividends and also that you recognized $CC million of deferred federal tax expense for 20XX. Please tell us, in detail, all the facts and circumstances related to the recognition of this deferred tax liability. Please also revise your MD&A in future filings to discuss the nature of transactions resulting in this variability in reported amounts related to the deferred tax liability and any implications on future operating results and liquidity.

CROWE PRACTICE NOTE

The FASB issued ASU 2023-02 in March 2023 to expand the proportional amortization method to tax equity investments if certain conditions are met. CorpFin staff likely will critically evaluate new disclosures. Refer to the Crowe article "Investments in Income Tax Credit Structures: FAQ" for more information on this ASU.

Risk and governance matters

CorpFin staff comment when corporate governance proxy statement disclosures[8] are not sufficiently tailored to address how the registrant's board structure and risk oversight address the unique circumstances and challenges of the registrant's business, which is information investors need to make informed voting and investment decisions.

CROWE PRACTICE NOTE

The Crowe article "SEC Focuses on Item 407 Board Governance Disclosure" provides further insights into CorpFin's focus on board risk disclosures.

Example SEC comments:

Please expand upon how your board administers its risk oversight function. Please disclose:

- The time frame over which you evaluate risks (short term, intermediate term, or long term) and how you apply different oversight standards based on the immediacy of the risk assessed
- Whether you consult with outside advisers and experts to anticipate future threats and trends and how often you reassess your risk environment
- How the board interacts with management to address existing risks and identify significant emerging risks
- Whether you have a chief compliance officer and to whom this position reports
- How your risk oversight process aligns with your disclosure controls and procedures

Please expand on your discussion of the reasons you believe that your leadership structure is appropriate, addressing your specific characteristics or circumstances. In your discussion, please also address the circumstances under which you would consider having the chair and CEO roles filled by a single individual, when shareholders would be notified of any such change, and whether you will seek input from shareholders.

[8] See Item 407(h) of Regulation S-K

Please expand upon the role that your independent chair plays in the leadership of the board. For example, please enhance your disclosure to address whether or not your chair may:

- Represent the board in communications with shareholders and other stakeholders
- Require board consideration of, and/or override your CEO on, any risk matters
- Provide input on design of the board itself

CROWE PRACTICE NOTE

The SEC continues its rulemaking efforts in a number of corporate governance disclosure areas. Recent final rules include:

- *Cybersecurity risk management, strategy, and governance*
- *Issuer share repurchases*
- *Executive compensation clawback*
- *Insider trading*

CorpFin has various strategies to communicate views on registrant compliance with new disclosure rules, including interpretive guidance, public statements, or comment letters. We will continue to keep you informed as we see developments on these new rules.

Non-GAAP measures

Non-GAAP measures[9] are a key focus area of CorpFin staff, and the staff remarked at the Dec. 2022 AICPA and CIMA Conference on Current SEC and PCAOB Developments that non-GAAP measures continue to be the leading area of SEC comment letters. Individually tailored accounting principles (ITAP),[10] prominence issues (for example, full non-GAAP income statements or presentation of the non-GAAP measure before the GAAP measure), and labeling or other compliance issues often receive a comment.

CROWE PRACTICE NOTE

In conjunction with the AICPA conference remarks, CorpFin updated its "Non-GAAP Financial Measures Compliance and Disclosure Interpretations" on Dec. 13, 2022, to provide refreshed perspectives on a number of non-GAAP topics.

ITAP

CorpFin has explained that Regulation S-K allows for measures that exclude amounts from the most directly comparable measure, but the regulation does not contemplate changing the basis of accounting (for example, from up-front to ratable recognition or from straight line to nonstraight line). Changing the basis of accounting typically is an ITAP because the measure often does not reflect the economics of the transaction. Several examples appear here, but the examples do not address all iterations of this type of comment.

Example SEC comments:

We note that you present different non-GAAP measures in the slide deck presentation accompanying your earnings conference call as compared to the non-GAAP measures presented elsewhere. Please tell us why it is appropriate to reflect each of the adjustments presented on slide XX of that presentation for the following measures:

- Adjusted net interest income
- Adjusted noninterest income
- Adjusted noninterest expense
- Adjusted pretax preprovision net revenue
- Adjusted net income before tax

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[9] See Item 10(e) of Regulation S-K.

[10] See Non-GAAP Financial Measures Compliance and Disclosure Interpretation Question 100.04 at https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm

In your response tell us how each such adjustment is not a prohibited tailored recognition or measurement method as stipulated in Question 100.04 or represents the prohibited removal of normal, recurring cash operating expenses as stipulated in Question 100.01 of the Compliance and Disclosure Interpretations for Non-GAAP Financial Measures.

We note that you disclose non-GAAP adjusted net income excluding the impact of "qualitative factors adjustment" as a result of sustained favorable macroeconomic conditions. It appears that this adjustment represents a tailored accounting principle prohibited by Rule 100(b) of Regulation G, as discussed in Question 100.04 of the Non-GAAP Financial Measures Compliance and Disclosure Interpretations. Please remove this adjustment from future filings. Alternatively, tell us how you comply with the guidance.

CROWE PRACTICE NOTE

Concluding whether a specific measure represents an ITAP can be challenging. Registrants that are considering the appropriateness of an existing or proposed non-GAAP financial measure are encouraged to consult with the CorpFin staff.

Labeling

CorpFin routinely comments if the registrant failed to label the non-GAAP measure, the existing non-GAAP measure labeling is misleading to investors, or the current presentation of the non-GAAP measure conflicts with other SEC rules and regulations.

Example SEC comments:

We note that you disclose net income, as adjusted; total noninterest expense, as adjusted; and total noninterest income, as adjusted. These adjusted measures appear to be non-GAAP measures. Please identify and label these measures as non-GAAP as required by Item 10(e)(1)(i) of Regulation S-K and provide all the disclosures in Item 10(e)(1)(i)(A-D) related to all non-GAAP indicators.

We note that you characterize the provision for loan losses related to the XX bankruptcy as nonoperating and you exclude the amount from your non-GAAP financial measure operating earnings and related non-GAAP financial metrics. Please change the name of this non-GAAP measure to more accurately reflect its content, eliminating the use of the word "operating." In this regard, credit risk and the management of credit risk related to customer bankruptcies, including potential fraud, appear to be part of the typical operating functions of a lending institution. Alternatively, do not exclude the provision for loan losses from your operating earnings non-GAAP measure.

We note that you have titled several of your non-GAAP measures "pro forma." It does not appear that information in the filing is pro forma financial information based on the guidance in Article 11 of Regulation S-X.[11] If true, please revise your presentation to more clearly present your non-GAAP measures eliminating the use of the words "pro forma."

[11] See Article 11 of Regulation S-X.

Other compliance issues

SEC rules typically require that certain disclosures (for example, reconciliation to the most directly comparable GAAP measure or disclosure of how management uses the measure) accompany non-GAAP financial measures, and CorpFin interpretive guidance prohibits certain non-GAAP presentations (for example, a full non-GAAP income statement). CorpFin also will routinely suggest presenting all non-GAAP measures in one portion of the registrant's disclosure document.

Example SEC comments:

We note that you added certain non-GAAP financial measures in the June 30, 20XX, 10-Q for the first time. Please tell us the following concerning these non-GAAP financial measures:

- How you meet the criteria in Item 10(e)(i)(B) of Regulation S-K regarding a reconciliation of the most comparable GAAP financial measures to the non-GAAP financial measures
- Why you consider these non-GAAP financial measures useful to investors under Item 10(e)(i)(C) of Regulation S-K

Please revise your future filings to eliminate the presentation of a full income statement of non-GAAP measures. We reference Compliance and Disclosure Interpretation Question 102.10 on non-GAAP financial measures.

Consider including a separate "non-GAAP" section in future filings that houses all non-GAAP disclosures included in the document.

CROWE PRACTICE NOTE

Which specific SEC rules and regulations or staff interpretive guidance[12] apply to the disclosure of additional information depends on whether the non-GAAP financial measure is presented in a filing or furnished in a Form 8-K (for example, in an earnings release).

[12] See Section 8100 of the CorpFin Financial Reporting Manual

Initial registration statements

Certain types of staff comments occur with relatively more frequency in initial registration statements because it is the first time CorpFin staff has reviewed the registrant's disclosures. In addition, the form requirements include certain disclosures that typically are not applicable to periodic filings once the registrant becomes a reporting company.

Example SEC comments:

Business description

Please revise the disclosure on pursuing acquisitions to clarify if there are any plans, arrangements, or understandings to make any acquisitions.

Please balance the description of your business, strategies, and strengths with equally prominent disclosure of the challenges you face and the risks and limitations that could harm your business. For example, and without limitation, please balance your discussion with a discussion of the risks outlined in your risk factor related to financial, execution, compliance, and operational risks of your acquisition strategy; the risk factor relating to the dependence of your financial performance on your growth strategy; the risk factor on the risks of AA% of your loan portfolio being comprised of real estate loans and the risk of commercial loans having a higher degree of risk; and the risk factor regarding the unseasoned nature of your loans.

Risk factors

We note that your summary includes a discussion of your competitive strengths and banking strategy. Please balance this disclosure by including a brief summary of the most significant risks that your business faces in this section of your prospectus.

Use of proceeds

You disclose that you plan to use the proceeds of this offering to repay indebtedness. Please revise to disclose the maturity of the debt that you intend to repay. Refer to Instruction 4 of Item 504 of Regulation S-K for additional guidance.

Please disclose whether the intended use of proceeds includes investing additional capital in the bank. If so, disclose the amount.

We note your disclosure that the redemption of your Small Business Lending Fund preferred stock is subject to the prior approval of the Federal Reserve. Please disclose the status of this approval and, if material, your intended uses of proceeds if approval cannot be obtained in a timely fashion or at all.

We note the disclosure that proceeds may be used "to fund potential future acquisitions of bank and nonbank financial services companies that we believe are complementary to our business and consistent with our growth strategy." If your future acquisition strategy will differ from the past strategy, please give a brief description of your post-offering acquisition strategy here and elsewhere in your filing, including the types of opportunities you intend to explore, or clarify that management has not yet determined a particular strategy.

Director and officer information

Please revise your directors' biographies to clearly identify the time periods associated with their business experience over the past five years. Refer to Item 401(e) of Regulation S-K for guidance.

Forum selection provision for litigation

We note that the forum selection provision in your Articles of Organization states that unless you consent in writing, the sole and exclusive forum for certain litigation, including "any derivative action" shall be XX or, if no state court has subject-matter jurisdiction, YY. Please revise your disclosure to discuss whether your forum selection provision applies to actions arising under the *Exchange Act*. In that regard, we note that Section 27 of the *Exchange Act* creates exclusive federal jurisdiction over all suits brought to enforce any duty or liability created by the *Exchange Act* or the rules and regulations thereunder. If the provision does not apply to actions arising under the *Exchange Act*, please ensure that the exclusive forum provision in your Articles of Organization states this clearly, or tell us how you will inform investors in future filings that the provision does not apply to any actions arising under the *Exchange Act*.

Mutual conversions

The aggregate purchase price of the common stock issued in a mutual conversion offering is based on the independently appraised pro forma market value of the common stock, as required by federal regulations and the typical plan of conversion. CorpFin often will issue comments if there appears to be comparability issues between the registrant and the peer group companies selected for the independent valuation. CorpFin also will issue comments if the discussion of the conversion process and timing is not clear.

Example SEC comments:

We note that there appears to be a significant variation in asset size among the peer group companies as compared to each other and as compared to XYZ Bancorp, as referenced in the table on page XX. Please revise to explain in greater detail how your independent third-party valuation firm concluded that these companies could be considered XYZ Bancorp's "peers" and therefore used in determining its appraised value.

Please expand your discussion of XX Inc.'s formation to include a discussion of the timing of the conversion, including the operative terms of the Plan of Conversion and when each step will occur relative to the offering. We note that the Plan of Conversion will be filed by amendment. Please note that we may have comments on the plan and that you should allow adequate time for the staff to review the exhibit.


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Final thoughts

The SEC comments in this publication have been lightly edited for clarity and are not the complete population of all recent comments issued in the banking sector; however, they are representative of the types of issues CorpFin has addressed in its review program. The focus of the SEC staff and the comments issued continually evolve, and Crowe will endeavor to keep you informed of new trends.

Learn more

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