

**SUBCHAPTER W. MISCELLANEOUS RULES FOR GROUP AND INDIVIDUAL  
ACCIDENT AND HEALTH INSURANCE****28 TAC §3.3615**

1. **INTRODUCTION.** The commissioner of insurance adopts 28 TAC §3.3615 on an emergency basis, effective December 1, 2013. This allows the Texas Health Insurance Pool (Pool) to continue insurance coverage for its enrollees, in force on December 31, 2013, to March 31, 2014. The extension is necessary to comply with and implement the provisions and intent of Senate Bill 1367, Act of June 14, 2013, 83rd Legislature, Regular Session, which permits the commissioner to delay the termination of the Pool's insurance if the operation of the federal health benefit exchange is delayed or if coverage that was expected to be available on a guaranteed issue basis to Pool enrollees is not reasonably available.

SB 1367 terminates the Pool's insurance coverage, effective January 1, 2014, unless the commissioner delays the effective date by rule. The commissioner finds that, unless the Pool's coverage is extended, enrollees with insurance in force on December 31, 2013, who have serious medical conditions, could face potentially catastrophic gaps in coverage while they search for other health insurance.

The rule continuing coverage is adopted on an emergency basis with an expedited effective date because an imminent peril to the public health, safety, and welfare exists

in light of the continuing difficult rollout of the federal health exchange. Problems with the exchange have created significant confusion for consumers, preventing Pool enrollees from enrolling in new coverage. It is imperative that they remain insured by the Pool without a break in coverage until they can find new coverage.

*Background.*

The Pool currently covers approximately 23,000 Texans with preexisting conditions that have caused them to be denied health insurance coverage in the private market. This coverage is expensive, but it ensures coverage to Texans who cannot find other insurance due to medical conditions. Enrollees in the Pool have serious medical conditions, and average claim costs for Pool members are approximately four times those for people insured in the commercial market.

The Federal Patient Protection and Affordable Care Act of 2010 (PPACA) prohibits insurance companies from denying coverage to people with preexisting conditions, effective January 1, 2014. SB 1367 provides for the termination of Texas Health Insurance Pool insurance on January 1, 2014, but gives the commissioner discretion to postpone the effective date of any part of certain sections of the Act, including Section 4 (relating to the termination of Pool coverage), Section 5 (relating to the exercise of the Pool's recovery rights), and Section 6 (relating to the transfer of certain funds and

continuation of assessment authority), and allows the commissioner to delay the implementation of the Pool's dissolution plan.

*Postponement is necessary.*

Under Section 7 of SB 1367, the commissioner may delay the implementation of any part of Sections 1 through 6 of the Act or the Pool dissolution plan established under the Act by rule if:

- (1) the guaranteed issue of health benefit coverage is delayed;
- (2) the operation of a health benefit exchange in this state is delayed; or
- (3) the commissioner determines that health benefit coverage expected to be available on a guaranteed issue basis to a class of individuals eligible for coverage under Chapter 1506, Insurance Code, immediately before the effective date of the Act, is not reasonably available to those individuals in this state.

The conditions described in (2) and (3) above now exist, so delays in implementation of SB 1367 are proper.

PPACA's coverage scheme centers around access to insurance through health benefit exchanges. Although Healthcare.Gov, the federally operated health benefit exchange in this state, "went live" on October 1, 2013, it experienced debilitating technical issues

that have allowed few individuals to enroll in coverage. Today, these issues have still not been resolved.

Only 2,991 Texans selected – but may not have paid for – a marketplace plan in the first month of the exchange’s operation. See issue brief published by the U.S. Department of Health and Human Services on November 13, 2013, available at:

[http://aspe.hhs.gov/health/reports/2013/MarketPlaceEnrollment/rpt\\_enrollment.pdf](http://aspe.hhs.gov/health/reports/2013/MarketPlaceEnrollment/rpt_enrollment.pdf).

Payment is the final step necessary to obtain coverage.

The federal administration’s stated goal is to have the exchange website operational by November 30, 2013, but it will still have issues. The actual goal appears to be that 80 percent of users will be able to navigate the exchange website. That goal, if met, will still result in 20 percent of users being unable to navigate the exchange website. There will still be one in five who will start the process online but will not be able to purchase insurance. See [http://www.washingtonpost.com/business/white-house-1-in-5-people-wont-make-it-through-health-exchange-website-despite-fixes/2013/11/18/ed8bff6c-508a-11e3-9ee6-2580086d8254\\_story.html](http://www.washingtonpost.com/business/white-house-1-in-5-people-wont-make-it-through-health-exchange-website-despite-fixes/2013/11/18/ed8bff6c-508a-11e3-9ee6-2580086d8254_story.html).

The federal exchange is unlikely to work properly by the end of November. This will cause serious problems for the 23,000 Texans who rely on health insurance provided by the Pool and who were supposed to have been able to obtain insurance through the federal exchange by January 1, 2014. It is irresponsible to jeopardize Pool enrollees’

health and access to insurance on the mere possibility that the exchange would be fixed by then.

For coverage through the federal exchange to be effective on January 1, 2014, an individual must enroll and pay for a plan by December 15, 2013. 45 CFR §155.410(c)(i). At the time SB 1367 passed, it appeared that enrollees in the Pool would have from October 1 to December 15, 2013 (two and one-half months) to enroll for January 1, 2014, coverage. Even if the federal exchange were fixed today, which is unlikely, given official statements about the problems, Pool enrollees will have, at best, from November 30 until December 15 (two weeks) to look over available coverage; consider coverage, pricing, and available providers; and enroll through the marketplace. The result is that the health benefit coverage expected to be available on a guaranteed issue basis to Pool enrollees immediately before the effective date of SB 1367 is not reasonably available to them. This is unreasonable and not what the Legislature contemplated when it decided to terminate Pool insurance effective January 1, 2014.

As the Legislature anticipated might be the case, the operation of the health exchange in Texas has been seriously delayed. The victims of the delay are people with serious medical conditions that may not allow them the freedom to thoroughly search for appropriate and affordable coverage, or any coverage at all, once the federal exchange becomes functional. In addition, their problems are in many cases exacerbated by medical conditions and treatment that make it difficult to focus on a complicated system

for evaluating insurance plans. It is necessary to extend Pool coverage to allow current Pool enrollees to obtain health insurance without a gap in coverage.

The likelihood is that the exchange site will still not function correctly or produce correct results, the confusion accompanying the rollout of the exchange will continue, and only a very small number of Texans will obtain coverage. This means that the health benefit coverage expected to be available on a guaranteed issue basis to Pool enrollees immediately before the effective date of SB 1367 is not reasonably available to them through the exchange, so it is necessary to extend Pool coverage.

Texas is not alone in this predicament. A number of other states in the same situation have recently announced that they are also extending their pool coverage.

Because of the facts discussed above, the commissioner finds that the operation of the federal health insurance exchange has been delayed by at least two months. The commissioner also finds that, as the Legislature anticipated might be the case, the reason for ending the Pool's coverage on January 1, 2014, does not exist and that implementation of SB 1367 on its original schedule will cause significant harm to Pool enrollees, many of whom suffer from serious medical conditions. The commissioner further finds that health benefit coverage expected to be available on a guaranteed issue basis to a class of individuals eligible for coverage under Insurance Code Chapter 1506, immediately before the effective date of SB 1367, is not reasonably available to

those individuals in this state. Under Section 7 of SB 1367, the commissioner is delaying the implementation of Sections 4, 5, and 6(a)-(d) of the bill until March 31, 2014, to align with the last day that open enrollment is available in the individual market under federal law. 45 CFR §155.410.

Delaying implementation of Section 4 (the termination of Pool coverage) allows Pool enrollees to retain their current coverage until March 31, 2014, rather than January 1, 2014. This will make health benefit coverage expected to be available on a guaranteed issue basis to a class of individuals eligible for coverage under Insurance Code Chapter 1506, immediately before the effective date of SB 1367, reasonably available to those individuals in this state by allowing Pool enrollees a reasonable chance to select and purchase replacement coverage before their current insurance expires.

Delaying the implementation of Section 5 (the exercise of the Pool's recovery rights), Section 6(a)-(d) (the transfer of funds and assessment authority from the Pool to the department), and the Pool dissolution plan are all necessary to effectuate the extension of Pool coverage, because the Pool will need to retain these recovery rights, funds, and functions until it is no longer insuring Pool enrollees.

*An emergency rule is necessary.*

With the statutory deadline for termination of the Pool's insurance approaching rapidly, the risk of losing health insurance coverage faced by Pool enrollees is imminent and will be disastrous for those affected. The victims will be among the most vulnerable in the state: people with medical conditions so serious as to render them uninsurable. Many of the Pool's enrollees will be unable to receive life sustaining treatments, such as chemotherapy, organ transplants, and access to other vital medical procedures essential to their survival if they are uninsured. The situation is so serious that it requires immediate action by the commissioner without notice or hearing to avoid irreparable harm to the Pool's enrollees. Under Government Code §2001.034, the commissioner finds that an imminent peril to the public health, safety, or welfare requires adoption of this rule on fewer than 30-days notice and with an expedited effective date of December 1, 2013.

As noted above, it is unlikely that all, or even a significant proportion, of Pool enrollees will be able to obtain insurance by selecting and paying for a plan through the federal exchange before December 15, 2013. They would need to do so to be insured on January 1, 2014, without a break in coverage. Even in cases where obtaining insurance is technically feasible, the delay in the operation of the federal health exchange in this state, the confusing information surrounding its rollout, and other aspects of PPACA have led to a situation in which consumers in general, and Pool enrollees in particular, are unsure where to turn for insurance that fills their needs.



Pool enrollees in particular tend to suffer from chronic health conditions requiring ongoing treatment. This adds to the likelihood that they will not be able to maneuver successfully through a complicated and confusing system, which is currently suffering through a series of malfunctions, to obtain insurance. This is complicated by serious concerns about whether their current providers are in the provider networks for exchange plans. As a result, many Pool enrollees are uncertain how to proceed, and are likely not to be able to obtain new insurance by January 1, 2014.

For Pool enrollees, the perils of being uninsured are obvious and severe. Many have serious and chronic health conditions, like cancer, heart disease, or kidney disease. They have Pool insurance to cover conditions for which they could not get insurance on the open market before January 1, 2014. If the Pool's coverage ends on that date, and they are not able to get insurance to replace it, they face a gap in coverage that can lead to a gap in treatment. For Pool enrollees who are in expensive and long-duration treatments (like chemotherapy, radiation treatments, or dialysis) or who are waiting for transplants or other procedures, an interruption in coverage means an interruption in necessary treatment. Many of these treatments will stretch into next year. Health care providers will not continue treatments without payment from an insurance plan in effect next year or some other source. This presents an imminent peril to enrollees' physical and financial welfare, their health, and their safety, because an absence of treatment is life threatening for these enrollees.

Some Pool enrollees are currently on transplant lists, waiting for organs to become available. They generally must have insurance to get on these lists, could be removed from the lists if they do not have insurance, and will likely not be able to receive a transplant if their insurance has lapsed when a suitable organ becomes available.

The executive director of the Pool has written to the commissioner requesting an extension and providing more information. A recent telephone poll of Pool enrollees taken from November 12, 2013, through November 17, 2013, illustrates the effect of the current confusing situation, which can lead to a failure to enroll in new coverage. Of 385 Pool enrollees surveyed, 98 percent understand that their Pool coverage is scheduled to end on January 1, 2014; 78 percent have begun to shop for new plans; 56 percent do not think there is enough time to enroll in new plan by December 15, 2013, or are not sure; and only one percent have completed enrollment in a new plan.

In any of the cases discussed above, a lapse in coverage could delay necessary medical care or result in extremely high costs. This situation places Pool enrollees at medical risk of being no longer able to obtain medical care from their existing physicians and care facilities and at financial risk when they are unable to obtain replacement plans before January 1, 2014. This may result in Pool enrollees, to their detriment, not seeking the care they need and to possible irreversible physical decline or death.

To complicate matters, the Pool must issue cancellation notices by the end of November if it plans to cease insurance operations as originally scheduled on January 1, 2014. If it continues to insure present enrollees in 2014, as it must to avoid the imminent peril to them, the Pool needs to notify those enrollees and collect required premiums to pay for their coverage. Either course requires the commissioner to let the Pool and the public know what to expect before the end of November. This requires immediate action by the commissioner without notice or hearing.

Although some Pool enrollees will no doubt be able to obtain coverage by going directly to insurers and some may successfully navigate the federal exchange, it is unlikely that all, or even most, will be able to do this by December 15, 2013, the date that will make new coverage effective on January 1, 2014, when their Pool insurance is scheduled to expire. Those who do not will be faced with a lapse in coverage. Such a lapse places them in imminent peril of not being able to get treatment for serious and chronic conditions, as well as for problems that are more acute.

The danger to Pool enrollees from a lapse in coverage is immediate. It is not slow and incremental. It can take effect immediately on January 1, 2014, or shortly thereafter. It can have health and life-threatening consequences. It cannot be suffered for thirty or ninety days while the problem is resolved in the ordinary process of rulemaking. It must be avoided by action before the end of November. It is an imminent peril to the public health, safety, and welfare.

This situation was not foreseeable. The extent of the debilitating technical issues with the federal exchange was not apparent until mid-November. It may not be fully apparent now. It was not preventable by this state or the department. It does not permit action within the regular rulemaking process, which takes months. It is so serious that it requires immediate action by the commissioner without notice or hearing to avoid irrevocable, catastrophic consequences for some of the most vulnerable Texans.

For the reasons stated under Government Code §2001.034, the commissioner finds that an imminent peril to the public health, safety, or welfare requires adoption of this rule immediately, on fewer than 30-days notice.

The commissioner also finds for the same reasons that an expedited effective date is necessary because of imminent peril to the public health, safety, or welfare and that this rule will be effective on December 1, 2013.

*Future rulemaking.*

The department intends to propose this or a similar rule under the normal rulemaking process and will consider any additional action necessary in the event problems continue with the federal exchange or with the availability of insurance on a guaranteed

issue basis to Pool members. Future rulemaking may also provide additional guidance on the termination of Pool coverage.

**2. STATUTORY AUTHORITY.** The sections are adopted on an emergency basis with an expedited effective date of December 1, 2013, under Section 7 of SB 1367, Act of June 14, 2013, 83rd Legislature, Regular Session; Insurance Code §36.001; and Government Code §2004.034 and §2004.036(a)(2).

Section 7 of SB 1367 allows the commissioner to delay by rule the implementation of any part of Sections 1 through 6 of the Act or the Pool dissolution plan established under the Act if:

- (1) the guaranteed issue of health benefit coverage is delayed;
- (2) the operation of a health benefit exchange in this state is delayed; or
- (3) the commissioner determines that health benefit coverage expected to be available on a guaranteed issue basis to a class of individuals eligible for coverage under Chapter 1506, Insurance Code, immediately before the effective date of this Act, is not reasonably available to those individuals in this state.

Insurance Code §36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

Government Code §2004.034 provides for the adoption of administrative rules on an emergency basis without notice and comment.

Government Code §2004.036(a)(2) provides for a rule to be effective on a stated date less than 20 days after the filing date if an expedited effective date is necessary because of imminent peril to the public health, safety, or welfare.

### **3. TEXT.**

3.3615 Continuation of Existing Texas Health Insurance Pool Coverage. The implementation of Sections 4, 5, and 6(a)-(d) of SB 1367, Act of June 14, 2013, 83rd Legislature, Regular Session, and the pool dissolution plan established under that Act, are delayed until March 31, 2014.

**4. CERTIFICATION.** This agency certifies that this rule and its emergency adoption have been reviewed by legal counsel and found to be within the agency's authority to adopt.

Issued at Austin, Texas, on November 22, 2013.



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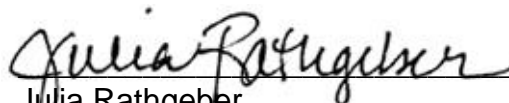
Sara Waitt  
General Counsel  
Texas Department of Insurance

**2860**

TITLE 28. INSURANCE  
Part I. Texas Department of Insurance  
Chapter 3. Life, Accident, Health Insurance and Annuities

Emergency Sections  
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The commissioner orders that §3.3615, effectively extending the termination of health insurance provided by the Texas Health Insurance Pool past January 1, 2014, to March 31, 2014, is adopted on an emergency basis, effective December 1, 2013.

  
Julia Rathgeber  
Commissioner of Insurance

ATTEST:

  
Sara Waitt  
General Counsel

COMMISSIONER'S ORDER NO. **2860**