SUBCHAPTER T. MINIMUM STANDARDS FOR MEDICARE SUPPLEMENT POLICIES
28 TAC §3.3312

1. INTRODUCTION. The Texas Department of Insurance adopts amendments to 28 TAC §3.3312, concerning the guaranteed issuance of Medicare supplement coverage to certain enrollees of the Texas Health Insurance Pool.

Section 3.3312 is adopted with minor editorial changes to the proposed text as published in the December 27, 2013, issue of the *Texas Register* (38 TexReg 9435).

As proposed and adopted, subsection (b)(9) is added to §3.3312 to identify those losing their Pool coverage as eligible persons.

Section §3.3312(c)(1) is amended to identify the Medicare supplement policies that former Pool enrollees may purchase on a guaranteed issue basis.

Subsection (d)(7) is added to §3.3312 to specify the guaranteed issue time period, 63 days from the date of the termination of Pool coverage.

Non-substantive amendments are made to other parts of §3.3312 to conform with agency style and usage guidelines.

The only change between the proposal and this adoption is that the Texas Department of Insurance (TDI) has capitalized the word “Part,” as in “Medicare Part C,” in 3.3312(b)(5) and (6) for editorial reasons. Those corrections were inadvertently omitted from the published proposal and have been revised in the adopted version to correct the error. These changes do not materially alter issues raised in the proposal,

introduce new subject matter, or affect persons other than those previously on notice.

2. REASONED JUSTIFICATION. TDI adopts the amendments under Insurance Code §§36.001, 1506.005, 1652.005, and 1652.051.

Amendments to §3.3312 are necessary to provide a guaranteed issue opportunity for alternative secondary coverage for Medicare enrollees whose secondary Pool coverage is terminating as a result of the coming dissolution of the Pool, and to conform with agency style and usage guidelines.

The amendments to §3.3312 provide a guaranteed issue opportunity for Pool enrollees concurrently enrolled in Medicare, because those Pool enrollees are unable to obtain new supplemental coverage when their Pool coverage ceases. These enrollees are predominantly under the age of 65 and have qualified for pre-65 Medicare coverage due to disabilities or end stage renal disease (ESRD). They purchased Pool coverage to pay claims secondary to Medicare because of the high claims costs that are not paid by Medicare, and because the Pool generally provides more benefits than Medicare supplement products. When they purchased Pool coverage, they could not have known that the Pool would be terminated, and they have now lost their initial guaranteed issue opportunity to purchase Medicare supplement insurance, a narrow window of time during which they initially enrolled in Medicare Part B.

TDI originally adopted §3.3312 to provide for additional Medicare supplement guaranteed issue opportunities for those on Medicare, such as for those whose group health insurance coverage is terminated (§3.3312(b)(1)), but TDI did not anticipate that

Pool enrollees would need such a special enrollment opportunity. To give those with Pool coverage the same opportunity to enroll in Medicare supplement coverage as those with employer-sponsored coverage, TDI amends §3.3312 to require that Medicare supplement carriers treat those whose Pool coverage is being terminated as eligible to purchase a Medicare Supplement policy for 63 days from the termination of their Pool coverage.

3. SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Comment: One commenter asserted that the Plan A Medicare Supplement made available to persons under 65 in existing §3.3312(c)(1), and to which the proposed amendments offer a new guaranteed issue period for Pool enrollees, is of low value, and plans other than Plan A are not offered. The commenter asked whether the Pool had coverage better than Plan A, asked why the state would cancel better coverage in favor of Plan A, and wondered if Medicare Advantage would not be an option.

Agency Response: TDI disagrees that it is appropriate in this rulemaking to adopt a new requirement that Medicare supplement carriers offer plans other than Plan A to persons under 65 enrolled in Medicare. TDI proposed amendments that would give those with terminating Pool coverage the same opportunity to enroll in Medicare supplement coverage as those with employer-sponsored coverage. The proposal, therefore, put those enrollees in the same position as if Pool coverage had never been available to them, by amending §3.3312 to require that Medicare supplement carriers treat those whose Pool coverage is being terminated as eligible to purchase a Medicare

Supplement policy for 63 days from the termination of the individual's Pool coverage. Requiring the offer of additional plans would exceed the scope of the proposal and be inconsistent with that purpose. Further, S.B. 1367 requires the dissolution of the pool, and allows the commissioner to continue Pool insurance based on certain criteria. TDI does not agree that it is appropriate at this time to delay termination of Pool coverage based on the availability of Medicare supplement plans beyond Plan A, the plan available before SB 1367. Finally, TDI has been working with the federal government to make sure that an early Medicare Advantage Special Enrollment Period will be made available to Pool enrollees who are eligible for Medicare Advantage. TDI will continue to monitor implementation of federal health reform and market developments to determine appropriate regulatory actions.

Comment: Four commenters supported the proposed 63-day guaranteed issue period, saying it would allow Medicare enrollees whose secondary coverage is being terminated because of the March 31, 2014, closing of the Pool the ability to transition to Medicare supplement policies with other carriers.

Agency Response: TDI agrees with the commenters, and appreciates the support for the proposed amendments.

Comment: Two commenters noted concerns that future patients with ESRD might lose coverage by not signing up for a Medicare supplement within the initial enrollment period or by late payment of premiums, and suggested that TDI and the legislature consider a one month annual open enrollment period for Medicare supplement policies

for those who did not purchase Medicare supplements initially, or who lost them along the way due to various circumstances.

Agency Response: TDI disagrees that it is appropriate to add an annual open enrollment period in these amendments. TDI proposed amendments that would give those with terminating Pool coverage the same opportunity to enroll in Medicare supplement coverage as those with employer-sponsored coverage. The proposal, therefore, put those enrollees in the same position as if Pool coverage had never been available to them, by amending §3.3312 to require that Medicare supplement carriers treat those whose Pool coverage is being terminated as eligible to purchase a Medicare supplement policy for 63 days from the termination of the individual's Pool coverage. TDI believes the adopted rule accomplishes this goal, and the suggestion is beyond the scope of the proposed amendments. TDI intends to monitor the under-65 Medicare population over time to better ascertain the impact of guaranteed available health benefit coverage as an alternative for those who are diagnosed with ESRD. TDI also recognizes that the Legislature may choose to consider and specifically address this issue and should have an opportunity to do so. For each of these reasons, TDI declines to adopt the suggestion.

Comment: One commenter called TDI's attention to the difficulties those with ESRD will still face, despite the proposed amendments, in getting accessible and affordable Medicare Supplemental policies and in losing access to affordable coverage, and welcomed TDI's continued focus on a long-term solution.

Agency Response: TDI shares the commenter's concern. TDI will monitor the impact of these amendments and other developments and continue on an ongoing basis to consider whether further regulatory response is appropriate.

5. NAMES OF THOSE COMMENTING FOR AND AGAINST THE SECTIONS.

Neither For Nor Against: One Individual

For: Renal Support Network; Fresenius Medical Care; DaVita Health Care; Dialysis Patient Citizens.

6. STATUTORY AUTHORITY. TDI adopts the amendments under Insurance Code §§36.001, 1506.005, 1652.005, and 1652.051.

Section 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.

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

Section 1652.005 provides that the commissioner must adopt reasonable rules necessary and proper to carry out Chapter 1652 (relating to Medicare Supplement Benefit Plans).

Section 1652.051 provides that the commissioner must adopt reasonable rules to establish specific standards for provisions in Medicare supplement benefit plans, which may include conditions of eligibility.

5. TEXT.

§3.3312 Guaranteed Issue for Eligible Persons

(a) Guaranteed issue.

(1) Eligible persons are those individuals described in subsection (b) of this section who seek to enroll under the Medicare supplement policy during the period specified in subsection (d) of this section, and who submit evidence of the date of termination, disenrollment, or Medicare Part D enrollment with the application for a Medicare supplement policy.

(2) With respect to eligible persons, an issuer must not deny or condition the issuance or effectiveness of a Medicare supplement policy described in subsection (c) of this section that is offered and is available for issuance to newly enrolled individuals by the issuer, and must not discriminate in the pricing of a Medicare supplement policy because of health status, claims experience, receipt of health care, or medical condition, and must not impose an exclusion of benefits based on a preexisting condition under a Medicare supplement policy.

(b) Eligible Persons. An eligible person is an individual described in any of the following paragraphs:

(1) The individual is enrolled under an employee welfare benefit plan that provides health benefits that supplement the benefits under Medicare, and the plan terminates, or the plan ceases to provide supplemental health benefits to the individual; or the individual is enrolled under an employee welfare benefit plan that is primary to

Medicare and the plan terminates or the plan ceases to provide all health benefits to the individual because the individual leaves the plan.

(2) The individual is enrolled with a Medicare Advantage organization under a Medicare Advantage plan under Part C of Medicare, and any of the following circumstances apply, or the individual is 65 years of age or older and is enrolled with a Program of All-Inclusive Care for the Elderly (PACE) provider under §1894 of the Social Security Act, and there are circumstances similar to the following that would permit discontinuance of the individual's enrollment with the provider if the individual were enrolled in a Medicare Advantage plan:

(A) the certification of the organization or plan has been terminated; or

(B) the organization has terminated or otherwise discontinued providing the plan in the area in which the individual resides;

(C) the individual is no longer eligible to elect the plan because of a change in the individual's place of residence or other change in circumstances specified by the Secretary, but not including termination of the individual's enrollment on the basis described in §1851(g)(3)(B) of the Social Security Act (where the individual has not paid premiums on a timely basis or has engaged in disruptive behavior as specified in standards under §1856), or the plan is terminated for all individuals within a residence area;

(D) the individual demonstrates, in accord with guidelines established by the Secretary, that:

(i) the organization offering the plan substantially violated a material provision of the organization's contract under 42 U.S.C. Chapter 7, Subchapter XVIII, Part D in relation to the individual, including the failure to provide an individual on a timely basis medically necessary care for which benefits are available under the plan or the failure to provide the covered care in accord with applicable quality standards; or

(ii) the organization, or agent or other entity acting on the organization's behalf, materially misrepresented the plan's provisions in marketing the plan to the individual; or

(E) the individual meets other exceptional conditions as the Secretary may provide.

(3) The individual is enrolled with an entity listed in subparagraphs (A) - (D) of this paragraph and enrollment ceases under the same circumstances that would permit discontinuance of an individual's election of coverage under paragraph (2) of this subsection:

(A) an eligible organization under a contract under §1876 of the Social Security Act (Medicare cost);

(B) a similar organization operating under demonstration project authority, effective for periods before April 1, 1999;

(C) an organization under an agreement under §1833(a)(1)(A) of the Social Security Act (health care prepayment plan); or

(D) an organization under a Medicare Select policy; and

(4) the individual is enrolled under a Medicare supplement policy and the enrollment ceases because:

(A) of the insolvency of the issuer or bankruptcy of the nonissuer organization; or of other involuntary termination of coverage or enrollment under the policy;

(B) the issuer of the policy substantially violated a material provision of the policy; or

(C) the issuer, or an agent or other entity acting on the issuer's behalf, materially misrepresented the policy's provisions in marketing the policy to the individual;

(5) the individual was enrolled under a Medicare supplement policy and terminates enrollment and subsequently enrolls, for the first time, with any Medicare Advantage organization under a Medicare Advantage plan under Part C of Medicare, any eligible organization under a contract under §1876 of the Social Security Act (Medicare cost), any similar organization operating under demonstration project authority, any PACE provider under §1894 of the Social Security Act, or a Medicare Select policy; and the subsequent enrollment is terminated by the individual during any period within the first 12 months of the subsequent enrollment (during which time the

individual is permitted to terminate the subsequent enrollment under §1851(e) of the Social Security Act); or

(6) the individual, upon first becoming enrolled in Medicare Part B for benefits at age 65 or older, enrolls in a Medicare Advantage plan under Part C of Medicare, or with a PACE provider under §1894 of the Social Security Act, and disenrolls from the plan or program no later than 12 months after the effective date of enrollment.

(7) The individual enrolls in a Medicare Part D plan during the initial enrollment period and, at the time of enrollment in Part D, was enrolled under a Medicare supplement policy that covers outpatient prescription drugs and the individual terminates enrollment in the Medicare supplement policy and submits evidence of enrollment in Medicare Part D along with the application for a policy described in subsection (c)(4) of this section.

(8) The individual loses eligibility for health benefits under Title XIX of the Social Security Act (Medicaid).

(9) The individual meets the following requirements:

(A) the individual was enrolled in both the federal Medicare program and the Texas Health Insurance Pool on December 31, 2013; and

(B) the individual's Pool coverage terminated on or after December 31, 2013.

(c) Products to Which Eligible Persons are Entitled.

The Medicare supplement policy to which eligible persons are entitled under:

(1) Subsection (b)(1), (2), (3), (4), (8), and (9) of this section is a Medicare supplement policy which has a benefit package classified as Plan A, B, C, F (including F with a high deductible), K, or L offered by any issuer, except that for persons under 65 years of age, it is a policy which has a benefit package classified as Plan A.

(2) Subsection (b)(5) of this section is the same Medicare supplement policy in which the individual was most recently previously enrolled, if available from the same issuer, or, if not available, a policy described in paragraph (1) of this subsection. After December 31, 2005, if the individual was most recently enrolled in a Medicare supplement policy with an outpatient prescription drug benefit, the Medicare supplement policy described in this paragraph is the policy available from the same issuer but modified to remove outpatient prescription drug coverage, or at the election of the policyholder, a policy described in paragraph (1) of this subsection.

(3) Subsection (b)(6) of this section must include any Medicare supplement policy offered by any issuer.

(4) Subsection (b)(7) of this section is a Medicare supplement policy that has a benefit package classified as Plan A, B, C, F (including F with a high deductible), K, or L, and that is offered and is available for issuance to new enrollees by the same issuer that issued the individual's Medicare supplement policy with outpatient prescription drug coverage.

(d) Guaranteed Issue Time Period.

(1) In the case of an individual described in subsection (b)(1) of this section:

(A) for a plan that supplements the benefits under Medicare, the guaranteed issue period begins on the later of:

(i) the date the individual receives a notice of termination or cessation of all supplemental health benefits (or if a notice is not received, the date the individual receives notice that a claim has been denied because of such termination or cessation); or

(ii) the date the applicable coverage terminates or ceases; and ends 63 days later; or

(B) for a plan that is primary to the benefits under Medicare, the guaranteed issue period begins on the later of:

(i) the date the individual receives a notice of termination or cessation of all health benefits (or if a notice is not received, the date the individual receives notice that a claim has been denied because of such termination or cessation); or

(ii) the date the applicable coverage terminates or ceases; and ends 63 days later.

(2) in the case of an individual described in subsection (b)(2), (3), (5), or (6) of this section whose enrollment is terminated involuntarily, the guaranteed issue

period begins on the date that the individual receives a notice of termination and ends 63 days after the date the applicable coverage is terminated;

(3) in the case of an individual described in subsection (b)(4)(A) of this section, the guaranteed issue period begins on the earlier of the date that the individual receives a notice of termination, a notice of the issuer's bankruptcy or insolvency, or other such similar notice if any, and the date that the applicable coverage is terminated, and ends on the date that is 63 days after the date the coverage is terminated;

(4) in the case of an individual described in subsection (b)(2), (4)(B) and (C), (5), or (6) of this section, who disenrolls voluntarily, the guaranteed issue period begins on the date that is 60 days before the effective date of the disenrollment and ends on the date that is 63 days after the effective date of disenrollment;

(5) in the case of an individual described in subsection (b)(7) of this section, the guaranteed issue period begins on the date the individual receives notice under §1882(v)(2)(B) of the Social Security Act from the Medicare supplement issuer during the 60-day period immediately preceding the initial Part D enrollment period and ends on the date that is 63 days after the effective date of the individual's coverage under Medicare Part D;

(6) in the case of an individual described in subsection (b) of this section, but not described in paragraphs (1) - (5) of this subsection, the guaranteed issue period begins on the effective date of disenrollment and ends on the date that is 63 days after the effective date of disenrollment; and

(7) in the case of an individual described in subsection (b)(9) of this section, the guaranteed issue period begins on the date that the individual's coverage in the Texas Health Insurance Pool terminates and ends 63 days later.

(e) Extended Medicare Supplement Access for Interrupted Trial Periods.

(1) In the case of an individual described in subsection (b)(5) of this section (or deemed to be so described, under this paragraph), whose enrollment with an organization or provider described in subsection (b)(5) of this section is involuntarily terminated within the first 12 months of enrollment, and who, without an intervening enrollment, enrolls with another organization or provider, the subsequent enrollment will be deemed to be an initial enrollment as described in subsection (b)(5) of this section.

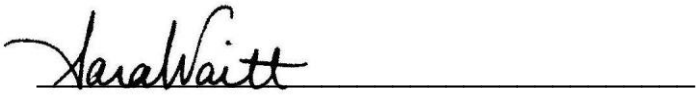
(2) In the case of an individual described in subsection (b)(6) of this section (or deemed to be so described, under this paragraph), whose enrollment with a plan or in a program described in subsection (b)(6) of this section is involuntarily terminated within the first 12 months of enrollment, and who, without an intervening enrollment, enrolls with another plan or program, the subsequent enrollment will be deemed to be an initial enrollment as described in subsection (b)(6) of this section.

(3) For purposes of subsection (b)(5) and (6) of this section, no enrollment of an individual with an organization or provider described in subsection (b)(5) of this section, or with a plan or in a program described in subsection (b)(6) of this section, may be deemed to be an initial enrollment under this paragraph after the 2-year

period beginning on the date on which the individual first enrolled with the organization, provider, plan, or program.

CERTIFICATION. This agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on February 10, 2014.



Sara Waitt, General Counsel
Texas Department of Insurance

The commissioner adopts the amendments to §3.3312.

Julia Rathgeber
Commissioner of Insurance

Commissioner's Order No. **2997**