December 28, 2018

The Honorable R. Alexander Acosta
Secretary, Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

The Honorable Alex Azar
Secretary, Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, DC 20201

The Honorable Steven Mnuchen
Secretary, Department of Treasury
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

RE: CMS-9918-P

Submitted Electronically via www.regulations.gov

Dear Secretaries Acosta, Azar and Mnuchen,

I am writing on behalf of the National Association of Health Underwriters (NAHU), a professional association representing more than 100,000 licensed health insurance agents, brokers, general agents, consultants and employee benefits specialists. We are pleased to have the opportunity to provide comments in response to the proposed rule titled "Health Reimbursement Arrangements and Other Account-Based Group Health Plans," published in the *Federal Register* on October 29, 2018.

The members of NAHU work on a daily basis to help millions of individuals and employers of all sizes purchase, administer and utilize health insurance coverage. Our expertise lies in the technicalities of health-plan purchasing and administration and the real-world challenges employers face therein. NAHU members are exceptionally well versed on the coverage options that businesses of all sizes, as well as individual consumers, have available to them, as well as the prices associated with all of these coverage choices in every state. We hope that with this response we can share our expertise in health insurance markets with your Departments as it relates to the ideas contained in the proposed rule.

A representative group of brokers who work exclusively in the markets most likely to be affected by the proposed rule (individual and small- and large-employer group) have contributed their insight about how this new approach will impact the markets they serve. We have tried to focus our comments on technical-level questions and thoughts on how the proposed rule could affect health plan administration, structure and regulation. NAHU members have identified some practical concerns that this rule and related guidance either does not address or does not cover thoroughly enough to answer questions that employers and employees have already posed to our members concerning the new proposal. As such, our

comments focus on the resources that health insurance agents and brokers need to be able to answer client questions regarding potential changes to Health Reimbursement Arrangements (HRAs) and other account-based plans. We also address the additional information employers and individual employees will need to make informed choices and implementation decisions concerning the new health coverage options proposed in this rule.

We have grouped our comments on the proposed letter by topic, as requested. Furthermore, we would like to note that while we briefly address issues the proposed rule might raise for applicable large employers and individual employees as it relates to the Affordable Care Act's employer shared responsibility requirements codified under IRC §4980(h) and the refundable tax credit eligibility requirements detailed in IRC §36B, as well as potential nondiscrimination concerns stemming from IRC §105(h), we have supplemented these comments with a detailed response to IRS Notice 2018-88. That letter is included as an addendum to this response. We appreciate your consideration of our point of view and the willingness to solicit opinions from all stakeholders on this important proposal.

Overview

NAHU understands the intent of the proposed rule is to provide American businesses with more choices when it comes to private-market employee benefit offerings. Every day, NAHU members work with owners of both large and small businesses who are struggling in their quest to find affordable health insurance options for themselves and their employees. Our association certainly understands the desire to provide more opportunities for this population. We see how, in some circumstances, the new HRA offerings could meet the needs of specific types of employers, particularly relative to certain classes of employees. It could also provide some possible alternatives for employers that can't afford to pay the cost of health insurance for their employees.

As with all proposals, there will be some entities that benefit more than others with the creation of new account-based plan options as proposed. We would be remiss if we didn't directly point out there will be a substantial administrative burden associated with offering a health reimbursement arrangement for individual health insurance coverage (HRA-IHIC). Furthermore, as currently proposed, the new option leaves employers with many unanswered compliance questions and perceived potential liability. NAHU has attempted to identify looming stumbling blocks for employers, and we urge the Departments to focus on answering these questions and providing solutions to these concerns about the new products that are already stymieing employers. As you move forward with the development of any final rules and related guidance on this topic, we urge you to keep in mind the following factors: (1) the extensive health insurance service and compliance needs of employers, particularly small employers that have limited accounting and human resources staff and support; (2) the reluctance of American business owners to increase their administrative burdens; (3) the amount of professional support most Americans need when making sound health insurance purchasing decisions, and the degree of help people need to manage their medical claims and coverage during the plan year, particularly in the face of any complex

medical issue; and (4) the need for a comprehensive national effort to reduce and contain medical care service costs that affect every health coverage program and insurance marketplace nationwide.

Health insurance agents and brokers are serving millions of employers and employees with their healthcare purchasing and year-round customer-service issues, and many NAHU members are interested in providing similar services to both employers and employees that may be affected by new account-based plan purchasing options. NAHU hopes the Trump Administration will be cognizant of the personalized assistance and professional advice business owners and individual health insurance consumers require when it comes to their health coverage, and will allow for meaningful participation and fair compensation of health insurance agents and brokers with any purchasing option created by a final rule.

Additionally, we call on the Trump Administration to continue its efforts to reduce healthcare-purchasing costs and growing market options for employers beyond account-based plan options and to include other ideas addressed in Executive Order 13813. Unless federal policymakers concentrate efforts on lowering the costs of medical care and prescription drugs directly, as well as increasing medical care price and quality transparency for consumers, market competition and cost issues will remain.

Group Health Plan Status and ERISA Compliance

The proposed rule sets criteria for employers to meet when establishing an HRA-IHIC to ensure that the individual plans the HRA-IHIC will reimburse will not be considered part of the employer group health plan and thereby be governed by the Employee Retirement Income Security Act of 1974 (ERISA). One of these requirements is that the purchase of individual coverage be a voluntary action on the part of each HRA-IHIC participant and another is that an employer not steer employees to individual coverage or endorse a specific plan.

NAHU members understand the need and rationale for such requirements; however, our association also feels that for HRA-IHICs to be a viable coverage option for both employers and employees that HRA-IHIC participants need to have a clear path to professional help for their coverage needs. Employers that offer HRA-IHIC coverage will still need the help of licensed health insurance producers to establish and administer the underlying group benefit plan, and individual employees may wish to utilize the assistance of a licensed advisor to help them determine their coverage choices and year-round customer service and claims needs. We believe higher employer adoption of these arrangements would occur and employees would be less overwhelmed by their individual plan choices if the final rule includes a clear path for brokers and employers to follow to legally assist both parties with their HRA-IHIC options and responsibilities. Accordingly, we urge the Departments to establish a safe harbor for employers to rely on to refer their employees to independent licensed advisors and other individual coverage resources without veering into group health plan territory.

Specifically we urge the Departments to include in any final rule explicit clarification of what it means to endorse a product and a safe harbor that specifies that an employer would not trigger ERISA jurisdiction merely by providing HRA-IHIC-eligible employees with access to an independent health insurance producer licensed in all states where individual employees reside. To obtain the safe harbor, we recommend that the agent would need to demonstrate to an employer his or her licensure status and document that all individual products that might be offered to employees are qualified health plans approved in all applicable states. Furthermore, to qualify, brokers could be required to verify completion of professional continuing education courses specific to account-based plan offerings, meet fiduciary disclosure requirements and disclose total annual compensation earned on all individual policies associated with the related account-based plan options to the employer.

Employer Verification Requirements

One of the most significant responsibilities the proposed rule places on employers to ensure that individual policies reimbursed under an HRA-IHIC are not considered to be group coverage subject to ERISA is the responsibility to verify employee coverage. The proposed rule requires employers to establish "reasonable verification procedures" to ensure that participants enroll in qualified individual coverage. Additionally it solicits comment on ways employers offering HRA-IHICs might verify that any individual coverage subject to reimbursement does, in fact, comply with the ACA's prohibition on lifetime and annual coverage limits on essential health benefits (EHBs) and how an HRA-IHIC operator could identify which benefits are considered EHBs for purposes of annual limits under 42 USC §2711.

NAHU members and their employer clients indicate that the employer verification requirements are one of the most concerning areas of the proposed rule. They will represent a significant compliance burden for employers, and they may pose an unnecessary liability risk. For employers, in particular small and midsize business owners, to readily embrace this concept, in NAHU's view the Departments will need to simplify the verification process, develop more guidance and resources for employers, and create more explicit rules and safe harbors.

For example, the proposed rule stipulates that employers will need to be able to verify that they are not providing reimbursements via HRA-IHIC funds for premiums for self-funded student coverage and short-term limited duration health insurance (STLDI) coverage. However, the proposed rule provides employers with no clear direction as to how to ascertain the funding status of student coverage programs. It would be impossible for employers to obtain verification easily, and individual employees or dependents enrolled in such coverage may not be a reliable source of such information. Similarly, how are employers supposed to quickly verify if employee coverage is STLDI? This type of verification burden will be a barrier to entry for many employers.

NAHU members have several suggestions as to ways that the Departments could reduce the burden on employers concerning verification and the scope of coverage subject to reimbursement. One would be to

limit HRA-IHIC reimbursements to traditional individual market coverage subject to the qualified health plan requirement with a metal level actuarial value designation of bronze, silver, gold or platinum. Another way would be to require all issuers to label each qualified plan option on all marketing materials, identification cards and websites with some quick visual identifier (e.g., a gold star or a blue dot) so consumers, employers and regulators would know the product's status. The awarding and inclusion of the visual identifier could be part of the product filing and approval process annually.

Concerning the actual verification of coverage status and maintenance of qualified individual coverage, the proposed rule requires that participants must be enrolled in compliant coverage each month they are in the HRA. However, the proposed rule provides little direction as to how employers will track and verify coverage enrollment monthly. Does the primary responsibility fall on the employer, the employee or both? What are the consequences to an employer group plan if one or more employees fail to maintain appropriate coverage? What are the implications for the individual employee? If employees do not substantiate their premium payments appropriately, could existing Flexible Spending Account rules then be invoked by the employer to recoup invalid HRA reimbursements so that the plan/employer does not run into issues? Could employers merely be bound by verification as of the first day of the month of the plan year, and then should employees drop their coverage, not notify the employer and continue to take the HRA contribution, could it be considered a tax event for the employee? If the individual health insurance coverage purchased through an HRA-IHIC is not subject to ERISA, then the individual employee needs to be responsible and accountable.

In any case, all of this information needs to be delineated to all stakeholders before any employer is likely to engage in an HRA-IHIC offering. Furthermore, employers are unlikely to consider this new plan option until the private market can respond with tracking and verification resources, which will take time and clear guidance to develop.

Regarding coverage verification, the proposed rule states that employers may ask for a copy of an insurance card or an explanation of benefits document as proof of coverage. However, NAHU members are concerned that an employee's ability to produce documents will be sufficient to document current and continuous enrollment in qualified coverage. Should employers have to contact an issuer to verify status? NAHU members expect that this would be a compliance burden and that employers would quickly encounter difficulties with verification attempts due to real or perceived HIPAA/HITECH privacy and data security concerns on the part of health insurance issuers. NAHU would appreciate clarification in any final rule about how an employer offering an HRA-IHIC should handle any failure by an employee to prove they have coverage. How long are employers required to wait for verification documents? Can an employer impose reasonable restrictions and timeframes? As our membership understands the current proposal, employers would have to provide HRA premium reimbursements a month in arrears to avoid paying in a month for which there is no coverage.

To address this situation, NAHU suggests the Departments consider adopting a requirement for issuers similar to the creditable coverage letter requirement that was in place after the enactment of HIPAA and eliminated after the implementation of ACA market requirements in 2014. A creditable coverage letter could be generated automatically via email by the 10th of the month to those with individual coverage showing a payment made for the previous month's coverage and coverage in force. Employees could rely on the documentation in such a letter to provide reimbursement for the employee's prior month of coverage.

The proposed rule also gives employers credence to accept an employee attestation as proof of continuous coverage, but requiring this of every affected employee on a monthly basis is a burden in and of itself. NAHU members and the business owners they represent also wonder if an attestation will be enough. The proposed rule specifies that an employer may not accept an attestation if it has reason to suspect an employee's veracity when it comes to coverage status. NAHU members and their clients have expressed significant concerns about shouldering the liability involved with making that determination. Additionally, businesses will need guidance on how to handle employee veracity issues and who within a company may have knowledge of potential fraud for an employer to have liability. In a bigger company, the entity verifying coverage will likely have less familiarity with all employees than a smaller organization would. NAHU members and their employer clients are concerned that this requirement would create more of a liability issue for smaller businesses. Furthermore, we request clarification as to whether verification procedures must be consistent across all affected classes of employees and suggest that any final rule specify that verification processes must be consistent across each class to prevent discrimination. Our association also requests guidance on how employers should document their verification procedures and related potential enforcement consequences for both employer liability protection purposes and for the information and education of affected plan participants.

Another issue identified by NAHU members and their clients that we request clarification for is that the rule specifies that "reasonable procedures" are all that are required of an employer to reimburse claims. However, if the underlying HRA will be considered minimum essential coverage (MEC), wouldn't the HRA need to have in place the same ACA-mandated claims-appeal standards as other MEC plans?

Classes of Employees

The proposed rule limits HRA-IHICs, if offered, to being the only plan choice for a class of employees. It prohibits employers from providing an HRA-IHIC in competition with other comprehensive group coverage. NAHU members strongly support this decision and urge the Departments to retain the requirement in any final rule. Ensuring that an HRA-IHIC option is not offered in competition with traditional group coverage is critical to reducing potential steering and discrimination charges and limiting employer liability. Even if there is no intentional discrimination, employers could be charged with discrimination by disgruntled employees who felt like they may have been directed to one plan

offering over another, and by prohibiting this offering, the Departments mitigate potential offenses and liability.

The proposed rule spells out some applicable classes of employees that can get a distinct HRA-IHIC offer, but it also gives employers some flexibility to create combinations of classes concerning the scope of the coverage offering. NAHU urges the Departments to reconsider this policy and instead provide a concrete list of categories of employees that must be used to determine the scope of an HRA-IHIC offering. Given that existing guidance on bona fide classes of employees is relatively broad and the liability associated with this rule and the introduction of a new coverage option high, NAHU members strongly believe that employer plan sponsors would prefer definitive rules on this topic.

Given the potential for overlap between this proposed rule and the requirements codified under IRC §4980(h) and addressed in Notice 2018-88, NAHU members suggest that the Departments use the same classes of safe harbors specified in the IRC §4980(h) rule provisions in regard to affordability safe harbors. Specifically, to make it simpler and more precise for all employers, we feel the final regulations should specify that an employer may choose to provide HRA-IHIC offerings to all of its employees or for any reasonable category of employees, provided it does so on a uniform and consistent basis for all employees in a class. Mirroring the existing affordability rules, we suggest that any final rule include the language "reasonable categories generally include specified job categories, nature of compensation (hourly or salary), geographic location and similar bona fide business criteria."

Finally, the proposed rule solicits comments about the potential for bona fide class manipulation among small employers. NAHU members feel that by not delineating clear classes of employees that may be eligible for HRA-IHIC offerings in the proposed rule, the Departments increase the potential of class manipulation by smaller employers and increase a small-business owner's potential exposure to discrimination charges. Even if a small employer did not manipulate the class with the intention of employee steering, if there is any perceived discrimination or steering, employers may have to defend against a complaint or deal with the impact of potentially disgruntled employees. By providing explicit rules for employers to use and point to, the Departments would do employers large and small a great service.

Definitions

As part of the class-of-employee requirements outlined in the proposed rule, the Departments specify that HRA-IHICs must define "full-time employee," "part-time employee" and "seasonal employee" consistent with existing federal law. However, because there are multiple definitions of these terms in the existing federal code, employer plan sponsors could choose among various sets of definitions. The proposed rule specifies that employers would have to adopt and maintain the same set of definitions throughout a plan year, but employers could theoretically change the definitions from one plan year to the next. The proposed rules include examples to show employers how this requirement could work, but

NAHU has significant concerns that the definition provisions in the proposed rule would be extremely confusing and unappealing to many group health plan sponsors.

Based on our members' decades of experience in working with group health plan sponsors on compliance issues, our association is confident that employers desire clear rules to follow when it comes to plan administration. To improve compliance, make things simpler for employers and shield employers from the potential for discrimination charges related to definitional shifts, NAHU members suggest that the final rule contain one set of clear definitions of these terms for employers to adopt. Given the continued existence of the IRC 4980(h) requirements and their intersection with the proposed rule for many eligible employers, NAHU suggests mirroring the definitions used for compliance with that statute. Additionally, NAHU requests that the Departments provide guidance in any final rule about how the definitions used for compliance with this rule would work with state statutory definitions of full-time, part-time and seasonal employees that currently may apply to small employers and small-group market coverage.

Opt-Out Requirements

The proposed rule requires participating employers to allow employees to opt out of the new HRA options on at least an annual basis. These requirements are similar to the current HRA opt-out rules but for certain individuals who may be offered an HRA-IHIC, a complicating wrinkle may be their premium tax credit eligibility. For some individuals offered an HRA-IHIC, the coverage will not meet the law's affordability standard; therefore, they could qualify for a health insurance premium tax credit for traditional individual health insurance coverage offered through a health insurance exchange. NAHU members request clarification from the Departments as to whether the timing of the opt-out provisions in the proposed rule would align for employees who wish to investigate their premium tax credit eligibility and related reduced coverage costs through a health insurance exchange and weigh that option against a potential HRA-IHIC offering. For those individuals with access to non-calendar-year employer plans or even group plans that begin each year on January 1 but may not have an open enrollment window that coincides precisely with the short and potentially variable federal individual market open enrollment cycle, would the opt-out rules outlined in the proposed regulations in conjunction with the new special enrollment rights detailed in the proposal provide individuals with enough time for plan comparisons?

NAHU has concerns that timing of an opt-out coupled with exchange-based individual coverage enrollment could be tough for a person to handle correctly. Our members would like the Departments to provide additional clarification on this issue in any final rule. Additionally, NAHU requests more information about what remedies the Departments may provide for individuals who do not understand their opt-out or special enrollment rights or might not be informed of them adequately. Would such individuals who enroll in an HRA-IHIC during the group plan enrollment period have tax credit eligibility later if they could document lack of adequate notification? Alternatively, would their enrollment in an

HRA-IHIC that is deemed minimum essential coverage automatically disqualify them from individual health insurance premium tax credit eligibility?

Employer Notice Requirement

The proposed rule would require employers to provide affected employees with a written notice about an HRA-IHIC at least 90 days before the beginning of each plan year. NAHU members have concerns with the timeframe proposed in this requirement. Most employers, particularly smaller employers that purchase fully insured traditional group coverage (or have in the past), will not have access to accurate renewal group coverage health plan rates until 60 days before the start of their new plan year. Therefore, employer groups in this position cannot make definitive health plan choices for the upcoming plan year until after the 90-day window outlined in the proposed rule. For employers purchasing large-group fully insured coverage, rates may be available slightly sooner but, in most cases, accurate rate quotes will not be available until closer to 60 days out. So while virtually all employers that choose to operate a group health plan make plans about their coverage offerings well in advance, those employers often cannot finalize their arrangements until 30 to60 days before their effective date. Accordingly, the 90-day notice requirement would be a barrier to entry to many employer plans considering offering HRA-IHIC coverage in an upcoming plan year. To solve this problem, NAHU recommends that this requirement be revised to mirror the distribution requirements for the summary of benefits and coverage and uniform glossary.

NAHU also has concerns about the content of the proposed notice. The proposed rule contains eight content elements that must be in a notice and gives employers some suggestions as to language to include, but ultimately leaves notice-drafting responsibility to each employer sponsoring an HRA-IHIC plan offering. NAHU suggests that the Departments instead develop a model disclosure template for employers to use. Templates are more straightforward for employers to implement, more accurate and more efficient for employee use. Recently, several rules and guidance proposed and executed by the Departments did not include models for notices, including the recent guidance on Qualified Small Employer Health Reimbursement Arrangements. In those cases, our members have observed that the lack of a template has led to both confusion and liability concerns in the employer community. Accordingly, we believe it is essential that the Departments provide a sample notice with any final version of this regulation.

As proposed, the written notice would not need to include information specific to each plan participant and specifically would not need to indicate whether the HRA-IHIC would be considered "affordable" for a particular employee. NAHU is confused why the Departments would exclude this information from the notice requirements, given that the affordability of an individual's coverage offer impacts their eligibility for a premium tax credit for exchange-based individual coverage and could have real personal tax consequences for employees. While it is arguable that requiring that the inclusion of such information on each notice would add to an employer's administrative compliance burden, what the proposed rule fails to consider is that 29 USC §218b requires the millions of employers subject to the Fair Labor Standards

Act (FLSA) to distribute an exchange notice to all new hires that reflects their current group health plan costs and coverage options. This notice must specify if the employer believes that the plan options available to the new hire would meet the ACA's affordability and minimum value of coverage tests. While the federal FLSA exchange notice template language has remained mostly the same since 2013, each employer group plan must update it annually to reflect current plan costs and coverage options and if plan options meet the ACA's affordability and minimum value of coverage tests. Therefore, most employers likely to avail themselves of the HRA-IHIC option envisioned by the proposed rule should be compiling this information for specific employees on an annual basis.

Finally, NAHU members and their employer clients would like to request additional guidance about delivery options for the proposed notice, as well as information about noncompliance penalties. Will the proposed notice be subject to the outdated electronic delivery requirements for group health plans subject to ERISA? What about employer plans not bound by ERISA? Will the Departments consider a modification and modernization of the electronic disclosure rules either for this notice requirement specifically or for all employer-sponsored health plan notices generally? Will employers be subject to any penalties for noncompliance? If so what will they be and how will notice compliance be enforced?

Violations

If an employer violates any of the requirements to maintain an ERISA safe harbor concerning the individual policies that receive premium reimbursement via an HRA-IHIC, will all ERISA/PHSA group health plan responsibilities, liabilities and penalty structures apply to the employer's plan offering? If this is indeed the case, as NAHU members assume, then NAHU urges the Departments to explicitly outline in the guidance what the consequences of the loss of eligible employer status will be so that employers fully understand their potential liability. This guidance should describe the timing involved when an employer or the federal government discovers the loss of safe harbor and at what point the employer will be required to submit to the ERISA regulations

Former Employees

The proposed rule allows new HRA offerings to be made to some, but not necessarily all, former employees. NAHU members have raised discrimination concerns with this part of the proposal and feel that its inclusion could be harmful to employers. Additionally, our members would like clarifying guidance about how this proposed option would work with Medicare-eligible former employees. Furthermore, NAHU has concerns about the possibility of tracking and providing notifications to former employees; an endeavor that has proven complicated with IRC §§6055 and 6056 reporting requirements, and likely would be with new HRA requirements as well.

Special Enrollment Periods

The proposed rule would create special enrollment periods in the individual market for people who want to use a new HRA-IHIC offering to obtain new individual coverage outside of the annual open-enrollment

period. This protection is vital for the millions of individuals with access to group health insurance coverage whose group health insurance open enrollment window does not align precisely with the individual market open-enrollment cycle. Those in non-calendar-year plans need this protection, but even those enrolled in group plans that begin each year on January 1 may not have an open-enrollment window that coincides exactly with the short and potentially variable federal individual market open-enrollment cycle.

In addition to providing for special enrollment rights for individuals who wish to enter the individual market off-cycle due to a new HRA-IHIC offering, NAHU members would like the Departments to provide clarification if any additional special enrollment provisions are granted to individuals who wish to leave the individual market to re-enroll in group coverage, including an HRA-IHIC. Would they merely be able to do so during their group health plan's open-enrollment period, or could they be granted specific enrollment rights in a final rule if the group and individual open-enrollment periods did not align?

NAHU members also request clarification as to what the Departments envision SEP verification and enforcement procedures will be when individuals elect to access one based on newfound eligibility for HRA-IHIC offerings? How will the health insurance exchanges and health insurance issuers verify eligibility, especially for individuals with non-calendar-year employer-sponsored plans?

Affordability Issues

One of the biggest stumbling blocks brokers and their employer clients have already identified with the proposed rule concerns the issue of coverage "affordability" as it relates to both the employer shared responsibility requirements codified under IRC §4980(h) and the refundable tax credit eligibility requirements detailed in IRC §36B. There are many issues that the proposed rule does not address, and while some of our pressing affordability concerns are covered in the companion Notice 2018-88 released on November 19, 2018, by the Internal Revenue Service, there are other points of question that the guidance does not address or does not cover thoroughly enough.

NAHU has drafted a detailed comment letter in response to Notice 2018-88, which is attached to this document as an addendum. In that letter, we cover our association's concerns and questions about the various safe harbors proposed to help applicable large employers demonstrate that potential HRA-IHICs meet the "affordability" and "minimum value" tests. In particular, we stress the need for administrative simplifications for employers. The lack of a safe harbor for age rating variations, in particular, will be problematic and a significant barrier to any ALE considering the possibility of offering HRA-IHICs to employees, given the difficulty associated with making level contributions to employee HRA-IHIC accounts. Another obstacle that we ask the IRS to address in this comment letter concerns the proposed rules, procedures, and timing for employers with regard to determining the plan cost on which to base their affordability calculation.

Timing is a significant issue as well. The proposed rule envisions that HRA-IHICs be made available as a plan option beginning on January 1, 2020. To be able to offer this option, employers will need the terms and affordability guidance finalized as soon as possible. They also need detailed guidance about HRA-IHICs and IRC§§ 6055 and 6056 reporting forms and processes on a near immediate basis. Employer-reporting compliance vendors will need the new rules to build software components and employers will need to incorporate the new standards into their tracking processes beginning on January 1, 2019. We also recommend that any further HRA-IHIC guidance for ALEs concerning both IRC §4980(h) and IRC§§ 6055 and 6056 provide employers with at least two years of specific transitory good-faith compliance relief.

Beyond the affordability questions we raise in our response to Notice 2018-88, our members have additional affordability questions relative to the employee side of the equation. The proposed rule gives individual employees a safe harbor relative to the affordability determination and their HRA-IHIC coverage offer. NAHU would appreciate clarification in the final rule as to how the exchange marketplaces will verify the accuracy of their decisions given that the exchange marketplaces do not have a comprehensive mechanism for verifying employer coverage now.

The proposed rule also holds employees harmless for HRA-IHIC mistakes that impact the award of a premium tax credit, provided that the error is not intentional or reckless. Will the final rule define what will be considered to be intentional or reckless regarding employee mistakes relative to the affordability issue? Will employees with HRA-IHIC eligibility have to provide the health insurance marketplace a copy of the HRA-IHIC notice they get from an employer when enrolling in marketplace coverage and applying for premium tax credits to help prevent unintentional errors? NAHU urges the inclusion of additional information on these topics in any final rule.

Documentation Issues

NAHU members request clarification from the Departments as to whether employers offering new account-based plan offerings as outlined by the proposed rule need to maintain the plan documents generally required of group health plans by ERISA and PHSA and follow related regulations and compliance responsibilities as they would with a traditional health reimbursement arrangement. For both consumer- and employer-protection purposes, NAHU members believe that the underlying HRA in an HRA-IHIC offering should have the same plan document and compliance requirements as traditional HRAs, but the proposed rule leaves this point unclear. If an employer offering one or more of the new account-based plan options outlined in the proposed rule does not need to produce plan documents generally required of group health plans by ERISA and PHSA, then how do the Departments suggest that employers document the rules and policies specific to the employer for both employee and beneficiary informative purposes, and as a liability protection for the employer without triggering group health plan rules? Additionally, what guidance can the Departments provide to employer group plans that may wish to avail themselves of the new plan options envisioned by the proposed rule but are not subject to ERISA?

Similarly, would employers offering one or more of the new account-based plan options envisioned by the proposed rule needs to provide eligible employees with a Summary of Benefits and Coverage regarding these new offerings, as they would with a traditional Health Reimbursement Arrangement? If an employer subject to ERISA offers a qualified plan option outlined in the proposed rule and 100 or more employees enrolled, would the new account-based plan option be subject to 5500 filings as well?

Furthermore, will employers offering such options be subject to HIPAA/HITECH privacy and data security requirements as covered entities or business associates? It is clear that these employers will have access to protected health information that will need a safeguard. NAHU members and their employer clients seek guidance on these questions as well.

Participation Requirements

Health insurance issuers typically apply participation and contribution requirements on employer group health plans. While the ACA and related regulations provide protections to employers to ensure that participation requirements do not interfere with the law's provisions regarding guaranteed issue of coverage, these protections do not eliminate issuer participation and contribution requirements, nor do they override existing state laws relative to employee participation in group coverage and required employer contribution standards. According to the guaranteed availability of coverage requirements outlined in 45 CFR §147.104, in the large-group market, issuers may not impose participation requirements on employers as a condition of offering coverage initially, but the regulation does not prohibit issuers from charging employers an inflated premium if a large group fails to meet participation standards. Nor does it prevent employer contribution requirements or imposing participation and contribution conditions as a condition of renewing coverage. In the small-employer market, issuers have to maintain a participation-requirement-free window for small-group enrollment from November 15 to December 15 annually. Participation and contribution requirements can apply on renewal unless a state's requirements specify otherwise.

Virtually all issuers place allowable participation and contribution requirements on small employers; in many geographic areas and industry classifications, they are common for large employers too. Furthermore, multiple state statutes require specific participation and contribution requirements, particularly of small employers. To meet participation standards, employees typically need to enroll in the coverage offered or produce a valid waiver that they have obtained group coverage through another source. Issuers almost never consider individual coverage as a suitable source of other health insurance for waiver purposes and some states, such as New Jersey, specifically prohibit individual coverage from being used for participation-waiver purposes.

Accordingly, NAHU members and their clients are concerned that if an employer elects to offer an HRA-IHIC to one or more classes of employees and a traditional group health plan to one or more other classes

of employees, that the HRA-IHIC will not be considered to be appropriate for waiver purposes by group health insurance issuers and/or state participation and contribution laws. The unintended consequence could be that employer group plans could be terminated on renewal because they do not meet participation requirements. Accordingly, NAHU recommends that any final rule contain an explicit direction that issuers must consider HRA-IHIC enrollment as other group coverage and may not apply participation penalties for employees that enroll in that type of offering at either initial enrollment or on renewal in either the small- or large-group markets. The Departments may also need to consider if and how existing group participation statutes may be affected by the proposed rule.

Impact on Existing Risk Pools

The Departments request comment on the integration rules generally, as well as the impact that the new HRA-IHIC option would have on individual-market risk pools and the potential for discrimination based on health status. In the view of the NAHU membership, there are really three groups of people who may gain access to coverage through a new HRA-IHIC offering: those with no coverage currently, those who are eligible but choose to decline, and those who are presently covered. Here are some observations on these groups and their likelihood of entering the risk pool:

Employed individuals who were previously ineligible for employer-sponsored coverage: This group includes people in a group coverage waiting period or non-full-time employees. NAHU believes some employers could offer the HRA-IHIC solution to new employees to bridge their waiting period or to variable-hour employees in their initial look-back measurement period. Neither of these situations, in and of themselves, would directly involve the steering of poorer-risk individuals to the individual market. In fact, it may incent some previously uninsured individuals to obtain coverage.

***Employed but employer does not offer coverage*:** Some companies have employees but do not currently offer a group plan. In these cases, many employees obtain coverage under a spouse's or parent's group health plan, have coverage in the individual market already or have access to coverage through Medicare, Medicaid or another entitlement program. Some employees may currently be uninsured and would be interested in an HRA-IHIC offering, but many employees are satisfied with their other sources of coverage. Therefore, NAHU expects that a smaller number of employers in this situation will find the HRA-IHIC concept appealing. We expect that the HRA-IHIC could appeal to small employers not subject to the employer shared responsibility requirements that have a hard time competing for talent. Sole proprietors or partnerships with few employees who are covered elsewhere would find few inherent tax or coverage benefits with the HRA-IHIC solution. The employees who are likely to access individual coverage in this scenario will likely be previously uninsured and could be high-risk due to delayed medical care.

***Employees are eligible but not enrolled*:** If the high cost of employer-sponsored premiums is the reason why employee enrollment in the traditional coverage offering is low, the introduction of an HRA-IHIC

could incent participation. However, the employer would have to choose to implement this new HRA program and potentially abandon its existing traditional group coverage program, or segment classes for this offer. With the onerous administrative requirements involved, NAHU members believe the HRA-IHIC option will have limited appeal for many employers. An HRA-IHIC would have to be significantly less expensive, even taking into account administrative time and resource costs, for most employers to consider replacing their traditional group health plan. Another factor for employers when considering the HRA-IHIC option will be the health and cost of the individual-market coverage in their state. If the competition is limited, networks sparse and prices high, as is the case in many states, employers will be less inclined to switch to the HRA-IHIC option. If the employer limits its HRA-IHIC to select classes, employees who are likely to access individual coverage in this scenario will likely be previously uninsured and could be high-risk due to delayed medical care.

Employees are eligible and there is a high take-up rate in the traditional group coverage option: NAHU members that believe that the likelihood that an employer in this scenario would entertain the HRA-IHIC scenario would be based on cost, administrative time and resources, and the condition of the individual market in the employer's geographic area. If an employer in this scenario adopted the HRA-IHIC, the mixed risk would go to the individual-market pool.

Employer Funding of HRAs

In the proposed rule, the Departments posit that employers will fund HRA-IHICs to the same degree that they previously funded traditional employer group coverage. NAHU members would like clarification for the Administration's basis for this assumption. Based on our members' conversations with employer clients representing businesses of all sizes and industries, it appears likely that a good portion of employers would contribute substantially less funding to HRA-IHICs, particularly to certain classes of employees. Based on employer reactions, many NAHU members have expressed real concern that certain employers may make *de minimus* contributions to HRA-IHICs to meet their IRC §4980(h) obligation to offer MEC. While this would not mitigate the responsibility to provide minimum-value coverage and associated penalty liability, many employers may calculate that this is a preferable risk to their current "skinny" MEC plan offerings that also do not meet minimum-value requirements. If such limited HRA-IHIC funding is allowed, NAHU is concerned that the proposed rule could lead to a downgrade in the scope of employer-sponsored coverage offerings in specific industries. The result will likely be an increase in the number of uninsured employees and dependents, particularly given that these individuals will no longer face individual mandate penalty liability from 2019 on forward. In the cases where employers do adequately fund HRA-IHIC offerings so that employees would have enough funds to purchase individual coverage, what will the impact be on the risk pool and individual consumers when a large number of people are directed to potentially unstable state-level individual health insurance markets?

The Scope of HRA-IHIC Reimbursements

The proposed rule asks for comments on the scope of the proposed regulation with regard to HRA-IHIC reimbursements in a variety of areas. One is whether individuals should be able to use HRA-IHICs to purchase grandfathered plans and receive reimbursement. The proposed rule indicates that it is the Departments' indication to allow this, as it would be difficult for employers to screen out grandfathered individual plans and, as the proposed rule notes, the Departments believe that very few individuals would be capable of using the funds to purchase a grandfathered health plan. On a practical level, NAHU agrees with this approach, as we believe the number of affected individuals would be quite small, given that the employees or dependents would have had to have maintained grandfathered individual coverage since 2010 and not enrolled in other employer-sponsored coverage.

Furthermore, we note that there would be no reliable means for an employer to determine the potential grandfathered status of a beneficiary's individual plan choice. However, we note that grandfathered health plans may not meet the standard of minimum-value coverage, which would be important to applicable large employers offering HRA-IHICs. These plans typically do not meet the essential health benefit plan requirements and may contain annual or lifetime limits on essential health benefits. There is no simple way for an employer to verify these items and, therefore, eliminate employer plan liability relative to other sections of the ACA. To keep compliance simple and the playing field level, it may be a wiser choice not to allow HRA-IHIC reimbursement of grandfathered plan options.

The proposed rule also envisions allowing HRA-IHICs to be used to reimburse premiums for student health insurance coverage sponsored by universities. However, there does not seem to be a clear way for employers to quickly verify if a student health plan is fully insured or self-funded and if such a plan is meeting EHB benchmark standards and lifetime and annual limit requirements. Given this employer verification and liability issue, NAHU would recommend that the Administration reconsider allowing HRA-IHICs to cover student health insurance coverage.

Comments were requested as to whether the scope of HRA-IHICs should be expanded to allow for their use to reimburse individuals for the purchase of short-term limited duration insurance coverage (STLDI). NAHU does not believe that the scope should be expanded to allow for such reimbursements at this time. While the overall HRA will meet the definition of MEC given that it is an employer-sponsored plan, STLDI policies themselves do not meet that criterion, and our members are concerned that allowing for their reimbursement through an HRA-IHIC could lead to consumer confusion. Further, and perhaps more important from a practical perspective, the availability, scope and duration of STLDI plans is variable by state. This could present a challenge for employers in geographic and metropolitan areas that span multiple states. Also, in the four states that have imposed their own individual mandate requirements, these policies do not qualify as acceptable coverage, which poses an additional issue for employers with employees living in those states.

NAHU notes that in the previous rulemaking by the Departments about setting the standard of minimum value coverage (45 CFR §156.145), the Departments specified that employers could rely on any metal-level policy sold in the small-group market as automatically meeting the minimum-value coverage standard. For metal-level plans, employers do not need to apply the minimum-value calculator or conduct an independent actuarial assessment. NAHU suggests creating a similar safe harbor for employers offering an HRA-IHIC concerning the standard of reimbursable coverage. Employers can know for sure that any individual policy sold that is bronze, silver, gold or platinum meets essential health benefit and annual and lifetime limit standards. Therefore, these policies should be those covered in a safe harbor for employers regarding policies qualified for reimbursement through an HRA-IHIC.

Cafeteria Plan Issues

In the proposed rule, the Departments solicit comments about the feasibility of integrating HRA-IHIC offerings with cafeteria plans regulated by IRC §125 and ask if additional guidance would be necessary to facilitate such integration. NAHU members and their employer clients believe that the possibility of integrating HRA-IHICs as envisioned by the proposed rule with §125 cafeteria plans would be a complicated and not necessarily advisable endeavor, and that additional detailed guidance from the IRS would undoubtedly be required before employers would feel comfortable with combining the two types of plan offerings.

The primary regulations that employers rely on today were issued in proposed form in August of 2007 and never finalized. NAHU members and employer clients wonder how a proposed integration of §125 plans and HRA-IHICs would work under this regulatory framework. We believe that the cafeteria plan rules would need to be modified and finalized to address how nondiscrimination testing and penalties would work with the potential reimbursement of individual coverage options, and that safe harbors would need to apply, particularly with HRA-IHICs. Additionally, guidance would be required to explain how HRA-IHIC offerings would work with the ACA's simple cafeteria plan safe harbor provisions that can be accessed by small employers. NAHU believes that any potential guidance regarding potential integration of HRA-IHICs with §125 cafeteria plans would need to cover the documentation of HRA-IHICs in §125 plan documents and how enrollment and disenrollment with an integrated §125 plan should be handled when individual-market open-enrollment periods and §125 plan years do not adequately align.

Many of the §125 plan discrimination concerns our members raise in this letter are similar to those raised by the IRS in Notice 2018-88 concerning the similar, but not identical nondiscrimination requirements for self-funded employer plans outlined in IRC §105(h). NAHU has provided detailed comments about the potential 105(h) safe harbors in our response to Notice 2018-88, and we note that similar attention must be paid to potential §125 plan safe harbors should the Departments act on integration with HRA-IHIC offerings.

Medicare Issues
With the number of Americans choosing to stay in the workforce past Medicare-eligibility age increasing every year, NAHU members and their employer clients are increasingly concerned about the intersection of Medicare rules with group health benefit plan requirements. The proposed rule raised some significant Medicare-related concerns among NAHU members and their employer clients. Specifically, NAHU members and their employer clients request additional detailed guidance about how the Departments envision the intersection of the HRA-IHIC provisions of the proposed rule and the Medicare secondary payer and nondiscrimination rules, both for traditional Medicare beneficiaries and those with Medicare eligibility due to a disability or end-stage renal disease.

NAHU members also would like clarification about the appropriate treatment of Medicare-eligible employees who are part of an employment class eligible for an HRA-IHIC. Would employers be required to provide these individuals with the same level of contribution as non-Medicare-eligible employees in the same class even though these individuals enrolled in Medicare are not eligible to purchase an individual policy? How would this work with contributions that are adjusted to accommodate age-rating premium variations? How would employers guard against potential accusations of age discrimination if different standards were required or allowed for Medicare-eligible employees? On a related note, what is the appropriate treatment for Medicare-eligible dependents?

Applicability to COBRA and State Continuation Laws
The proposed rule specifies that an HRA-IHIC is a group health plan and would qualify as minimum essential coverage under existing law, even though the individual coverage that may be reimbursed under the HRA-IHIC would not be considered group health plan coverage, provided that the employer meets conditions outlined in the rule. Since the HRA itself is considered to be minimum essential group coverage, NAHU members and their employer clients wonder how the new proposed HRA structure would work with current employer continuation of coverage requirements that stem from both COBRA and state continuation of coverage laws. NAHU members believe that there are many issues in this area that will need resolution via clarifying guidance before any employer could consider implementing an HRA-IHIC in 2020 or beyond. NAHU requests detailed guidance from the Departments as soon as possible specifying how the Administration envisions new plan options working with COBRA and the varied state-level approaches to handling continuation of coverage for smaller employers and other entities.

Section 1332 Waivers
Recently CMS released guidance for states on how they may qualify for Relief and Empowerment Waivers authorized by §1332 of the ACA. Relief and Empowerment Waivers may be used to create state-specific variations concerning the ACA's employer shared responsibility requirements, essential health benefit requirements, the minimum value and affordability requirements, and health insurance premium tax credits for individual coverage. As part of the new guidance, CMS specifically noted that HealthCare.gov would be able to support state-specific variations as part of a §1332 waiver. NAHU members would like

clarification about how the Departments intend to reconcile the programs and ideas outlined in the proposed rule with regard to potential state-level Relief and Empowerment Waivers. We request additional guidance on this issue generally. Furthermore, NAHU suggests that should a state apply for and be granted a waiver that would potentially impact Health Reimbursement Arrangements, other account-based plans or the essential health benefit requirements in a particular state, that the Departments automatically issue guidance directed toward employer plan sponsors and other issuers in the state and any surrounding metropolitan areas. This guidance should cover how the waiver terms might impact any existing health coverage requirements and any implementation concerns and changes that would be required of group health plans and issuers.

Excepted Benefit HRAs

The excepted benefits HRA provisions raise many of the same issues as the HRA-IHIC provisions in the proposed rule, so NAHU's concerns and questions apply to this proposed plan option as well. For example, all of our documentation and ERISA compliance questions and concerns regarding plan documents, SBCs and reporting requirements remain consistent. Additionally, the provisions relative to classes of employees and definitions are the same, so our technical questions and concerns about the potential for both intentional discrimination on the part of employers and greater discrimination charge exposure for employers generally remain the same. Our association's comments and practical observations relative to employer verification requirements and procedures would also apply to excepted benefit HRAs as proposed. We strongly suggest that the Departments develop a model disclosure notice for this HRA option, given the reimbursement limitations associated with this offering.

The Departments also solicited comments about the proposed $1800 annual contribution limit. NAHU members believe that if adequately indexed for inflation annually, that annual contribution limit should be sufficient, given that they will be limited to reimbursement for short-term limited duration plans, dental and vision, and COBRA premiums. For plans other than COBRA, $1800 is a very generous level of reimbursement, and for COBRA it could be helpful, particularly if the funds could be used to pay for spousal COBRA premiums.

EHB Benchmark Plans

The proposed rule expands upon the 2019 Notice of Benefit and Payment Parameters and provides a great deal of new flexibility to states and employers operating self-funded group major medical plans on the selection and use of EHB benchmark plans. NAHU appreciates the expanded flexibility but would like to formally request additional guidance on its parameters for self-funded group health plans. In particular, our members and their employer clients would like to know the timeframes self-funded employer plans must use in selecting a base-benchmark plan for the upcoming plan year and how base-benchmark plan selection must be recorded and communicated to plan participants. For example, our members assume notification would need to be made through the plan's summary of benefits and coverage and ERISA plan documents, but we wonder what the documentation procedures would be for

those self-funded group plans that are not subject to ERISA. Our members also would like to know how this new flexibility will coordinate with enforcement efforts and an employer's responsibility to maintain an ACA-compliant group health benefit plan. If there are other concerns or best practices the Departments envision for self-funded employer groups regarding base-benchmark plan selection, documentation and implementation, we request that these be addressed in future guidance as well.

Conclusion

The members of NAHU sincerely appreciate the opportunity to ask these questions and voice our views about how the proposed rule could function more effectively for employers and employees. As you work on final guidance, we request that you focus on administrative simplification, establishing a clear path for employers to obtain licensed professional help with HRA-IHIC administration and to provide employees who need it with a ready source of licensed professional assistance. Finally, we note that if the Trump Administration truly wishes to make new account-based plan options available to employers and employees as of January 1, 2020, the expedient release of much more detailed implementation guidance is necessary. If you have any questions about our comments, or if NAHU can be of assistance as you move forward, please do not hesitate to contact me at either (202) 595-0787 or jtrautwein@nahu.org.

Sincerely,

Janet Stokes Trautwein
Executive Vice President and CEO
National Association of Health Underwriters

Addendum

December 28, 2018

The Honorable David J. Kautter
Acting Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20044

RE: Notice 2018-88, submitted electronically via www.regulations.gov

Dear Mr. Kautter,

I am writing on behalf of the National Association of Health Underwriters (NAHU), a professional association representing more than 100,000 licensed health insurance agents, brokers, general agents, consultants and employee benefits specialists. We are pleased to have the opportunity to respond to the Internal Revenue Service's request for comments on IRS Notice 2018-88, published on November 19, 2018, and titled "Shared Responsibility for Employers Regarding Health Coverage; Amounts Received under Accident and Health Plans."

The members of NAHU work on a daily basis to help millions of individuals and employers purchase, administer and utilize health insurance coverage. Our expertise lies in the technicalities of health plan administration and the real-world challenges employers face when offering and operating employee-sponsored coverage. Over the past several years, NAHU members have helped businesses nationwide prepare for and implement the employer shared responsibility requirements outlined in IRC §4980(h), and NAHU members routinely help employer clients with IRC §105(h) compliance and plan testing. As such, NAHU members appreciate the development of the proposed Notice 2018-88 guidance, since it helps explain how employers might structure Health Reimbursement Arrangements (HRAs) that are integrated with individual health insurance coverage to avoid assessable payments under IRC §4980(h) and potential loss of the exclusion from income for employer-provided health benefits detailed in IRC §105(h).

However, in reviewing this guidance, NAHU members have identified some practical concerns that Notice 2018-88 either does not address or does not cover thoroughly enough to answer questions that employers have already posed to our members concerning how the new proposed HRAs integrated with individual coverage would work with existing Internal Revenue Code requirements. As such, our comments focus on the resources health insurance agents and brokers need to be able to answer client questions regarding individual health insurance coverage health reimbursement accounts (HRA-IHICs)

and their potential interface with IRC §4980(h) and §105(h). Please know that a representative group of health insurance agents who work with large-employer clients that could potentially be impacted by the new guidance provided the content for this comment letter. This letter is supplemented by NAHU's detailed response to the proposed rule titled "Health Reimbursement Arrangements and Other Account-Based Group Health Plans," published in the *Federal Register* on October 29, 2018.

The proposed guidance notes that an HRA qualifies as minimum essential coverage (MEC) since it is an employer-sponsored health plan. So if an applicable large employer (ALE) offers the HRA-IHIC or other MEC to 95% of employees and dependents, then it avoids "A" penalty liability under IRC 4980(h). NAHU believes it is important to note that, based on the questions employer clients have already posed to NAHU members about the new HRA-IHIC proposed rule, and our association has a concern that certain employers may make *de minimus* contributions to HRA-IHICs to meet their IRC §4980(h) obligation to offer MEC. While this would not mitigate the responsibility to offer minimum-value coverage and associated penalty liability, many employers may calculate that this is a preferable risk to their current "skinny" MEC plan offerings that also do not meet minimum-value requirements. If such limited HRA-IHIC funding is all that will be required to escape "A" penalty liability, NAHU is concerned that there will be a downgrade in the scope of employer-sponsored coverage offerings in specific industries increasing the number of uninsured employees and dependents. In the cases where employers do adequately fund HRA-IHIC offerings so that employees would have enough funds to purchase individual coverage, what will the impact be on the risk pool and individual consumers when a large number of people are directed to potentially unstable state-level individual health insurance markets?

Besides NAHU's concern of employers minimally funding HRA-IHICs and still being considered to offer MEC, NAHU members report that for ALEs that might consider offering HRA-IHICs, mitigating "B" penalty liability under IRC 4980(h) is a significant issue. Notice 2018-88 proposes various safe harbors to help ALEs demonstrate that potential HRA-IHICs meet the affordability and minimum-value tests.

According to the notice and the proposed HRA rule, health insurance exchanges will calculate the affordability of an HRA-IHIC offering for potential subsidy recipients on an individual basis using both the cost of the second-lowest silver plan in the rating area where the person lives and the person's age to account for individual-market age rating. However, employers considering offering HRA-IHICs to their employees will also need to calculate the affordability of their HRA-IHIC contribution for each employee. ALEs will need to do so for penalty liability purposes, and all employers that offer an HRA-IHIC that are also subject to the Fair Labor Standards Act and have to calculate coverage affordability for the exchange notice they must give to every new hire. Notice 2018-88 acknowledges for an employer using each employee's home address to calculate the cost of the second lowest silver plan would be burdensome. To address this situation, your agency proposes a location safe harbor whereby an employer could use the worksite location to obtain the second-lowest silver plan cost and use that for all employees offered an HRA-IHIC at that location. Notice 2018-88 inquires about the feasibility of this safe harbor.

NAHU members agree that the prospect of calculating affordability based on individual employee home addresses, which can change during the course of a plan year and are beyond an employer's control, would be extremely burdensome. Our association appreciates the intent of this safe harbor, but it does present some questions and concerns. First, many ALEs maintain multiple worksites so the affordability calculation burden for these employers would still be high. Also, if a business has numerous work locations, what would happen if an employee changed primary work locations mid-year? Should the safe harbor specify that the employee's work location at the beginning of the plan year or calendar year can be used for the entire year for affordability safe harbor purposes?

Notice 2018-88 states that the IRS doesn't currently plan to create an age safe harbor, so employers will still have to make employee-by-employee affordability calculations to adjust for age-rated individual market premiums. NAHU members are concerned that the resulting administrative burden will be a significant barrier to any ALE considering the possibility of offering HRA-IHICs to employees and that the IRS should consider making some modifications. Given that people's birthdays are all during the year, NAHU suggests that any future guidance should, at minimum, contain a specification that an employer only needs to account for an employee's age on the first day of the plan year for affordability purposes, and that employers do not have to recalculate affordability on a month-to-month basis. Similarly, NAHU suggests that the Trump Administration revise the overall age-rate calculation policy for qualified health plans so that age-banded rates would only increase on the plan anniversary, not on the birthday of each individual. This one change would reduce the administrative burden on all employers, by eliminating the possibility of month-by-month rate calculations. Employers would only need to revisit the affordability calculation if an employee has a significant salary change mid-year.

Another issue raised by Notice 2018-88 is how many employers will want to make a level HRA contribution to all employees in a class. However, if age is used in the affordability calculation, then unless the level contribution is quite significant, ALEs could have "B" penalty exposure for older workers. NAHU believes that unless the IRS develops a solution to allow employers to make level HRA-IHIC contributions without worry, it will be a significant participation barrier for any employer considering the HRA-IHIC concept.

For ALEs, any barrier to a level contribution will be particularly burdensome due to potential penalty exposure, but NAHU believes it will be an issue for virtually all employers debating the choice to offer HRA-IHICs. If an employer gives different contribution levels based on age, then there is the potential for employee complaints. Small employers and NAHU members have already experienced this now that small-group age rating has forever changed the pre-ACA notion of employer group composite rating. However, even now, with traditional small-group policies, there are ways to make scaled premium contributions and limited options for composite pricing, but these options would not be feasible for employers offering an HRA-IHIC. Besides, NAHU has concerns that the proposed policy for HRA-IHIC

would lead to the more significant potential for age discrimination in hiring since employers will know that the older the new hire, the more substantial the needed contribution.

Solving this issue is both imperative and complicated. One possible option would be to allow an employer to use the average age of all employees in each class on the first day of the plan year when making their affordability calculation and determining appropriate contribution levels. No matter what type of accommodation for age the IRS elects to use, a simple online calculator for employer use must accompany any future guidance. Employers could enter the premium by age for each employee at the start of the plan year into the calculator, and then use the tool to calculate affordability employee by employee, and determine the minimum affordability contribution by the employer.

The timing of the release of individual-market qualified health plan rates each year also may pose a challenge for ALEs, as the cost of the second-lowest silver plan in a rating area might not be known in time for an employer to set its HRA contributions for the year ahead. To address this issue, Notice 2018-88 proposes allowing employers the ability to use the cost of the plan from the year prior. The language in Notice 2018-88 indicates that the IRS will work with HHS to make sure that employers have a way of referencing the prices of the appropriate plans for each geographic area for the prior year. However, NAHU members and their clients will need more information about how historical silver plan rates will be made readily available to have any degree of comfort with a potential HRA-IHIC offering. Additionally, NAHU members have concerns about how this policy would work for non-calendar-year plans that would span multiple tax and rating years.

For this idea to be successful, user-friendly and publicly accessible affordability tables will be needed. These tables must detail the lowest-cost silver plan for each ZIP code for each month of the year, and full historical access to tables will be required in order to accommodate not only IRC §4980(h) enforcement, but also refundable tax credit eligibility detailed in IRC §36B and the enforcement of accuracy in IRC§§ 6055 and 6056 reporting. Additionally, an accommodation would need to be made for non-calendar-year plans, and the dates would vary based on the plan year dates involved. If this policy is adopted, the IRS should not further complicate the data and burden on employers by including a cost adjustment to the prior year silver plan prices for affordability calculation purposes. It will already be confusing for employers to figure out last year's second-cost silver plan price in their specific worksite locations, let alone adding in an additional price factor.

One of the accommodations proposed in Notice 2018-88 for non-calendar-year plans would be to allow these plans to merely use the cost of coverage on the first month of the plan year when calculating affordability for every month in the plan year. NAHU supports this idea and suggests that the IRS adopt this method for all calendar-year and non-calendar-year plans, not the range-of-dates method also proposed.

Another idea included in Notice 2018-88 supported by NAHU is requiring employers to use the safe harbors proposed by the IRS consistently across specified classes as they do for the existing IRC §4980(h) safe harbors for determining household income. NAHU agrees that ALEs should use the same class designations as in the existing IRC §4980(h) rules. Additionally, our members strongly suggest the class designations for HRA-IHIC offerings should be limited to those same designations already outlined in the IRC §4980(h) rules to make it simpler and more precise for all employers. Specifically, we feel the regulations should specify that an employer may choose to provide HRA-IHIC offerings to all of its employees or for any reasonable category of employees, provided it does so on a uniform and consistent basis for all employees in a class. Mirroring the affordability rules, we feel the language in any final rule should be clarified to read "reasonable categories generally include specified job categories, nature of compensation (hourly or salary), geographic location and similar bona fide business criteria."

NAHU also supports the proposal to require ALEs that offer HRA-IHICs to use the existing IRC §4980(h) affordability measurement safe harbors of Federal Poverty Level, W-2 wages and rate of employee pay. Our members believe that the use of consistent safe harbors will significantly reduce potential employer confusion and errors.

Notice 2018-88 acknowledges that any new IRC §4980(h) affordability safe harbors will also impact the in IRC§§ 6055 and 6056 reporting forms and processes and notes that further guidance on this topic will be forthcoming. NAHU agrees that new health information reporting guidance will be essential and we urge its expedient release. Employer reporting-compliance vendors will need the new rules to build software components and employers will need to incorporate the new standards into their tracking processes on a near-immediate basis. If HRA-IHICs are to be a legitimate employer plan offering beginning on January 1, 2020, finalized guidance for the employer reporting requirements must be completed as soon as possible. Furthermore, when developing such guidance, NAHU urges the IRS to use specific and straightforward terminology to minimize confusion. Concerning revised reporting forms, we suggest that your agency include a box that indicates "no safe harbors selected" or a "yes/no" option for each safe harbor, rather than allowing employers to merely leave boxes blank. NAHU believes that such a modification will reduce the possibility of safe-harbor errors and ease the IRC§4980(h) enforcement.

Notice 2018-88 indicates that if an HRA-IHIC meets the IRC§4980(h) affordability test, then it will also be considered to be minimum-value coverage. NAHU has concerns with this approach as currently worded. Instead, NAHU suggests using a similar safe harbor as the existing regulatory specification that any small-group metal plan is also considered to automatically meet the minimum-value test, as the metal-plan requirements are more stringent than the minimum-value calculator. Future guidance could indicate that if an HRA-IHIC is used to reimburse premiums for a plan sold in the marketplace that meets metal-plan standards, then the requirement that the plan meets minimum value is satisfied. Accordingly, NAHU also recommends that future guidance limit HRA-IHIC reimbursements to traditional individual-market coverage subject to the qualified health plan requirement with a metal-level actuarial value designation

of bronze, silver, gold or platinum.

Finally, Notice 2018-88 includes several means of addressing the IRC §105(h) nondiscrimination rules concerning HRA-IHIC offerings. NAHU members support the proposal to apply nondiscrimination testing safe harbor for HRA-IHICs that solely provide reimbursement for qualified individual-market policies, which we believe will greatly simplify things for small employers. However, the guidance also creates standards for "covered HRAs" that provide reimbursement for other qualified medical expenses. The guidance anticipates that many employers offering covered HRA plans may encounter IRC §105(h) discrimination issues since employers may contribute varying amounts to HRA-IHICs due to employee age variances and businesses may wish to offer different contribution levels to separate classes of employees. The guidance proposes a safe harbor from non-discrimination penalties if the employer sets the same maximum contribution level for all employees in the same class, and if there are age variations, each employee of the same age in the same class must have an equal maximum reimbursement level that increases annually at the same rate. Even with the proposed safe harbor, NAHU members are concerned that §105(h) will be an enormous administrative burden that employers will resist, particularly small employers. We also request clarification as to how the proposed §105(h) safe harbor would work with any potential age-rating accommodations that may be revealed in future guidance.

NAHU is grateful for the opportunity to provide information to the IRS on Notice 2018-88 and appreciates your willingness to consider the point of view of brokers, employers and individual health insurance consumers. If you have any questions or need additional information about our suggestions, please do not hesitate to contact me at either (202) 595-0787 or jtrautwein@nahu.org.

Sincerely,

Janet Stokes Trautwein
Executive Vice President and CEO
National Association of Health Underwriters