

Part III - Administrative, Procedural and Miscellaneous

Section 4980H — Shared Responsibility for Employers Regarding Health Coverage

Section 105 — Amounts Received Under Accident and Health Plans

Notice 2018-88

I. PURPOSE AND OVERVIEW

On October 23, 2018, the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS), the Department of Labor (DOL), and the Department of Health and Human Services (HHS) (collectively, the Departments) issued proposed regulations¹ under section 2711 of the Public Health Service Act (PHS Act)² and the health nondiscrimination provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191, and the Patient Protection and Affordable Care Act, Public Law 111-148, as amended by the Health Care Education Reconciliation Act of 2010, Public Law 111-152, (collectively PPACA) (HIPAA/PPACA nondiscrimination provisions).³ The proposed regulations are intended to expand the usability of health reimbursement arrangements and other account-based group health

¹ See 83 FR 54420 (Oct. 29, 2018).

² The proposed regulations under section 2711 of the PHS Act also apply for purposes of section 2713 of the PHS Act.

³ See Internal Revenue Code (Code) sections 9802 and 9815, Employee Retirement Income Security Act (ERISA) sections 702 and 715 and PHS Act section 2705. Although section 9802 of the Code and section 702 of ERISA were not amended by PPACA, the requirements of section 2705 of the PHS Act were also incorporated by reference into section 9815 of the Code and section 715 of ERISA. PPACA section 1201 moved the PHS Act nondiscrimination provisions from section 2702 to section 2705, with some modifications.

plans (collectively referred to in this notice as HRAs).⁴ In general, the proposed regulations would expand the usability of HRAs by eliminating the current prohibition on integrating HRAs with individual health insurance coverage (as defined in Treas. Reg. § 54.9801-2)⁵, thereby permitting employers to offer HRAs to employees enrolled in individual health insurance coverage. Therefore, under the proposed regulations employees would be permitted to use amounts in an HRA integrated with individual health insurance coverage (referred to in this notice as an individual coverage HRA) to pay expenses for medical care (as defined in section 213(d), including premiums for individual health insurance coverage), subject to certain requirements (the proposed integration regulations). In addition, the Treasury Department and the IRS issued proposed regulations under section 36B regarding premium tax credit (PTC) eligibility for individuals offered coverage under an individual coverage HRA (the proposed PTC regulations).⁶

⁴ See Prop. Treas. Reg. § 54.9815-2711(d)(6)(i) for the proposed definition of an account-based group health plan. This term does not include qualified small employer health reimbursement arrangements (QSEHRAs) (as defined under section 9831(d)), medical savings accounts (see section 220), or health savings accounts (see section 223). In addition, for purposes of the proposed rules, the proposed definition would not include an employer arrangement that reimburses the cost of individual health insurance coverage in a cafeteria plan under section 125.

⁵ Under § 54.9801-2 the term “individual health insurance coverage” means health insurance coverage offered to individuals in the individual market, but does not include short-term, limited-duration insurance. Individual health insurance coverage can include dependent coverage and therefore can be self-only coverage or other-than-self-only coverage.

⁶ See 83 FR 54420. In addition to the proposed integration regulations and the proposed PTC regulations: (1) the Departments proposed regulations setting forth conditions under which certain HRAs would be recognized as limited excepted benefits; (2) HHS proposed regulations that would provide a special enrollment period in the individual market for individuals who gain access to and enroll in an individual coverage HRA or who are provided a QSEHRA; and (3) DOL proposed a clarification to provide plan sponsors with assurance that the individual health insurance coverage the premiums of which are reimbursed by an HRA or a QSEHRA does not become part of an ERISA plan, if certain conditions are met (and the Departments provided a related clarification of the definition of the term “group health insurance coverage”). All of these regulations (the proposed regulations), including the proposed integration regulations and the proposed PTC regulations, are set forth in one notice of proposed rulemaking, at 83 FR 54420.

The proposed integration regulations and the proposed PTC regulations raise issues under the Code, in particular concerning the application of section 4980H (the employer shared responsibility provisions) and section 105(h) (addressing discriminatory self-insured group health plans). This notice is intended to initiate and inform the process of developing guidance that addresses these issues, and requests comments on potential approaches developed by the Treasury Department and the IRS.

II. BACKGROUND

A. The Proposed Integration Regulations

On October 12, 2017, President Trump issued Executive Order 13813,⁷ “Promoting Healthcare Choice and Competition Across the United States,” stating, in part, that the “Administration will prioritize three areas for improvement in the near term: association health plans (AHPs), short-term, limited-duration insurance, and health reimbursement arrangements (HRAs).” With regard to HRAs, the Executive Order directs the Secretaries of the Treasury, Labor, and Health and Human Services to “consider proposing regulations or revising guidance, to the extent permitted by law and supported by sound policy, to increase the usability of HRAs, to expand employers’ ability to offer HRAs to their employees, and to allow HRAs to be used in conjunction with nongroup coverage.” The Executive Order further provides that expanding “the flexibility and use of HRAs would provide many Americans, including employees who work at small businesses, with more options for financing their healthcare.”

⁷ See 82 FR 48385 (Oct. 17, 2017).

In response to the Executive Order, on October 23, 2018, the Departments issued the proposed integration regulations⁸ under PHS Act section 2711 and the HIPAA/PPACA nondiscrimination provisions. The proposed integration regulations, if finalized in substantially the same form as proposed,⁹ would expand the potential use of HRAs by eliminating the prohibition under the current regulations on an HRA being integrated with individual health insurance coverage¹⁰ so long as the individual coverage HRA complies with certain requirements.¹¹ As proposed, those requirements generally include the following terms and conditions:

- A plan sponsor that offers an individual coverage HRA to a class of employees¹² must offer the individual coverage HRA on the same terms (that is, both in the same amount and otherwise on the same terms and conditions) to all employees in the class (subject to certain exceptions discussed later in this notice);
- The participant, and any of his or her dependent(s) whose medical care expenses are reimbursable under the individual coverage HRA, must be enrolled in individual health insurance coverage that is subject to and complies with PHS Act sections 2711 and 2713, and the regulations

⁸ See 83 FR 54420.

⁹ This notice sets out potential approaches that could apply if the proposed regulations are finalized in substantially the same form as proposed; thus, the potential safe harbors and the examples illustrating the safe harbors described in this notice use the framework from the proposed regulations. The proposed regulations are subject to notice and comment, and the Departments will consider all comments in the development of any final regulations. To the extent the final regulations differ from the proposed regulations, the Treasury Department and the IRS will consider necessary modifications to the potential approaches outlined in this notice.

¹⁰ See § 54.9815-2711(d)(4).

¹¹ See Prop. Treas. Reg. § 54.9802-4(c).

¹² See Prop. Treas. Reg. § 54.9802-4(d) for the definition of “class of employees” that applies under the proposed integration regulations and for purposes of this notice.

thereunder, for each month that the individual(s) are covered by the individual coverage HRA;¹³

- A plan sponsor that offers any class of employees an individual coverage HRA may not also offer a traditional group health plan to the same class of employees;¹⁴
- A participant must be permitted to opt out of and waive future reimbursements from the individual coverage HRA at least annually, and, upon the participant's termination of employment, either the remaining amounts in the individual coverage HRA are forfeited or the participant is permitted to permanently opt out of and waive future reimbursements from the individual coverage HRA;
- The individual coverage HRA must implement reasonable procedures to ensure that individuals whose medical care expenses are reimbursable by the individual coverage HRA are, or will be, enrolled in individual health insurance coverage for the plan year;¹⁵ and
- The individual coverage HRA must provide a written notice to each participant, in general, at least 90 days before the beginning of each plan year, that explains the consequence of accepting the individual coverage HRA for PTC eligibility and provides information that the plan sponsor has

¹³ For this purpose, the proposed integration regulations would consider all individual health insurance coverage (other than coverage that consists solely of excepted benefits) to be subject to and comply with PHS Act sections 2711 and 2713. See Prop. Treas. Reg. § 54.9802-4(c)(1).

¹⁴ See Prop. Treas. Reg. § 54.9802-4(c)(2) for the definition of traditional group health plan.

¹⁵ This requirement would also include an ongoing substantiation obligation. See Prop. Treas. Reg. § 54.9802-4(c)(5).

and that the participant will need to determine the effect of being offered the individual coverage HRA on PTC eligibility.¹⁶

The proposed integration regulations are proposed to apply for plan years beginning on or after January 1, 2020.

B. Section 36B and the Proposed PTC Regulations

Section 36B allows the PTC to certain taxpayers to help with the cost of individual health insurance coverage enrolled in through an Exchange.¹⁷ Under section 36B(a) and (b)(1) and § 1.36B-3(d), a taxpayer's PTC is the sum of the premium assistance amounts for all coverage months during the taxable year for individuals in the taxpayer's family.

An individual is eligible for the PTC for a month if the individual meets various requirements for the month (a coverage month). Among other requirements, under section 36B(c)(2), a month is not a coverage month for an individual if either: (1) the individual is eligible for coverage under an eligible employer-sponsored plan and the coverage is affordable and provides minimum value (MV); or (2) the individual enrolls in an eligible employer-sponsored plan, even if the coverage is not affordable or does not provide MV.¹⁸ See section III.B of this notice for a description of when an eligible employer-sponsored plan is affordable and provides MV.

¹⁶ See Prop. Treas. Reg. § 54.9802-4(c)(6) for the rule as to when the notice would be required to be furnished to a participant who is not eligible to participate either at the beginning of the plan year or at the time the notice is provided before the beginning of the plan year.

¹⁷ Exchanges are entities established under sections 1311 or 1321 of PPACA through which qualified individuals and qualified employers can purchase health insurance coverage.

¹⁸ See section 36B(c)(2)(C)(iii) and § 1.36B-2(c)(3)(vii)(A). See also §§ 1.36B-2(c)(3) and 1.36B-3(c).

An eligible employer-sponsored plan includes coverage under a self-insured group health plan¹⁹ and is minimum essential coverage unless it consists solely of excepted benefits.²⁰ An HRA is a self-insured group health plan and, therefore, is an eligible employer-sponsored plan.²¹ Accordingly, an individual is ineligible for the PTC for a month if the individual is covered by an HRA or is eligible for an HRA that is affordable and provides MV for the month.

The Treasury Department and the IRS previously issued guidance that provides that individuals covered by an HRA are ineligible for the PTC.²² However, prior to the proposed PTC regulations, the Treasury Department and the IRS did not provide guidance as to the circumstances in which an HRA is considered to be affordable or to provide MV.²³

On October 23, 2018, the Treasury Department and the IRS issued the proposed PTC regulations, which propose rules for the circumstances in which an individual coverage HRA would be considered to be affordable and to provide MV.²⁴ The proposed PTC regulations are discussed in more detail in section III.B. of this notice. The proposed PTC regulations are proposed to apply for individuals' taxable years beginning on or after January 1, 2020.

C. Section 4980H

¹⁹ See § 1.5000A-2(c).

²⁰ See section 5000A(f)(3) and § 1.5000A-2(g).

²¹ See Notice 2013-54, 2013-40 I.R.B. 287, Q&A 10.

²² Id.

²³ The Treasury Department and the IRS have provided guidance regarding when amounts newly made available under an HRA count toward the affordability or MV of another group health plan offered by the same employer. See §§ 1.36B-2(c)(3)(v)(A)(5) and 1.36B-6(c)(4). See also Notice 2015-87, 2015-52 I.R.B. 889, Q&A 7. The proposed PTC regulations and the guidance in this notice would not make substantive revisions to those rules.

²⁴ See 83 FR 54420.

The employer shared responsibility provisions under section 4980H only apply to an employer that is an applicable large employer (ALE). In general, an employer is an ALE for a year if it had an average of 50 or more full-time employees (including full-time equivalent employees) during the preceding calendar year.²⁵

There are two circumstances in which an ALE may owe an employer shared responsibility payment to the IRS. For any month, an ALE may owe a payment under either section 4980H(a) or 4980H(b), or neither, but an ALE will not owe a payment under both section 4980H(a) and 4980H(b). An ALE will owe a payment under section 4980H(a) for a month if it fails to offer coverage under an eligible employer-sponsored plan to at least 95 percent of its full-time employees (and their dependents) and at least one full-time employee is allowed the PTC for purchasing individual health insurance coverage from an Exchange.²⁶ An ALE will owe a payment under section 4980H(b) for a month if it offers coverage under an eligible employer-sponsored plan to at least 95 percent of its full-time employees (and their dependents) but at least one full-time employee is allowed the PTC for purchasing individual health insurance coverage from an Exchange, which may occur because the ALE did not offer coverage to that particular full-time employee or because the coverage the employer offered was unaffordable or did not provide MV.²⁷

Whether an employee may claim the PTC depends on the rules under section 36B, including the rules for whether an offer of coverage is affordable and

²⁵ See section 4980H(c)(2) and § 54.4980H-2. See also § 54.4980H-1(a) for definitions of the terms used in this background section and in section III of this notice.

²⁶ See § 54.4980H-4. Also note that if an ALE offers coverage to all but five of its full-time employees (and their dependents), and five is greater than five percent of the employer's full-time employees, the employer will not owe a payment under section 4980H(a).

²⁷ See § 54.4980H-5.

provides MV.²⁸ However, the regulations under section 4980H provide safe harbors for determining whether an ALE is treated as making an offer of coverage that is affordable²⁹ under section 4980H.³⁰ These section 4980H affordability safe harbors are described in more detail in section III.B of this notice.

D. Section 105(h)

In general, section 105(b) excludes from gross income amounts received by an employee through employer-provided accident or health insurance if those amounts are paid to reimburse medical care expenses incurred by the employee (for the employee, the employee's spouse, or the employee's dependents, as well as children of the employee who are not dependents but have not attained age 27 by the end of the taxable year) for personal injuries and sickness.

Section 105(h) provides, however, that excess reimbursements (as defined in section 105(h)(7)) paid to a highly compensated individual (as defined in section 105(h)(5) and § 1.105-11(d)) (HCI)³¹ under a self-insured medical reimbursement plan are includible in the gross income of the HCI if either (a) the plan discriminates in favor of HCIs as to eligibility to participate in the plan, or (b) the benefits provided under the plan discriminate in favor of HCIs.³² Section 105(h)(4) provides that a self-insured medical reimbursement plan does not satisfy the nondiscriminatory

²⁸ See section 4980H(c)(3). See also §§ 54.4980H-1(a)(28) and 54.4980H-5(e)(1).

²⁹ See § 54.4980H-5(e)(2).

³⁰ Whether or not an employee has been offered affordable coverage for purposes of eligibility for the PTC is determined under section 36B(c)(2)(C)(i) and regulations thereunder (as opposed to the section 4980H safe harbors).

³¹ Generally, HCIs include the highest paid 25 percent of all employees (including the five highest paid officers, but not including employees excludible under § 1.105-11(c)(2)(iii) who are not participants in any self-insured medical reimbursement plan of the employer), without regard to the HCI's level of compensation.

³² See sections 105(h)(1) and (2).

benefits rule unless all benefits provided to HCIs are also provided to all other participants.

The regulations under section 105(h) provide that, in order to satisfy the nondiscriminatory benefits rule under section 105(h)(4), all benefits made available under a self-insured medical reimbursement plan to an HCI (and the HCI's dependents) must also be made available to all other participants (and their dependents).³³ In addition, the regulations provide that "any maximum limit attributable to employer contributions must be uniform for all participants and for all dependents of employees who are participants and may not be modified by reason of a participant's age or years of service."³⁴ The consequence of a plan failing to satisfy this nondiscriminatory benefits requirement is that any excess reimbursements paid under the plan to an HCI are includible in the gross income of the HCI.

III. APPLICATION OF SECTION 4980H TO AN ALE THAT OFFERS AN INDIVIDUAL COVERAGE HRA, POTENTIAL SAFE HARBORS AND REQUEST FOR COMMENTS

Although the proposed regulations do not include proposed regulations under section 4980H, as part of implementing the objectives of Executive Order 13813, the Treasury Department and the IRS considered how section 4980H would apply to an ALE that offers an individual coverage HRA. In order to provide clarity to stakeholders, section III.A. of this notice explains how section 4980H(a) would apply to an ALE that offers an individual coverage HRA. In addition, section III.B of this notice explains how section 4980H(b) (including the current affordability safe harbors) would apply to an

³³ See § 1.105-11(c)(3)(i).

³⁴ Id.

ALE that offers an individual coverage HRA, describes potential additional affordability safe harbors, requests comments, and provides examples.

A. Application of Section 4980H(a) to an ALE that Offers an Individual Coverage HRA

As described earlier in this notice, an ALE will owe a payment under section 4980H(a) for a month if it fails to offer an eligible employer-sponsored plan to at least 95 percent of its full-time employees (and their dependents) and at least one full-time employee is allowed the PTC for the month for purchasing individual health insurance coverage from an Exchange. An HRA, including an individual coverage HRA, is an eligible employer-sponsored plan. Therefore, if an ALE were to offer an eligible employer-sponsored plan (including an individual coverage HRA) to at least 95 percent of its full-time employees (and their dependents), the ALE would not be liable for a payment under section 4980H(a) for the month, regardless of whether any full-time employee is allowed the PTC for purchasing individual health insurance coverage from an Exchange.

B. Application of Section 4980H(b) to an ALE That Offers an Individual Coverage HRA

An ALE that offers an eligible employer-sponsored plan to at least 95 percent of its full-time employees (and their dependents), and therefore is not liable for a payment under section 4980H(a), will be liable for a payment under section 4980H(b) if at least one full-time employee is allowed the PTC for purchasing individual health insurance coverage from an Exchange. As described earlier in this notice, an employee is not eligible for the PTC if the employee has an offer of coverage under an eligible employer-

sponsored plan that is affordable and that provides MV, as set forth under section 36B and the regulations thereunder.

Whether an offer of an individual coverage HRA would be considered to be affordable and provide MV would be based on the application of the proposed PTC regulations that are described in the following parts of this section III.B.

1. Affordability

In general, under section 36B, an eligible employer-sponsored plan is affordable for an employee if the amount the employee must pay for self-only coverage whether by salary reduction or otherwise (the employee's required contribution) does not exceed a percentage (the required contribution percentage³⁵) of the employee's household income.³⁶

For traditional group health plan coverage, the employee's required contribution is the amount the employee must pay for self-only coverage under the lowest cost MV plan the employer offers to the employee. Because the proposed integration regulations would not permit an employer that offers an individual coverage HRA to offer the employee a traditional group health plan, the proposed PTC regulations propose a method for identifying the plan to be used to determine affordability (generally, the affordability plan) and explain how the amounts made available under the individual coverage HRA would factor into the determination of the employee's required contribution.

³⁵ See § 1.36B-2(c)(3)(v)(C).

³⁶ See section 36B(c)(2)(C) and § 1.36B-2(c)(3)(v)(A)(1) and (2). See § 1.36B-2(c)(3)(v)(A)(3) for a safe harbor that, in certain circumstances, allows an employee to claim the PTC even if the offer of coverage ultimately is affordable.

More specifically, under the proposed PTC regulations, an individual coverage HRA would be affordable for an employee for a month if the required HRA contribution (as defined in Prop. Treas. Reg. § 1.36B-2(c)(5)(ii)) does not exceed 1/12 of the product of the employee's household income and the required contribution percentage. The required HRA contribution under the proposed PTC regulations would be the excess of: (1) the monthly premium for the lowest cost silver plan for the employee for self-only coverage offered by the Exchange for the rating area, as defined in 45 CFR 147.102(b), in which the employee resides (the HRA affordability plan); over (2) in general, the self-only amount the employer makes available to the employee under the individual coverage HRA for the month.³⁷

a. Potential Section 4980H Safe Harbors and Request for Comments

i. Potential Section 4980H Safe Harbor Regarding the Location Used to Identify the Affordability Plan and Request for Comments on Age-Based Issues

Under the proposed PTC regulations, the HRA affordability plan would be determined on an employee-by-employee basis. That is, the HRA affordability plan for each employee would be based on that particular employee's age and that particular employee's place of residence. However, the Treasury Department and the IRS are concerned that requiring ALEs to determine the HRA affordability plan for each full-time employee to assess whether an offer of an individual coverage HRA is affordable for purposes of section 4980H could raise significant administrative issues for employers

³⁷ See Prop. Treas. Reg. § 1.36B-2(c)(5) for more information on how this amount would be determined, including how the amount would be determined if the employer makes the same amount available for all employees regardless of the number of individuals covered.

and may be prohibitively burdensome. This, in turn, could undermine the goal of expanding the use of HRAs set forth in Executive Order 13813.

The Treasury Department and the IRS anticipate issuing guidance that would provide a safe harbor under which, for purposes of section 4980H, an ALE may use as the affordability plan for an employee the lowest cost silver plan for the employee for self-only coverage offered by the Exchange in the rating area in which the employee's primary site of employment is located (the location safe harbor).³⁸ Under this safe harbor, an ALE would be allowed to determine the affordability plan for each employee based on the employee's worksite location, rather than the employee's place of residence, the latter of which the Treasury Department and the IRS understand is information that might change over time and can be difficult for employers to keep up to date. The Treasury Department and the IRS request comments on the location safe harbor and whether an alternative safe harbor would be preferable and, if so, why.

This notice does not set out an anticipated section 4980H safe harbor related to the fact that the cost of the affordability plan for an employee is based on that employee's age. However, the Treasury Department and the IRS request comments on any administrative burdens that may arise due to the need to separately determine the employee's required contribution for each individual employee based on the employee's age. In particular, the Treasury Department and the IRS anticipate that some employers may wish to contribute an identical amount to an individual coverage HRA for each employee (or for each employee in a class of employees), in which case, under the

³⁸ Note that one of the classes of employees that would apply for purposes of the proposed integration regulations is "employees whose primary site of employment is in the same rating area as defined in 45 CFR 147.102(b)." See Prop. Treas. Reg. § 54.9802-4(d)(1)(viii).

proposed PTC regulations, each employee's required contribution likely would vary based on age, because the cost of the affordability plan used to determine the employee's required contribution likely would vary based on age. On the other hand, some employers may wish to contribute to an individual coverage HRA for each employee (or each employee in a class of employees) an amount sufficient to allow each employee to contribute the same amount to purchase individual health insurance coverage, in which case, because coverage for older employees will likely cost more, the amount made available under the HRA would likely need to increase with age. In each case, the employer may wish to predict or eliminate the potential for liability under section 4980H by ensuring that, for purposes of section 4980H, the offer of the individual coverage HRA is treated as affordable and as providing MV. The Treasury Department and the IRS request comments on the administrative issues and burdens that would arise for employers in determining the employee's required contribution, for section 4980H purposes, due to each employee's age being relevant to this determination. To the extent these burdens exist, the Treasury Department and the IRS request suggestions as to any safe harbors or other alternatives that would ease the burdens, that are also consistent with the purposes and policies underlying section 4980H. For example, the Treasury Department and the IRS request comments on whether the ability to use age bands or other assumptions concerning employee ages for this purpose would lower an employer's administrative burden without unduly undercutting the application of section 4980H and/or being subject to abuse, and if so, the extent to which such a safe harbor allowing the use of age bands or other

assumptions about an employee's age should be required to apply to each employee (or each employee in a class of employees) regardless of the employee's actual age.

ii. Potential Section 4980H Safe Harbor Regarding Use of Prior Year Cost for Calendar Year Individual Coverage HRAs

Under the proposed PTC regulations, an employee's required contribution for a month is determined based, in part, on the cost of the HRA affordability plan for that month. For example, an employee's required contribution for January 2020 for an individual coverage HRA would be based on the cost of the HRA affordability plan for January 2020. Exchange plan premium information for a calendar year generally is not available until shortly before the beginning of the open enrollment period for that calendar year, which begins on November 1 of the prior calendar year.³⁹ Accordingly, the cost of the HRA affordability plan (and the cost of the plan determined under the location safe harbor, if applicable) that will apply for a calendar year, which is necessary to determine whether an offer of an individual coverage HRA will be affordable, will not be available until mid-to-late fall of the prior calendar year.

While this time frame is sufficient for individuals and Exchanges to determine PTC eligibility for the upcoming calendar year, the Treasury Department and the IRS are aware that employers generally determine the health benefits they will offer for an upcoming plan year well in advance of the start of the plan year. Therefore, for a plan with a calendar year plan year, employers generally would determine the benefits to offer, including the amount to make available in an HRA for the year, well before mid-to-late fall of the prior calendar year. Further, under section 4980H, ALEs are intended to

³⁹ See 45 CFR 155.410(e)(3).

be able to decide whether to offer coverage sufficient to avoid an employer shared responsibility payment or to decline to do so. ALEs are only able to make that choice if they have timely access to the information necessary to do so. Accordingly, the Treasury Department and the IRS anticipate issuing guidance that would provide a safe harbor under which, for purposes of section 4980H, an ALE may determine the affordability of an offer of an individual coverage HRA that has a calendar year plan year based on the cost of the applicable affordability plan (that is, either the HRA affordability plan or the affordability plan determined under the location safe harbor, if applicable) for the prior calendar year (the calendar year safe harbor). The Treasury Department and the IRS intend to work with HHS to ensure that this information is readily available for use under this rule.

The Treasury Department and the IRS considered whether to apply an adjustment to the cost of the prior year's affordability plan for purposes of this safe harbor, but do not anticipate proposing such an adjustment, to avoid complexity and due to uncertainty regarding defining an adjustment that would be appropriate in all circumstances and for all years. The Treasury Department and the IRS request comments on whether such an adjustment should be included in future guidance and, if so, how the adjustment should be calculated.

It is anticipated that the calendar year safe harbor could be used by an ALE in addition to the location safe harbor or could be applied to the HRA affordability plan. The Treasury Department and the IRS also note that in the event the cost of the affordability plan that applies under the calendar year safe harbor exceeds the cost of the HRA affordability plan that applies for purposes of section 36B (that is, the premium

for the applicable plan decreases from one year to the next), and, as a result, the offer is considered affordable under section 36B but unaffordable under the calendar year safe harbor, the ALE will not owe a payment under section 4980H(b) with respect to the applicable full-time employee(s) because, regardless of the calendar year safe harbor, an ALE is only liable for a payment under section 4980H(b) with respect to a full-time employee who is allowed the PTC. The Treasury Department and the IRS also reiterate that this safe harbor would not apply for purposes of section 36B and therefore, an individual with an offer of an individual coverage HRA that is affordable under the section 36B rules is ineligible for the PTC, without regard to whether that offer would be considered unaffordable under the calendar year safe harbor.

The Treasury Department and the IRS request comments on whether a similar safe harbor would be needed for employers that offer individual coverage HRAs with non-calendar year plan years, and, if so, the range of plan year start dates to which such a safe harbor should apply.

iii. Potential Section 4980H Safe Harbor Regarding Cost of Affordability Plan for Individual Coverage HRA with a Plan Year That Spans Two Taxable Years

Consistent with the rules for traditional group health plan coverage,⁴⁰ the proposed PTC regulations require that affordability be determined separately for the portions of the plan year of an individual coverage HRA that span different taxable years of the employee.⁴¹ Thus, under the proposed PTC regulations, assuming an employee's taxable year is the calendar year, if the plan year of an individual coverage HRA spans two calendar years, the cost of the applicable affordability plan could change during the

⁴⁰ See § 1.36B-2(c)(3)(v)(B).

⁴¹ See Prop. Treas. Reg. § 1.36B-2(c)(5)(vi).

HRA plan year. For example, assume an employee with a taxable year that is a calendar year is offered an individual coverage HRA with a plan year starting July 1, 2020 and ending June 30, 2021. For purposes of the PTC generally, the cost of the HRA affordability plan in 2020 will apply for July 1, 2020 through December 31, 2020 and the cost of the HRA affordability plan in 2021 will apply for January 1, 2021 through June 30, 2021.⁴²

In this circumstance, it is unlikely that the cost of the affordability plan (either the HRA affordability plan or the plan determined under the location safe harbor, if applicable) for the months in the plan year that fall in the second calendar year will be available at the time an ALE must determine the amount that will be made available under the HRA for the plan year. As a result, the Treasury Department and the IRS are concerned that application of this aspect of the proposed PTC regulations to section 4980H would be inconsistent with the intent of section 4980H because ALEs would be unable to plan, and to know whether they were offering sufficient coverage, to avoid an employer shared responsibility payment. In addition, in the context of a traditional group health plan, the cost of coverage that applies for affordability purposes is determinable before and consistent throughout the plan year.

Accordingly, the Treasury Department and the IRS anticipate providing that, for purposes of section 4980H, an ALE that offers an individual coverage HRA may assume that the cost of the affordability plan for the first month of the plan year will be

⁴² However, consistent with the rules for traditional employer coverage in § 1.36B-2(c)(3)(v)(A)(3), if an Exchange determines that the HRA is not affordable for the employee for the plan year, that determination will apply for purposes of the PTC for the entire plan year. See Prop. Treas. Reg. § 1.36B-2(c)(3)(v)(A)(3) and (c)(5)(iv).

the cost of the affordability plan for all the months in the plan year (non-calendar year safe harbor).⁴³ It is anticipated that the non-calendar year safe harbor could be used by an ALE in addition to the location safe harbor. The Treasury Department and the IRS request comments on this approach, including whether additional guidance is needed.

iv. Consistency Requirement

ALEs would not be required to use any of the anticipated section 4980H safe harbors described in this notice. The Treasury Department and the IRS anticipate that some level of consistency will be required in the application of the anticipated safe harbors by an employer to its employees, and request comments on the scope of such a requirement. In particular, the Treasury Department and the IRS request comments on whether employers should be allowed to choose to apply the safe harbors to reasonable categories of employees, such as some or all of the categories identified in § 54.4980H-5(e)(2)(i), including whether the application of such a standard in this context would permit arrangements inconsistent with the purpose and policies underlying section 4980H and, if so, how that issue should be addressed.

v. Reporting under Section 6056

Under section 6056 and Form 1095-C, Employer-Provided Health Insurance Offer and Coverage, which ALEs file and furnish in order to satisfy the reporting requirements under section 6056, ALEs must report each full-time employee's required contribution. Because of the issues previously described in this notice, the Treasury

⁴³ The Treasury Department and the IRS anticipate that the primary circumstance in which an individual coverage HRA plan year would span two taxable years of an individual is when the individual has a calendar year taxable year and the HRA has a non-calendar year plan year. Therefore, the discussion in this notice focuses on that set of facts. However, the safe harbor is not limited to individual coverage HRAs with non-calendar year plan years because there could be other circumstances in which the HRA plan year covers two taxable years, for example, if an HRA has a calendar year plan year and an individual has a non-calendar year taxable year.

Department and the IRS anticipate providing multiple safe harbors that relate to the determination of the employee's required contribution for purposes of section 4980H. Also, as a result of the concerns about burden previously noted, the Treasury Department and the IRS anticipate that ALEs would not be required to report the employee's required contribution that is calculated under the proposed PTC regulations and would instead be required to report the employee's required contribution determined under the safe harbors set forth in this notice, if applicable. However, the Treasury Department and the IRS continue to consider the application of section 6056 to ALEs that offer individual coverage HRAs and anticipate providing additional guidance on these issues in the future.

b. Application of Current Section 4980H Affordability Safe Harbors to Individual Coverage HRAs

As described earlier in this notice, whether an offer of coverage under an eligible employer-sponsored plan is affordable is based on whether the employee's required contribution exceeds a certain percentage of the employee's household income. Because an ALE generally will not know an employee's household income, the current section 4980H regulations set forth three safe harbors under which an employer may compare the employee's required contribution to information that is readily available to the employer, rather than to actual household income. These three safe harbors are the Form W-2 wages safe harbor, the rate of pay safe harbor, and the federal poverty line safe harbor (referred to in this notice as the HHI safe harbors (but referred to in the regulations under section 4980H as the affordability safe harbors)).⁴⁴

⁴⁴ See § 54.4980H-5(e)(2).

The HHI safe harbors are optional and apply only for purposes of section 4980H. An ALE may choose to use one or more of the HHI safe harbors for 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 category. In addition, an ALE may use an HHI safe harbor only if the ALE offers its full-time employees and their dependents eligible employer-sponsored coverage that provides MV with respect to the self-only coverage offered to the employee.

The Treasury Department and the IRS anticipate providing guidance clarifying that an ALE that offers an individual coverage HRA would be permitted to use the HHI safe harbors, subject to the applicable requirements, for purposes of section 4980H. The HHI safe harbors assume that the employee's required contribution will be based on the lowest cost self-only coverage that provides MV that the employer offers to the employee. The Treasury Department and the IRS anticipate issuing guidance to clarify that in applying the HHI safe harbors to an offer of an individual coverage HRA, the plan that would be used to determine the employee's required contribution would be the HRA affordability plan or the affordability plan that would apply under the potential safe harbors outlined in this notice, as applicable.

In addition, because of the way that MV would be determined for an individual coverage HRA, which is described in the next section of this notice, the Treasury Department and the IRS anticipate issuing guidance to clarify that the condition in § 54.4980H-5(e)(2)(i) (that an employer may only use the HHI safe harbor if the self-only coverage offered to the employee provides MV) would be met for an employer that

offers an individual coverage HRA that is affordable, taking into account the HHI safe harbor and any of the safe harbors outlined in this notice, if applicable.

2. Minimum Value

In general, under section 36B, an eligible employer-sponsored plan provides MV if the plan's share of the total allowed costs of benefits provided under the plan is at least 60 percent of the costs and if the plan provides substantial coverage of inpatient hospitalization and physician services.⁴⁵ Because of differences between HRAs and traditional group health plans, the proposed PTC regulations provide guidance regarding the circumstances in which an individual coverage HRA would be considered to provide MV.

Under the proposed PTC regulations, an individual coverage HRA that is affordable would be treated as providing MV. The MV definition under the proposed PTC regulations would apply for purposes of determining whether an ALE that offers an individual coverage HRA has made an offer that provides MV for purposes of section 4980H. Therefore, an individual coverage HRA that is affordable (taking into account the HHI safe harbors and any of the safe harbors outlined in this notice, if applicable) would be treated as providing MV for purposes of section 4980H.

3. Examples

The following examples illustrate issues addressed in this section III. For purposes of these examples, assume that the required contribution percentage for 2020 is 9.86%.

⁴⁵ See section 36B(c)(2)(C)(ii); see also 80 FR 52678 (Sept. 1, 2015).

Example 1 (Section 4980H(a)). Facts: For 2020, Employer X is an ALE. It offers all of its full-time employees and their dependents an individual coverage HRA for each month in 2020.

Conclusion: Employer X would not owe a payment under section 4980H(a) for any month in 2020 regardless of whether any full-time employee is allowed the premium tax credit.

Example 2 (Section 4980H(b) – Location Safe Harbor and Calendar Year Safe Harbor). Facts: For 2020, Employer Y is an ALE. It offers all of its full-time employees and their dependents an individual coverage HRA and makes \$6,000 available in the HRA for the calendar year plan year. All of Employer Y's employees have a primary site of employment in rating area 1. Employer Y chooses to use the location safe harbor and the calendar year safe harbor. Employee A is 40 years old. The lowest cost silver plan for self-only coverage for a 40 year old offered by the Exchange for rating area 1 in the prior year (that is, 2019) was \$7,000. Employer Y also chooses to use the Form W-2 HHI safe harbor for its full-time employees. Employee A's Form W-2 wages for 2020 are \$15,000. Employee A's required contribution under section 4980H is \$1,000 (\$7,000 (cost of affordability plan determined under the location safe harbor and calendar year safe harbor) minus \$6,000 (HRA amount)).

Conclusion: Employer Y has made an offer of affordable MV coverage to Employee A because the employee's required contribution (\$1,000) is less than the amount equal to the required contribution percentage multiplied by Employee A's Form W-2 wages (9.86% of \$15,000 = \$1,479). Employer Y would not owe a payment under section 4980H(b) with respect to Employee A for any month in 2020. (Also, Employer Y would not owe a payment under section 4980H(a) for any month in 2020 because it offered an individual coverage HRA to all of its full-time employees and their dependents for each month in 2020.)

Example 3. (Non-Calendar Year Safe Harbor). Facts: Employer Z is an ALE. Employer Z offers an individual coverage HRA to all of its full-time employees and their dependents for a plan year beginning on July 1, 2020 and ending on June 30, 2021. Employee B is 30 years old. For 2020, the cost of the affordability plan that applies for Employee B is \$6,000. In late October 2020, it is announced that the cost of the affordability plan that will apply for Employee B in 2021 will be \$7,000.

Conclusion: Employer Z may apply the cost of the affordability plan for the first month of the plan year (that is, \$6,000/12 = \$500) to determine the employee's required contribution for each month of the plan year, including the months in 2021 (January 2021 through June 2021) when the cost of the HRA affordability plan (\$7,000) will apply under section 36B.

IV. APPLICATION OF SECTION 105(h) TO THE PROPOSED INTEGRATION

REGULATIONS AND POTENTIAL SAFE HARBORS

HRAs generally are subject to the rules under section 105(h) and its related regulations because they are self-insured medical reimbursement plans.⁴⁶ However, HRAs that reimburse employees only for premiums paid to purchase health insurance policies, including individual health insurance policies, are not subject to the rules under section 105(h) and its related regulations.⁴⁷ The proposed guidance described in this section IV addresses certain individual coverage HRAs that (1) would be subject to the rules under section 105(h) and the regulations thereunder, and (2) are offered to one or more HCIs. For purposes of section IV of this notice, these individual coverage HRAs are referred to as covered HRAs.

As described earlier in this notice, the proposed integration regulations would expand the potential use of HRAs by permitting employers to offer individual coverage HRAs to their employees, as long as certain requirements are satisfied. Among other requirements, the proposed integration regulations would allow the plan sponsor to limit the offer of the individual coverage HRA to members of certain classes of employees and to vary the amounts, terms, and conditions of individual coverage HRAs between

⁴⁶ See § 1.105-11(b)(1); see also Notice 2002-45, 2002-02 C.B. 93.

⁴⁷ See § 1.105-11(b)(2). HRAs that provide for the reimbursement of premiums to purchase health insurance policies in addition to other medical care expenses are subject to the rules under section 105(h) and the regulations thereunder because the HRA amounts may be used to reimburse medical care expenses other than premiums for health insurance policies. In addition, although HRAs are self-insured group health plans and PHS Act section 2716, as incorporated into the Code by section 9815, applies nondiscrimination rules similar to section 105(h) to insured coverage, PHS Act section 2716 may apply to HRAs that only provide for the reimbursement of premiums for the same reasons these HRAs are not subject to the rules under section 105(h). However, under Notice 2011-1, 2011-2 I.R.B. 259, the Departments determined that compliance with PHS Act section 2716 should not be required (and thus, any sanctions for failure to comply do not apply) until after regulations or other administrative guidance of general applicability has been issued under PHS Act section 2716.

the different classes of employees.⁴⁸ However, the proposed integration regulations would require that within each class of employees offered an individual coverage HRA, the plan sponsor would be required to offer the individual coverage HRA on the same terms and conditions (including, generally, in the same amount) to all employees who are members of that class of employees.⁴⁹

Varying the maximum HRA amounts for different classes of employees would conflict with the requirement in the section 105 regulations that any maximum limit attributable to employer contributions must be uniform for all participants (later in this section of the notice the Treasury Department and the IRS address the permissibility of varying the maximum HRA amounts within a class of employees). The IRS interprets this rule to require that, while certain employees in certain classes may be excluded from a plan for discrimination testing purposes, if an employee in an excludible class is provided benefits, the benefits must be provided on a nondiscriminatory basis to all covered employees. Under the proposed integration regulations, employees in different classes may receive different HRA amounts, with the result that the maximum limit attributable to employer contributions, while generally uniform for all participants in a class (subject to certain exceptions set forth in Prop. Treas. Reg. § 54.9802-4(c)(3), as described later in this notice), would not be uniform for all HRA participants.

In order to facilitate the offering of covered HRAs as anticipated by the proposed integration regulations, the Treasury Department and the IRS anticipate that future guidance will provide that a covered HRA would be treated as not failing to meet the requirement in § 1.105-11(c)(3)(i) that any maximum limit attributable to employer

⁴⁸ See Prop. Treas. Reg. § 54.9802-4(c)(2).

⁴⁹ See Prop. Treas. Reg. § 54.9802-4(c)(3).

contributions must be uniform for all participants, if the covered HRA provides the same maximum dollar amount to all employees who are members of a particular class of employees, limited to the classes specified under the proposed integration regulations (which includes combinations of specified classes) and subject to the exceptions set forth in Prop. Treas. Reg. § 54.9802-4(c)(3), as described later in this notice.

Further, as previously noted, while the proposed integration regulations would allow different HRA amounts for employees in different classes, the employer generally would be required to offer the HRA on the same terms to all employees who are members of the same class of employees. However, the proposed integration regulations include two exceptions to this rule.

The exception to this same-terms requirement that is relevant to the application of section 105(h) to the proposed integration regulations is that the covered HRA would be permitted to provide that the maximum dollar amount made available to an employee for any plan year increases as the age of the employee increases.⁵⁰ Under this exception, the same maximum dollar amount attributable to the increase in an employee's age would be required to be made available to all employees who are members of the same class of employees who are the same age.⁵¹

Without further guidance, under section 105(h) and the regulations thereunder, however, certain amounts paid to an HCI under a covered HRA that implements such

⁵⁰ See Prop. Treas. Reg. § 54.9802-4(c)(3)(i). The other exception to the same terms requirement is that the individual coverage HRA would be permitted to provide that the maximum dollar amount made available to an employee who is a member of a class of employees to reimburse medical care expenses for any plan year may increase as the number of the employee's dependent(s) who are covered by the individual coverage HRA increases. However, the same maximum dollar amount attributable to the increase in family size must be made available to all employees who are members of the same class of employees with the same number of dependent(s) covered by the individual coverage HRA. See Prop. Treas. Reg. § 54.9802-4(c)(3)(ii).

⁵¹ See Prop. Treas. Reg. § 54.9802-4(c)(3)(i).

an age-based increase would be includible in the income of the HCI because the covered HRA would fail to meet the requirement in § 1.105-11(c)(3)(i) that prohibits the maximum limit attributable to employer contributions to the covered HRA from being modified by reason of a participant's age. The Treasury Department and the IRS recognize that some employers may wish to offer a covered HRA to their employees without causing HCIs to include in their income certain payments from the arrangement, as a result of the arrangement failing to meet that requirement in the section 105(h) regulations.

To facilitate the offering of this type of covered HRA, the Treasury Department and the IRS anticipate that future guidance would provide that a covered HRA would be treated as not failing to meet the requirement in § 1.105-11(c)(3)(i) that any maximum limit attributable to employer contributions be uniform for all participants and that prohibits the maximum limit attributable to employer contributions from being modified by reason of a participant's age, if the covered HRA meets certain conditions. Specifically, the covered HRA would have to provide that the maximum dollar amount made available to employees who are members of a particular class of employees increases in accordance with the increases in the price of an individual health insurance coverage policy in the relevant individual insurance market based on the ages of the employees who are members of that class of employees, provided that the same maximum dollar amount attributable to the increase in age is made available to all employees who are members of that class of employees who are the same age. For purposes of this notice, the "relevant individual insurance market" is an individual

insurance market in which at least one employee who is a member of the class of employees is able to purchase individual health insurance coverage.

The following examples illustrate the potential safe harbors described in section IV of this notice that the Treasury Department and the IRS anticipate would be included in future guidance under section 105(h).

Example 1 (Covered HRA does not Fail to Satisfy Section 105(h) – Age Variation). Facts: In 2020, Employer A offers all full-time employees, including HCIs, an individual coverage HRA that reimburses all medical care expenses (including premiums for individual health insurance coverage). The maximum dollar amount available under the individual coverage HRA increases in accordance with the increases in the price of an individual health insurance policy in County X, based on the ages of all full-time employees. At least one full-time employee of Employer A is a resident of County X. The same maximum dollar amount attributable to the increase in age is made available to all full-time employees who are the same age.

Conclusion: The individual coverage HRA would be a covered HRA that would be treated as not failing to meet the requirement in § 1.105-11(c)(3)(i) that prohibits the maximum limit attributable to employer contributions from being modified by reason of a participant's age.

Example 2 (Covered HRA does not Fail to Satisfy Section 105(h) – Class by Class Variation). Facts: In 2020, Employer B offers all full-time and part-time employees, including HCIs, an individual coverage HRA that reimburses all medical care expenses (including premiums for individual health insurance coverage). The maximum dollar amount available under the individual coverage HRA for each full-time employee is \$5,000 per plan year. The maximum dollar amount available under the individual coverage HRA for each part-time employee is \$2,000 per plan year.

Conclusion: The individual coverage HRA would be a covered HRA that would be treated as not failing to meet the requirement in § 1.105-11(c)(3)(i) that any maximum limit attributable to employer contributions must be uniform for all participants.

Example 3 (Individual Coverage HRA is not Subject to Section 105(h) – Only Reimburses Premiums). Facts: In 2020, Employer C offers all full-time employees, including HCIs, an individual coverage HRA that only reimburses premiums for individual health insurance coverage.

Conclusion: The individual coverage HRA would not be a covered HRA because it would only reimburse premiums for individual health insurance coverage. Therefore, it would not be subject to the nondiscrimination requirements in section 105(h) and the regulations thereunder.

Example 4 (Individual Coverage HRA is not Subject to Section 105(h) – No HCIs). Facts: In 2020, Employer D offers all employees included in a unit of employees covered by a particular collective bargaining agreement in which Employer D participates (collectively bargained employees) an individual coverage HRA that reimburses all medical care expenses (including premiums for individual health insurance coverage). No collectively bargained employee is an HCI.

Conclusion: The individual coverage HRA would not be a covered HRA because it would not be offered to any HCIs. Therefore, it would not be subject to the nondiscrimination requirements in section 105(h) and the regulations thereunder.

V. REQUEST FOR COMMENTS

The Treasury Department and the IRS invite comments on the issues addressed in this notice, and on any other tax issues related to individual coverage HRAs as described in the proposed integration and PTC regulations. Also see section III.B of this notice for specific comment solicitations regarding section 4980H. The Treasury Department and the IRS intend to issue further guidance on the issues addressed in this notice in conjunction with the issuance of any final integration and PTC regulations. The Treasury Department and the IRS further intend to propose regulations to codify, and seek additional comment on, the safe harbors, if any, provided in the additional guidance anticipated to be released in conjunction with any final integration and PTC regulations.

Public comments should be submitted no later than December 28, 2018.

Comments should include a reference to Notice 2018-88. Comments may be submitted electronically via the Federal eRulemaking Portal at www.regulations.gov (type IRS-2018-0032 in the search field on the **regulations.gov** homepage to find this notice and

submit comments). Alternatively, submissions may be sent to CC:PA:LPD:PR (Notice 2018-88), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions also may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (Notice 2018-88), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20044. All recommendations for guidance submitted by the public in response to this notice will be available for public inspection and copying in their entirety.

VI. RELIANCE

This notice does not provide guidance under section 4980H or section 105(h) upon which taxpayers may rely.

VII. NO INFERENCE

No inference should be drawn from any provision of this notice concerning any provision of section 4980H or section 105(h) or any other section of the Code, or PPACA, except those provisions specifically addressed in this notice.

VIII. DRAFTING INFORMATION

The principal author of this notice is Ronald Rutherford-Triche of the Office of Associate Chief Counsel (Tax Exempt and Government Entities), although other Treasury Department and IRS officials participated in its development. For further information regarding this notice, contact Christopher Dellana or Kevin Knopf at (202) 317-5500 (not a toll-free call).