

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

1. INTRODUCTION. The Texas Department of Insurance proposes new 28 TAC §3.3615, concerning Continuation of Existing Texas Health Insurance Pool Coverage. New §3.3615 is necessary to allow the Texas Health Insurance Pool (Pool) to continue existing coverage and avoid a lapse in coverage for its enrollees. The new section will replace the emergency rule adopted effective December 1, 2013, and published in the December 13, 2013, issue of the *Texas Register* (38 TexReg 8983).

The extension of Pool coverage to March 31, 2014, 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 of insurance 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. The commissioner imposed such a delay by emergency rule November 22, 2013, effective December 1, 2013. That emergency rule expires March 31, 2014. New §3.3615 is proposed under the regular rulemaking process to continue Pool coverage to the same date, and to consider whether an additional continuation is warranted.

The commissioner believes that continuing existing Pool insurance to March 31, 2014, is necessary as a one-time measure to allow those with existing Pool insurance an

adequate opportunity to obtain other health insurance on a guaranteed issue basis.

The commissioner hopes and expects that no further continuation will be necessary, and is reluctant to continue Pool coverage beyond that date. However, in an abundance of caution, the new rule is proposed with a mechanism for further extending coverage for a limited time after notice and hearing if current Pool enrollees continue to experience difficulties obtaining replacement health insurance coverage. This mechanism will provide an opportunity for stakeholder input should the commissioner consider further continuing Pool coverage.

Continuation to March 31, 2014

The factors originally requiring adoption of the emergency rule still exist and require continuing existing Pool insurance until March 31, 2014. The continuing difficulties with the rollout of the federal health exchange and the enrollment website, HealthCare.gov, have created confusion and significant barriers to enrollment for current Pool enrollees. Unless the Pool's coverage is extended, currently insured Pool enrollees with serious medical conditions could face potentially catastrophic gaps in health insurance coverage while they search for other health insurance.

The Pool currently covers approximately 23,000 Texans with preexisting conditions. This coverage is expensive, but ensures coverage to Texans who cannot find other insurance due to preexisting conditions. Average claim costs for Pool members are approximately four times those for people insured in the commercial market.

The Patient Protection and Affordable Care Act of 2010 (PPACA) prohibits insurance companies from denying coverage to people with preexisting conditions, effective January 1, 2014. Senate Bill 1367 provides for termination of Pool insurance on January 1, 2014, but gives the commissioner discretion to delay the effective date of any part of certain sections of the Act, including Section 4 (relating to termination of Pool coverage), Section 5 (relating to exercise of the Pool's recovery rights), and Section 6 (relating to transfer of certain funds and continuation of assessment authority). It also allows the commissioner to delay implementation of the Pool's dissolution plan. The commissioner imposed these delays in the emergency rule and is proposing this rule to replace the emergency rule.

Under §7 of Senate Bill 1367, the commissioner may delay the implementation of any part of §§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.

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 allowed few individuals to enroll in coverage. Today, it is still not clear that these issues have 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.

Payment is the final step necessary to obtain coverage.

The federal administration’s stated goal was to have the exchange website operational by November 30, 2013. The goal appeared to be that 80 percent of users would be able to navigate the exchange website. That goal, if met, will still result in one in five users starting the process online but not being able to purchase insurance.

Applicants have about three weeks from the administration’s November 30, 2013, target date to get insurance that is effective January 1, 2014. And the federal exchange may still not function efficiently enough for Pool enrollees to select, enroll, pay, and receive coverage benefits, and the operation of the exchange may still be delayed, past January 1, 2014. The confusion accompanying the exchange rollout may continue and Pool members may not timely obtain coverage. If the 23,000 Texans currently enrolled in the Pool do not have other health coverage, the Legislature’s reason for ending Pool coverage on January 1, 2014, will not exist and implementation of Senate Bill 1367 will

cause significant harm to Pool enrollees. The health benefit coverage expected to be available on a guaranteed issue basis to Pool enrollees immediately before the effective date of Senate Bill 1367 will not be reasonably available to them through the exchange, so it is necessary to extend Pool coverage past January 1, 2014.

For Pool enrollees, a lapse in insurance coverage will be disastrous. The victims will be among the most vulnerable in the state: people with medical conditions so serious as to render them uninsurable. Many Pool enrollees are currently in active treatment for their illnesses and conditions and will be unable to receive life sustaining treatments, such as chemotherapy, dialysis, or organ transplants, and other vital medical treatment and procedures essential to their survival.

Pool enrollees 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.

It remains unclear whether all, or even a significant portion of, Pool enrollees will be able to search for, select, pay for, and be covered by a plan through the federal exchange before December 31, 2013. 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.

A telephone poll of Pool enrollees taken from November 12, 2013, through November 17, 2013, illustrated the effect of the current confusing situation. Of 385 Pool enrollees surveyed, 98 percent understood that their Pool coverage was scheduled to end on January 1, 2014; 78 percent had begun to shop for new plans; 56 percent did not think there was enough time to enroll in new plan by December 15, 2013, or were not sure; and only one percent had completed enrollment in a new plan.

This situation was not foreseeable. The extent of the debilitating technical issues with the federal exchange was not apparent until mid-November 2013. It may not be fully apparent now. It was not preventable by this state or the department. As shown by the emergency rule on this subject, the situation has been so changing and problems so emergent that it did not permit the department to act within the regular rulemaking process, which takes months. The situation required immediate action by the commissioner to avoid possibly irrevocable, catastrophic consequences for some of the most vulnerable Texans.

§3.3615(a)

Under §7 of Senate Bill 1367, the proposed §3.3615(a) would delay the implementation of §§4, 5, and 6(a)-(d) of Senate Bill 1367 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 the date stated in the rule. This will make health benefit coverage that was 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 Senate Bill 1367, reasonably available to those individuals in this state. It will give Pool enrollees the time necessary to select and purchase appropriate 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 allow for 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.

Continuation Past March 31, 2014

The commissioner hopes and expects that continuing existing Pool insurance coverage until March 31, 2014, will allow Pool enrollees to avoid a lapse in coverage and does not anticipate continuing Pool coverage beyond that date. However, it is not clear if the

difficulties with the operation of the federal health benefit exchange in this state will be resolved by that date, or if 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 Senate Bill 1367 will be reasonably available to those individuals in this state by that time. It is impossible to predict whether problems with enrollment in the health exchange will still exist and whether further continuation of the Pool is needed, until a point too close to March 31, 2014, for the ordinary rulemaking process to suffice. The commissioner proposes, in an abundance of caution, a mechanism to further continue existing Pool insurance coverage for a period not to exceed 90 days, after notice and hearing.

§3.3615(b)

Proposed §3.3615(b) would allow the commissioner, after notice and hearing, to extend the delays described above for a period not to exceed 90 days 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 Senate Bill 1367, Act of June 14, 2013, 83rd Legislature, Regular Session, is not reasonably available to those individuals in this state.

§3.3615(c)

Proposed §3.3615(c) is a severability clause, to ensure that any invalidity of the rule will not affect parts of the rule that can be given effect without the invalid provision or application.

2. FISCAL NOTE. Doug Danzeiser, manager, Regulatory Matters, Life, Accident, and Health Section, has determined that for each year of the first five years the proposed section will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the proposal. There will be no measurable effect on local employment or the local economy as a result of the proposal.

3. PUBLIC BENEFIT AND COST NOTE. Mr. Danzeiser has also determined that for each year of the first five years the proposed section is in effect, the public benefit anticipated as a result of the proposal is an extended but limited continued coverage period for Pool enrollees.

The cost to persons required to comply with the proposal is related to the assessments that will be made by the Pool to cover claims and administration costs to extend Pool coverage beyond January 1, 2014. The Pool may make assessments on health benefit plan issuers to cover its losses under Insurance Code Chapter 1506, subchapter F. The Pool assessed issuers approximately \$165 million in 2013. This averages

approximately \$13,750,000 per month during 2013, spread across all health benefit plan issuers. The department anticipates that assessments during the months coverage is extended will not exceed this amount per month. Instead, as Pool enrollees find other coverage, the impact of continuing the Pool should decrease each month. Though the Pool and the department are providing assistance to Pool enrollees to find other coverage, the department cannot know at this time how many enrollees will remain in the Pool, or for how long.

4. ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

FOR SMALL AND MICRO BUSINESSES. Government Code §2006.002(c) provides that if a proposed rule may have an economic impact on small businesses, state agencies must prepare as part of the rulemaking process an economic impact statement that assesses the potential impact of the proposed rule on small businesses and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule. Government Code §2006.001(2) defines “small business” as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated; and has fewer than 100 employees or less than \$6 million in annual gross receipts. Government Code §2006.001(1) defines a “micro business” as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated; and has no more than 20 employees. Government Code §2006.002(f) requires a state agency to adopt provisions concerning micro

businesses that are uniform with those provisions outlined in Government Code

§2006.002(b)-(d) for small businesses.

Under Government Code §2006.002(c), the department has determined that §3.3615(a) of the proposal may have an adverse economic impact on small and micro businesses that are health benefit plan issuers as defined by Insurance Code §1506.002 and subject to assessment by the Pool. In 2013, the Pool assessed 147 issuers. The department believes that one or more of these carriers is a small or micro business under Government Code §2006.002(c). The adverse economic impact to these issuers results from the costs associated with the requirement to pay assessments for the months that Pool coverage is extended, as discussed in the Public Benefit and Cost Note section above.

Assessment costs will vary for small and large businesses based on premium volume under the formula in Insurance Code §1506.253. Though assessments may have an adverse effect on small and micro businesses, the department has considered the purpose of the applicable statutes, which is to spread the impact of the assessments across many carriers in proportion to premium volume. In light of the assessment formula, the department has determined that it is neither legal nor feasible to waive the provisions of proposed §3.3615(a) for small or micro businesses.

5. TAKINGS IMPACT ASSESSMENT. The department has determined that no private real property interests are affected by this proposal and that this proposal does not

restrict or limit an owner's right to property that would otherwise exist in the absence of government action and so does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

6. REQUEST FOR PUBLIC COMMENT. If you wish to comment on this proposal you must do so in writing no later than 5:00 p.m. on January 27, 2014. Please send your written comments to Sara Waitt, general counsel, by email at: chiefclerk@tdi.texas.gov, or by mail at Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. You must simultaneously submit an additional copy of the comment to Doug Danzeiser, manager, Regulatory Matters, Life, Accident, and Health Section by email at: 1hlcomments@tdi.texas.gov, or by mail at Mail Code 107-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

The commissioner will consider the adoption of the proposed new section in a public hearing under Docket No. 2760 scheduled for 9 a.m. on January 23, 2014, in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street, Austin, Texas. The commissioner will consider written and oral comments presented at the hearing, and written comments submitted by 5 p.m. on January 27, 2014.

7. STATUTORY AUTHORITY. The new section is proposed under §7 of Senate Bill 1367, Act of June 14, 2013, 83rd Legislature, Regular Session; and Insurance Code §36.001 and §1506.005.

Section 7 of Senate Bill 1367 allows the commissioner to delay by rule the implementation of any part of §§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 may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

Insurance Code §1506.005 provides that the commissioner may adopt rules necessary and proper to implement Chapter 1506 (relating to the Health Insurance Pool).

8. CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal:

§3.3615(a) Senate Bill 1367, Act of June 14, 2013, 83rd Legislature, Regular Session

§3.3615(a) Insurance Code Chapter 1506

§3.3615(b) Senate Bill 1367, Act of June 14, 2013, 83rd Legislature, Regular Session

§3.3615(b) Insurance Code Chapter 1506

§3.3615(c) Insurance Code Chapter 1506

9. TEXT.

§3.3615 Continuation of Existing Texas Health Insurance Pool Coverage.

(a) The implementation of Sections 4, 5, and 6(a)-(d) of Senate Bill 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.

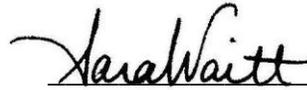
(b) The commissioner may, after notice and hearing, delay the implementation of Sections 4, 5, and 6(a)-(d) of Senate Bill 1367, Act of June 14, 2013, 83rd Legislature, Regular Session, and the pool dissolution plan established under that Act for a further period not to exceed 90 days if:

- (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 Senate Bill 1367, Act of June 14, 2013, 83rd Legislature, Regular Session, is not reasonably available to those individuals in this state.

(c) If a court of competent jurisdiction holds that any part of this rule or its application to any person or circumstance is invalid for any reason, the invalidity does not affect other provisions or applications of this rule that can be given effect without the invalid provision or application, and to this end the provisions of this rule are severable.

10. CERTIFICATION. This agency certifies that legal counsel has reviewed the proposal and found it to be within the agency's legal authority to adopt.

Issued at Austin, Texas, on December 6, 2013.



Sara Waitt
General Counsel
Texas Department of Insurance