



# AMERICAN BENEFITS COUNCIL

December 27, 2019

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Internal Revenue Service  
CC:PA:LPD:PR (REG-136401-18)  
Courier's Desk  
1111 Constitution Avenue NW  
Washington, DC 20224

**Re: Comments on Proposed Regulations on the Application of the Employer Shared Responsibility Provisions and Certain Nondiscrimination Rules to Health Reimbursement Arrangements and Other Account-Based Group Health Plans Integrated With Individual Health Insurance Coverage or Medicare**

Dear Sir or Madam:

The American Benefits Council (“the Council”) appreciates the opportunity to comment on the Notice of Proposed Rulemaking on the Application of the Employer Shared Responsibility Provisions and Certain Nondiscrimination Rules to Health Reimbursement Arrangements and Other Account-Based Group Health Plans Integrated With Individual Health Insurance Coverage or Medicare<sup>1</sup> (“Proposed Regulations”) issued by the U.S. Department of the Treasury and Internal Revenue Service (IRS).

The American Benefits Council is a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-sponsored plans.

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<sup>1</sup> 84 Fed. Reg. 51471 (Sept. 30, 2019).

For years the Council has urged policymakers to make health reimbursement arrangements (HRAs) more flexible. To that end, we supported the regulations issued by Treasury, IRS and the departments of Health and Human Services (HHS) and Labor permitting the use of HRAs in combination with policies purchased on the individual insurance market and with certain Medicare policies (ICHRAs). Indeed, those regulations (“Final ICHRA Regulations”<sup>2</sup>) largely aligned with the Council’s recommendation for “stand-alone HRAs” in our long-term strategic plan adopted in 2014, [A 2020 Vision: Flexibility and the Future of Employee Benefits](#). Permitting the use of ICHRAs, if implemented correctly, will provide employers with an additional tool in designing employer-sponsored health benefit plans, which have been the backbone of America’s system of health coverage for generations.

## SUMMARY OF COMMENTS

The Council appreciates that the Proposed Regulations carefully address the topic of determining the affordability of ICHRAs for purposes of the Affordable Care Act’s (ACA) employer “shared responsibility” provisions under Internal Revenue Code Section 4980H. These regulations will play a central role in determining whether employers choose to offer ICHRAs to their employees. The Proposed Regulations acknowledge, and take important steps forward in addressing, employers’ need for predictability and certainty in using ICHRAs, and our comments strongly support certain aspects of the Proposed Regulations.

However, due to the limited nature of the location and age-based safe harbors provided with respect to determining affordability of ICHRAs for purposes of the employer shared responsibility provisions, if the regulations are finalized as proposed, the Council is concerned that the regulations will have the unintended effect of discouraging large employers from offering ICHRAs to full-time employees. In order to better enable large employers to offer ICHRAs, which is the stated intent of the Proposed Regulations and which the Council fully supports, we request that Treasury and IRS adopt final regulations that provide broader, and in some cases additional, safe harbors to employers in determining the affordability of an ICHRA for purposes of the employer shared responsibility provisions.

The Council has the following comments and concerns with respect to the Proposed Regulations, each of which is discussed in further detail below:

- The Council appreciates that the Proposed Regulations contain a location-based safe harbor for purposes of determining affordability under the employer shared responsibility provisions, but the final regulations should provide an expanded safe harbor, such as an employer-wide or nationwide safe harbor, to reduce the

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<sup>2</sup> 84 Fed. Reg. 28888 (June 20, 2019).

burden on large employers and support the use of ICHRAs.

- If the final regulations retain the rating-area-by-rating-area worksite safe harbor for purposes of determining affordability under the employer shared responsibility provisions, the Council requests that employers not be required to change the affordability calculation mid-plan year if an employee's worksite changes. The Council also requests more practicable rules for employees who work remotely.
- The Council requests that Treasury and IRS provide an age-based safe harbor, such as one based on 10-year age bands, for purposes of determining affordability under the employer shared responsibility provisions. Such a safe harbor would both help address the significant burden placed on employers in determining affordability on an age-by-age basis and mitigate Treasury's and IRS's concerns regarding discrepancies between affordability for purposes of the Premium Tax Credit (PTC) under Code Section 36B and the employer shared responsibility provisions.
- The Council supports the look-back month safe harbor for determining affordability under the employer shared responsibility provisions. This safe harbor provides employers with needed predictability and certainty and should be included in the final regulations. The Council does not support applying an adjustment to the look-back month premium. The added complexity of an adjustment would not be justified by added accuracy, due to the insufficiency of reasonably available adjustments.
- The Council supports the ability of employers to report under Code Section 6056 the employee's required contribution determined for purposes of the employer shared responsibility provisions, including any applicable safe harbors, rather than the employee's required contribution determined for purposes of the PTC. The Council requests that IRS minimize changes to Forms 1094-C and 1095-C related to ICHRAs, to reduce the burden and cost on employers, and that administrative guidance on Section 6056 ICHRA reporting be provided as soon as possible.
- The Council requests that Code Section 6055 reporting obligations not apply to employers with respect to coverage provided under ICHRAs. Such reporting would be duplicative and impose burdens on employers without adding corresponding value for employees or the IRS.
- The Council appreciates that under the Proposed Regulations employers may rely on the lowest cost silver plan (LCSP) premium information made available by exchanges in determining affordability for purposes of the employer shared responsibility provisions and strongly encourages that this rule be retained. The Council also requests that the exchanges make LCSP information available as

soon as possible each year and retain historical LCSP information for use by employers and the IRS.

- The Council supports the Code Section 105(h) safe harbor contained in the Proposed Regulations. The safe harbor reduces complexity and should be finalized as proposed.
- The Council appreciates that employers may rely on the Proposed Regulations, including for a window of time following issuance of final regulations. Due to the reliance that employers have with respect to the Proposed Regulations, the Council respectfully urges Treasury and IRS to take the time necessary to develop workable rules, rather than prioritizing speed in finalization.

The Council recognizes and appreciates the Administration's efforts with respect to increasing the availability and use of HRAs. The Council notes, more broadly, that in addition to workable regulations, in order for ICHRAs to be a viable option for employers, it is vital that the individual market be stable and well-functioning, otherwise, employers will be unwilling to utilize this expanded flexibility. As such, continued uncertainty surrounding the individual marketplace limits the success of the Administration's efforts regarding ICHRAs.

The detailed comments that follow are intended both to support employer adoption of ICHRAs and to take into account statutory and policy concerns identified by Treasury and IRS in the Proposed Regulations.

## **CODE SECTION 4980H PROPOSED REGULATIONS**

### **Location Safe Harbor**

#### *In General*

Under the general rules governing ICHRAs and the PTC, whether an offer of an ICHRA is affordable for an employee depends in part on the monthly premium for the LCSP for self-only coverage offered through the exchange for the rating area in which the employee resides. However, as Treasury and IRS acknowledged in the Proposed Regulations and in Notice 2018-88,<sup>3</sup> which preceded the Proposed Regulations, a substantial burden would be placed on employers if they were required to determine affordability based on each employee's place of residence, as employees move frequently and employers do not always have up-to-date records regarding where an employee resides.

Accordingly, the Proposed Regulations provide that employers may determine

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<sup>3</sup> IRS Notice 2018-88, 2018-49 IRB 817.

affordability for purposes of the employer shared responsibility provisions based on the LCSP in the rating area in which the employee's primary site of employment is located, rather than the LCSP in the rating area in which the employee resides.<sup>4</sup> The Council appreciates Treasury's and IRS's willingness to provide a safe harbor that allows an employer to determine affordability based on where the employee works rather than where the employee resides. The Council fears, however, that if employers are not allowed to base affordability on a nationwide LCSP or employer-wide LCSP, that will be a significant factor weighing against large employers offering ICHRAs to full-time employees.

As Treasury and IRS acknowledge in the preamble to the Proposed Regulations, under the standard affordability rules applicable to other group health plans, employers need only look at the cost of one plan (that is, the plan they offer to their full-time employees), while ICHRA affordability determinations, even under the proposed safe harbor, will require employers to look to the cost of the LCSP for each employee based on the rating area in which their worksite is located.

This will impose significant complexity and related burden on large employers. There are in excess of 500 rating areas in the nation, with most states having multiple rating areas and several states having dozens of rating areas (*e.g.*, Texas has 26 rating areas, South Carolina has 46 rating areas and Florida has 67 rating areas).<sup>5</sup> For employers with employees in multiple states, of which there are many, and even for employers with employees in only one state, the lack of a broader safe harbor will necessitate tracking the cost of scores of plans. Employers need a uniform standard that they can apply to their workforce if ICHRAs are to be a viable option. Making employee-by-employee determinations of affordability based on hundreds of possible plans is simply not feasible for most employers.

As the Council noted in our comments on Notice 2018-88, clear and *workable* guidance regarding how employers can offer ICHRAs and at the same time avoid payments under Section 4980H is critical to employers adopting a plan design that includes ICHRAs. To this point, the Council requests that Treasury and IRS reconsider adopting a safe harbor rule that would permit the use of a nationwide or employer-wide standard (such as for example, where an employer is headquartered) for determining affordability for purposes of Section 4980H. Doing so would avoid the imposition of unnecessary costs and administrative burdens on employers and encourage the use of ICHRAs. This is particularly important given the rise of employers

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<sup>4</sup> We note that the Final ICHRA Regulations do not allow employers to offer or vary ICHRA amounts based on employee place of residence. Instead those rules are based on employees' primary site of employment.

<sup>5</sup> Centers for Medicare & Medicaid Services, the Center for Consumer Information & Insurance Oversight, Market Rating Reforms, State Specific Geographic Rating Areas available at <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Market-Reforms/state-gra> (last checked December 26, 2019).

with geographically dispersed employees, the use of telecommuting, and an increasingly mobile workforce. We understand that no such nationwide standard currently exists, and we defer to Treasury and IRS (in conjunction with HHS if necessary) to determine what standard would work best.

Although Treasury and IRS acknowledge the burden placed on employers even under the proposed location safe harbor, the Proposed Regulations do not include an employer-wide or nationwide safe harbor, at least in part, due to a concern expressed by Treasury and IRS that employers would unduly benefit from such a safe harbor. The concern appears to be that employers would be able to offer an ICHRA based on the cost of a LCSP, which for some employees would be less than the otherwise applicable LCSP, and therefore employers could avoid an employer shared responsibility payment and also avoid having to pay for the ICHRA by encouraging employees to opt out of the ICHRA and instead go to the exchange and get the PTC. The Council notes, however, that the request for a nationwide or employer-wide safe harbor is not based on the desire to avoid funding ICHRAs or to encourage employees to seek the PTC and is instead merely a request for a reasonable and administrable rule that will make it feasible for employers to offer ICHRAs to their employees.

Further, these concerns are already meaningfully addressed by the proposed consistency requirement (see below), which we support including in a final rule, and which would provide that an employer, in order to be able to make use of an employer-wide or nationwide safe harbor, would need to use the safe harbor for all employees in a class of employees or for no employees in a class. This would prevent employers from only using the safe harbor in high cost areas while using the actual premium of the LCSP in low cost areas and would provide employers with bright line, easily administrable rules.

Moreover, Treasury and IRS clearly have regulatory authority to create affordability safe harbors, such as those included in the final regulations on the employer shared responsibility provisions (Employer Shared Responsibility Regulations<sup>6</sup>) and those included in the Proposed Regulations. The Council understands concerns expressed by Treasury and IRS regarding deviating too far from the PTC affordability rules. In this instance, however, the Council believes that sound policy requires Treasury and IRS to ensure that there are safe harbors that will support the use of ICHRAs by employers and that a nationwide or employer-wide safe harbor, coupled with a consistency requirement, would not create a discrepancy with the PTC rules significant enough to challenge Treasury's and IRS's authority.

As to the statement by Treasury and IRS that if employers would like to minimize burden and multiple ICHRA amounts they can base contributions on the LCSP that has the highest premium for any of its full-time employees, such an approach may be unaffordable for some employers. Additionally, many employers might prefer instead

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<sup>6</sup> 79 Fed. Reg. 8544 (Feb. 12, 2014).

to use any excess amounts here for the provision of additional employee wages, or perhaps retirement savings (such as in the form of enhanced 401(k) plan matching contributions or a profit sharing contribution). Thus, the Council encourages Treasury and IRS not to view this approach as a viable contribution option for most employers.

For the reasons discussed above the Council requests a nationwide or employer-wide affordability safe harbor. If Treasury and IRS cannot provide such a safe harbor, a statewide safe harbor would be preferable to the primary site of employment safe harbor which requires employers to base affordability off too many plans to be workable for a significant number of employers.

### *Identifying the Primary Site of Employment*

The Proposed Regulations provide that for purposes of the location safe harbor an employee's primary site of employment generally is the location at which the employer reasonably expects the employee to perform services on the first day of the plan year. This site will be treated as changing if the location at which the employee provides services changes and the employer expects the change to be permanent or indefinite. In that case, the employer has until the first day of the second calendar month following the change in location to apply the updated affordability determination. Subject to the comments below, the Council supports the Proposed Regulations' general approach to identifying an individual's primary site of employment. This rule appears to be an attempt to strike a balance between requiring employers to use specific and up-to-date information while also taking into account administrative realities.

However, to reduce unwarranted burden, the Council suggests that employers be allowed to make the primary site of employment determination once per year, rather than multiple times a year. As discussed above, individual-by-individual determinations of affordability are extremely burdensome for employers. Also, there is no ability for an employer to take strategic advantage of employees moving locations without incurring substantial additional costs. Finally, on average employees should be moving both to higher and to lower cost areas, and so the costs should average out. If annual determinations are not sufficient, employers should be permitted to determine location twice per year, but should not be required to monitor changes on a daily basis. Doing so increases administrative costs and burdens, without any real gain in operability of the rule.

As Treasury and IRS point out in the preamble discussing the look-back month safe harbor, under Section 4980H, employers are intended to be able to decide whether to offer coverage sufficient to avoid an employer shared responsibility payment, and they may only do so if they have timely access to relevant information. Given how mobile the workforce is, requiring employers to make midyear changes based on an employee's move directly cuts against the statutory policy by preventing employers from having timely access to relevant information about the cost of the benchmark plan in advance of the ICHRA plan year.

In addition, the Proposed Regulations require that, with respect to an employee who teleworks and does not have a particular assigned office space or particular location to which to report, the employee's residence is the primary site of employment. As Treasury and IRS themselves note in the preamble to the Proposed Regulations, however, employers often do not have up-to-date information on where an employee resides. Even if the final regulations do not provide for a nationwide or employer-wide location safe harbor generally, the Council requests the final regulations do so for employees who exclusively telework, many of whom may move quite frequently. In such cases employers should be permitted to use a nationwide safe harbor or treat their domestic headquarters (or a similar standard location) as the employee's primary site of employment.

### ***Employee Residence***

In the preamble to the Proposed Regulations, Treasury and IRS note that they expect that most employers will choose to use the location safe harbor rather than the employee's residence to determine affordability. This is in part because under the Final ICHRA Regulations, an employer may offer and vary ICHRAs for a class of employees based on primary site of employment but not based on employee residence. As a result, Treasury and IRS note that rules to identify employee residence in advance of the plan year for purposes of the employer shared responsibility provisions are not included in the Proposed Regulations but comments are requested.

Although some Council members have noted that employers may wish to be able to offer ICHRAs for classes of employees based on employee residence, the Council acknowledges that the Final ICHRA Regulations do not include such a rule and, therefore, the Council agrees with Treasury and IRS that rules regarding identification of employee residence as part of a location-based safe harbor for the employer shared responsibility provisions is not needed at this time and could cause confusion.

### **Age-Related Issues**

#### ***Consideration of Age Safe Harbor***

Under the Proposed Regulations, even for employees who work at the same worksite and for whom the employer uses the location safe harbor, the cost of the LCSP used to determine the affordability of an ICHRA will vary on an employee-by-employee basis to the extent employees are different ages, because age affects the cost of plans offered in the individual market, including the LCSP.

As Treasury and IRS acknowledge in the preamble to the Proposed Regulations, determining the premium for the LCSP used to determine affordability in this way is burdensome for employers. If finalized as proposed, employers would be required to determine affordability and ICHRA amounts for each employee based on age (*e.g.*, an employer with employees ranging from age 20 to 65 would have up to 45 different



ICHRA affordability amounts). Alternatively, employers would be able to provide ICHRA amounts for age ranges (*e.g.*, 10 year age bands) but would need to determine the ICHRA amount for each age range based on the oldest employees in the group, or the employer would need to offer an ICHRA amount for all employees in the class based on the cost of the LCSP for the oldest employee.

These options are either unduly administratively burdensome or require employers to contribute amounts to ICHRAs that are not in sync with the actual cost of coverage for the employee and could be prohibitively expensive. Such a rule strongly discourages adoption of ICHRAs and is inconsistent with the idea that ICHRAs could provide a straight-forward, less burdensome way to provide health coverage.

The Council understands Treasury's and IRS's concerns with respect to providing an age-based safe harbor, and we appreciate the extensive discussion in the preamble regarding the limitations on the regulatory authority to provide safe harbors that deviate significantly from PTC affordability determinations. Treasury and IRS note that employers know the age of their employees and therefore do not need an age-based safe harbor. However, while employers may indeed know their employees' ages, this does not obviate Treasury's and IRS's authority to provide administrable rules, such as a safe harbor offering employers relief from having to provide potentially dozens of different ICHRA amounts. The Council asks Treasury and IRS to reconsider the issue of an age-based safe harbor in the final rule due to its importance for employers and its potential impact on the ultimate uptake of ICHRA offerings.

Treasury and IRS noted numerous ideas from commenters for single-age safe harbors, including basing affordability on a composite premium for an employer's employees or allowing employers to use the average age of all employees in each class of employees on the first day of the plan year. This type of safe harbor would simplify application of the employer shared responsibility provisions a great deal, in particular for those employers wanting to offer one ICHRA amount for all employees regardless of age. The Council supports the adoption of a safe harbor along these lines.

The Council understands Treasury's and IRS's concerns about the potential insufficiency of a single proxy to determine an appropriate ICHRA amount based on age. If the final rule does not provide a single-age safe harbor, the Council requests that Treasury and IRS provide a safe harbor based on ten-year age bands (which allows use of a LCSP amount other than the LCSP amount for the oldest age in the band), rather than requiring employers to make an individual-by-individual determination. Using age bands eases the burden on employers while simultaneously addressing the regulators' concerns about significant deviations from the actual cost of coverage. The costs will average out over all employees in a band, and changes in cost will likely be relatively minor within a band. Providing such a safe harbor harmonizes the affordability rules with the underlying integration rules and addresses concerns about complexity associated with age-by-age ICHRA amounts.

## *Age Used to Determine Premium for Affordability Plan for an Employee*

The Proposed Regulations provide that for purposes of affordability, an employee's age for the plan year is the employee's age on the first day of the plan year or, for individuals who are first eligible in the middle of the plan year, their age on the date the ICHRA can first become effective for that employee. The Council thanks Treasury and IRS for specifying the date as of which an employee's age should be determined for these purposes. This rule is reasonable and provides helpful certainty for employers in administering their ICHRAs.

## **Look-Back Month Safe Harbor**

### *In General*

The Proposed Regulations provide that in determining an employee's required contribution for any calendar month in a plan year, for purposes of determining affordability of an ICHRA under the employer shared responsibility provisions, employers may use the premium for the LCSP for January of the previous year for calendar year ICHRAs and the premium for the LCSP for January of the current calendar year for non-calendar year ICHRAs. The Council strongly supports the look-back month safe harbor as it provides predictability and certainty to employers, which, as Treasury and IRS acknowledge, is essential for employers to be able to avoid an employer shared responsibility payment through offering coverage.

As noted in the preamble to the Proposed Regulations, employers determine benefits for the upcoming year well in advance of the start of the plan year. The ability to use the prior year's January LCSP premium for calendar year ICHRAs provides sufficient lead time for employers in determining benefits. Although the rule for non-calendar year ICHRAs provides less lead time, in particular for ICHRAs with plan years that start early in the calendar year, the rule proposed has the benefit of being simple and straight-forward, and the Council does not expect many employers to provide non-calendar year ICHRAs due to complex interactions with the individual market. As a result, the Council supports the application of the look-back month safe harbor to non-calendar year ICHRAs as proposed.

Although the Council appreciates that generally the look-back month safe harbor allows an employer to use the same premium to determine affordability for each month of the plan year, the Proposed Regulations require employers to change the affordability determination mid-plan-year if the employee's applicable location changes (even though the employer could still continue to use the look-back month safe harbor, for the new location). The Council requests that employers not be required to change affordability calculations based on an employee's mid-plan-year change in location (either worksite or residence). Employers do not generally control where employees live and so this would not present an opportunity for employers to take any strategic advantage of the rules, and to the extent employers would require employees to move

worksite locations, it is expected that employers would be doing so for legitimate business reasons, otherwise it would not be cost efficient. Requiring mid-plan-year affordability calculation changes when an employee moves cuts against the well-established policy that under Section 4980H employers must have timely access to relevant information to determine whether to offer coverage to avoid an assessable payment in advance of the plan year.

### ***Adjustments to Look-Back Month Premium Amounts***

The Proposed Regulations do not include an adjustment to the LCSP premium for the applicable month (*i.e.*, January of the prior year or January of the current year, as applicable) under the look-back month safe harbor. However, Treasury and IRS request comments on this topic. The Council recommends against adding an adjustment to the premium for the applicable LCSP under the look-back month safe harbor. The Council considered various possibilities for adjustment factors but did not identify an adjustment that would be a sufficiently accurate proxy for annual increases in the cost of LCSPs, due largely to geographic variation. Further, the closer any adjustment comes to being a reasonable proxy (*i.e.*, a geographic-specific adjustment), the more complex it becomes, which undermines the simplicity and clarity offered by the look-back month safe harbor provided in the Proposed Regulations.

If Treasury and IRS decide to add an adjustment requirement to the final regulations, the Council requests use of a standardized and readily ascertainable adjustment, such as CPI-U. Further, if an adjustment is implemented, HHS and the state-based exchanges should reflect that adjustment in the LCSP information made available, and on which employers may rely.

### **Consistency Requirement for Affordability Determinations**

Under the Proposed Regulations employers need not use any particular safe harbor but if they do so, they must do so on a consistent basis for a class of employees, as defined in the Final ICHRA Regulations. The Council supports inclusion of this consistency requirement in the final regulations for the reasons stated earlier and appreciates Treasury and IRS allowing employers to apply this consistency requirement with respect to each permitted class of employees as set forth in the Final ICHRA Regulations at 26 CFR 54.9802-4(d)(2), rather than the more general standard provided in the Employer Shared Responsibility Regulations. Coordinating the rules in this way reduces complexity for employers. For the sake of clarity, the Council requests confirmation that for purposes of the consistency requirement, employers are permitted to use any subclasses permitted under the Final ICHRA Regulations, including under 26 CFR 54.9802-4(d)(2)(xi), which relates to combinations of classes of employees.

### **Application of Current Household Income Safe Harbors to ICHRAs**

Per the employer shared responsibility regulations, employers are permitted to use

certain safe harbor amounts (*i.e.*, Form W-2 wages, rate of pay, federal poverty line) as a proxy for employee's household income for purposes of determining affordability under Section 4980H, as employers generally do not know employees' household incomes. The Council appreciates Treasury and IRS providing that these same household income safe harbors may be applied with respect to ICHRAs. As with other types of employer-sponsored coverage, employers that offer ICHRAs will not know employees' household incomes and so the reasons for the safe harbors as applied to traditional employer-sponsored coverage apply equally for an employer that offers an ICHRA.

### **Minimum Value**

Under the Proposed Regulations, an ICHRA that is affordable, including as determined under the affordability safe harbors, is deemed to provide minimum value. The Council greatly appreciates this rule, which is simple and clear and should be retained in the final regulations as proposed.

### **Implementation of Code Section 4980H Safe Harbors and Reliance on Exchange Information**

The Proposed Regulations provide that a large employer may rely on information provided by an exchange in determining whether the offer of an ICHRA is affordable and provides minimum value. The Council strongly supports this aspect of the Proposed Regulations.

The Council also appreciates that HHS has worked to develop a look-up tool for use by employers in identifying the LCSP applicable to a given employee for federally-facilitated exchange plans. This tool should be very helpful for employers in determining what level of ICHRA contribution may be required for a given employee to ensure affordable coverage. Unfortunately, there does not appear to be any similar tool available with respect to state-based exchanges. The absence of such tool(s) stands as a deterrent to employers for the sponsorship and maintenance of ICHRAs; thus, we urge Treasury and IRS, along with its fellow federal agencies and the states, to develop a similar tool for use by employers in identifying the LCSP in states that use a State-Based exchange.

Further, as Treasury and IRS are aware, due to timing of employer reporting and IRS processing, employers do not receive any assessment under Section 4980H until at least a year after the year to which the assessment applies. For the IRS and for employers, therefore, exchanges will need to retain the LCSP information made available for past years so that if issues arise in the future employers can look up the relevant historical LCSP to demonstrate the affordability of their ICHRA offer.

### **Other Comments Related to Code Section 4980H**

The Council thanks Treasury and IRS for clarifying that an offer of coverage under

an ICHRA is an offer of coverage for purposes of the employer shared responsibility provisions even if the employee does not enroll in individual insurance coverage or take the ICHRA. The Council requested this clarification and appreciates Treasury's and IRS's responsiveness to our concerns. While the decision to offer an ICHRA is an employer's choice, whether an individual employee actually enrolls in individual health insurance coverage is outside the employer's control, and it would entail significant administrative burden to determine and monitor enrollment.

## **REPORTING UNDER CODE SECTIONS 6056 AND 6055**

### **Section 6056**

Although the Proposed Regulations do not propose to amend regulations under Section 6056, Treasury and IRS note in the preamble that they anticipate issuing administrative guidance regarding reporting of ICHRAs under Section 6056. That guidance is anticipated to provide that employers may report the employee's required contribution (Form 1095-C, Line 15) based on the Section 4980H safe harbors, rather than the employee's required contribution determined under the PTC rules, without the application of any safe harbors. The Council strongly supports a rule allowing employers to report the employee's required contribution determined under the Section 4980H rules, including safe harbors. Requiring the reporting of the employee's required contribution calculated strictly under the PTC rules would radically undermine the utility of the safe harbors provided in the Proposed Regulations.

Further, Treasury and IRS note that they are continuing to consider whether and how to revise the codes used on Form 1095-C to address ICHRAs. The Council requests as few changes as possible with respect to the current Forms 1094-C and 1095-C. Developing systems consistent with the current forms and instructions has been an expensive and time consuming endeavor for employers, and any changes to the forms and reporting rules would likely result in the imposition of additional costs and burdens. For example, there should not be a need for new codes under Line 16 (Section 4980H safe harbors) because employers are permitted to use the household income safe harbors for ICHRAs. Reporting under Section 6056 is already complex, and adding new lines and codes would add to the existing burden without significantly aiding IRS enforcement or individual compliance.

Further, while the Council supports addressing Section 6056 reporting through administrative guidance and appreciates that Treasury and IRS acknowledged the need for timely guidance, we request that draft forms and instructions be released as early as possible so that employers can prepare for timely reporting and provide meaningful comment on any proposed changes. Finally, for the first few years of required ICHRA reporting, good faith penalty relief under Code sections 6721 and 6722 for errors and omissions in returns and statements filed with the IRS and furnished to employees

should be provided, similar to the relief that has been provided with respect to Section 6056 reporting more generally for 2015 through 2019.

## **Section 6055**

In the preamble to the Proposed Regulations, Treasury and IRS note that, as ICHRAs are self-insured group health plans and therefore minimum essential coverage, employers are generally subject to Section 6055 reporting with respect to ICHRAs. Treasury and IRS further state that although there are exceptions from Section 6055 reporting for certain duplicative coverage, ICHRAs would not fall under those exceptions.

The Council appreciates that Treasury and IRS raised this important issue in the preamble. However, when Treasury and IRS developed Section 6055 regulations, including providing certain exceptions for duplicative coverage, ICHRAs did not yet exist.<sup>7</sup> The Council therefore believes that the existing regulations regarding Section 6055 exceptions for duplicate reporting merit a fresh look and should be amended to take ICHRAs into account.

More specifically, employers should not be required to report under Section 6055 for ICHRAs. Such reporting would be wasteful for employers and for employees. First, employees with an ICHRA must be covered by an individual health insurance coverage (or Medicare) so any employer reporting would be duplicative of reporting by the exchange or by an insurance carrier (or by Medicare). Second, with the individual shared responsibility provision penalty under Code Section 5000A reduced to zero for 2019 and later years, Section 6055 reporting is generally no longer useful for employees. This was recently acknowledged by Treasury and IRS in Notice 2019-63<sup>8</sup> which provides certain exceptions to the requirement to furnish Section 6055 reporting to individuals.

The Council understands that the IRS may have an interest in ICHRA reporting under Section 6055 to verify PTC eligibility. However, other parts of the PTC eligibility process, including front-end processes by the exchange and the notice employers provide to employees explaining the PTC consequences of the offer of the ICHRA, may largely address those concerns. Accordingly, the Council urges Treasury and IRS to consider the extent to which these existing processes may be sufficient for PTC administration to allow for an exception from Section 6055 reporting for ICHRAs.

## **Proposed Regulations Under Code Section 105(h)**

The Proposed Regulations provide that an ICHRA that increases contribution amounts based on the ages of participants will not fail to violate the nondiscrimination

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<sup>7</sup> Prop. Treas. Reg. § 1.6055-1(d)(2) and (3), in 81 Fed. Reg. 50671 (Aug. 2, 2016).

<sup>8</sup> Notice 2019-63, 2019-51 IRB 1390 (Dec. 16, 2019).

rules under Section 105(h) that otherwise prohibit age-based variation, as long as the ICHRA complies with the age-variation rules contained in the Final ICHRA Regulations, which generally limit age-based variation to a ratio of 3:1. The Council supports the safe harbor under Section 105(h) contained in the Proposed Regulations, which was simplified as compared to the safe harbor anticipated in Notice 2018-88, which tied age-based ICHRA contribution increases to variation in premiums for an actual policy.

As we noted in our comments on Notice 2018-88, some employers may wish to offer ICHRAs with increased contributions based on age to ensure that older employees are not relatively disadvantaged compared to younger employees due to the fact that the pricing of individual health insurance coverage is age-rated and, as such, increases with the age of the insured. Therefore, the Council appreciates that the Section 105(h) regulations have been harmonized with the Final ICHRA Regulations to allow for age-based increases in ICHRA contributions. Further, as a practical matter, the Council appreciates that the safe harbor under Section 105(h) in the Proposed Regulations springboards off of extant rules in the Final ICHRA Regulations, thereby creating uniformity and decreasing unnecessary complexity.

### **Proposed Applicability Date**

The Proposed Regulations provide that taxpayers may rely on the regulations for periods during any plan year (or for any plan year, for Section 105(h)) of an ICHRA beginning before the date that is six months following the publication of any final regulations. The Council appreciates that the regulations provide reliance and that the reliance continues for a window even after publication of any final regulations. This provides employers the ability to offer an ICHRA as soon as otherwise possible.

As discussed above, the Council urges Treasury and IRS to provide an employer-wide safe harbor or a nationwide location safe harbor as well as an age-based safe harbor. We understand the substantial effort required by Treasury and IRS to develop such regulations given the various interrelated statutory provisions and the need to develop regulations that can be easily implemented. Due to the reliance that employers have with respect to the Proposed Regulations, the Council respectfully urges Treasury and IRS to take the time necessary to develop workable regulations rather than prioritizing speed in finalization, if such speed would provide insubstantial time for Treasury and IRS to consider developing broader safe harbors. Affordability safe harbors under the employer shared responsibility provisions which are sufficiently broad and flexible are essential to the viability of ICHRAs and would be well worth the time and effort involved. To that end, the Council would be pleased to provide information or assist Treasury and IRS in any way.

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The Council appreciates the Administration's efforts with respect to increasing the

availability and use of HRAs, and thanks Treasury and IRS for taking steps to address the complexities related to the application of the employer shared responsibility provisions and nondiscrimination rules to ICHRAs. However, the Council believes that broader safe harbors are needed under the employer shared responsibility provisions regarding determination of affordability for ICHRAs to encourage large employers to adopt ICHRAs.

Thank you for considering these comments. If you have any questions or would like to discuss these comments further, please contact us at (202) 289-6700.

Sincerely,

A handwritten signature in black ink that reads "Ilyse Schuman". The signature is written in a cursive, flowing style.

Ilyse Schuman  
Senior Vice President, Health Policy