

SEC Relief for RILA Issuers to Use Statutory Financials: Has the Moratorium Been Lifted?

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Innovative registered index-linked annuity (RILA) contracts have become a permanent fixture in the retirement savings marketplace. RILAs provide investors with a product that offers upside potential with downside protection, and RILA sales have been robust.

While the SEC is developing a new registration statement form tailored for RILAs, insurers currently must register RILA offerings on one of the “catchall” SEC registration forms, Form S-1 or Form S-3. These forms generally require insurers registering RILAs to include insurance company financial statements prepared in accordance with generally accepted accounting principles (GAAP). For insurers that currently only prepare financial statements in accordance with statutory accounting principles applicable to insurance companies (SAP), preparing GAAP financial statements can be extremely daunting and expensive.

A number of RILA issuers that do not prepare GAAP financial statements have obtained relief under Rule 3-13 of Regulation S-X to use SAP financials in their registration statements instead. Rule 3-13 provides that the SEC “may, upon the informal written request of the registrant, and where consistent with the protection of investors, permit the omission of one or more financial statements required by Regulation S-X or the filing in substitution thereof of appropriate statements of a comparable character.”

Such Rule 3-13 relief is available only to insurers registering their RILA offerings on Form S-1. Those insurers also generally rely on Rule 12h-7 under the Securities Exchange Act of 1934 to avoid filing periodic reports such as Forms 10-K and 10-Q. Importantly, the exemption is not available to insurers using Form S-3 because a registrant must file 1934 Act reports to be eligible to use, or remain on, Form S-3. Accordingly, RILA insurers may conclude that registration on Form S-1 is preferable to Form S-3.

Interestingly, while letters granting Rule 3-13 relief for the use of SAP financial statements in RILA registration statements were issued on an increasingly regular basis until October 2022, no letters were issued after that until March 2023. We understand that several companies were close to receiving such relief when the letters stopped being issued last year in October.

On March 17, 2023, however, a letter granting Rule 3-13 relief was issued to a RILA issuer. While neither the SEC nor its staff to our knowledge has provided formal information on this point, some practitioners have attributed the moratorium to a renewed interest by the SEC and its staff in whether SAP financials are appropriate for RILA registration statements, as they consider what type of financial statements the new tailored RILA registration form should require.

It remains to be seen if other RILA issuers will receive Rule 3-13 relief for that purpose going forward.

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