December 30, 2019

Charles P. Rettig
Commissioner
Internal Revenue Service
Department of the Treasury
1111 Constitution Ave NW
Washington, DC 20224

RE: IRS REG–136401–18

Submitted Electronically via www.regulations.gov

Dear Mr. Rettig:

I am writing on behalf of the National Association of Health Underwriters (NAHU), a professional association representing more than 100,000 licensed health insurance agents, brokers, general agents, consultants and employee benefits specialists. We are pleased to have the opportunity to provide comments in response to the proposed rule titled "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," published in the *Federal Register* on September 30, 2019.

Every day, the members of NAHU help individuals and employers of all sizes purchase, administer and utilize health insurance coverage. Our expertise lies in the technicalities of health-plan purchasing and administration and the real-world challenges employers face therein. NAHU members know the coverage options that businesses of all sizes have available to them, and the decision-making process employers utilize when choosing amongst those coverage options. We hope that with this response, we can share our expertise in health insurance markets as it relates to the ideas contained in the proposed rule.

A representative group of brokers who work exclusively with the type of employers most likely to be affected by the proposal has contributed their insight about how it will impact the clients they serve. Together, they have identified some practical concerns that this rule does not address. NAHU members want to highlight questions that employers are already posing to our members concerning the feasibility of individual coverage Health Reimbursement Arrangements (ICHRAs). We have also identified additional information that licensed benefit professionals and group health plan sponsors will need if they are to make informed choices and implementation decisions concerning the new safe harbors proposed in this rule. NAHU hopes this information will be helpful to you as you craft final rules and develop sub-regulatory guidance about ICHRAS. We have grouped our comments on the proposed letter by topic. We appreciate your consideration of our point of view and your willingness to solicit opinions from all stakeholders.

Applicability of IRC §4980H to ICHRAs
The members of NAHU support the IRS decision to extend the applicability of existing IRC §4980H safe harbors to assess household income to ICHRAs. We also appreciate your clarification that an ICHRA will be considered an

offer of an eligible employer-sponsored plan for purposes of IRC §4980H(a). Beyond these rulings, our membership strongly suggests that your agency limit the class designations for ICHRA offerings to those designations already outlined in the IRC §4980H rules to make it simpler and more precise for all employers. Specifically, we feel the regulations should specify that an employer may choose to provide ICHRA offerings to all of its employees or for any reasonable category of employees, provided it does so on a uniform and consistent basis for all employees in a class. Mirroring the affordability rules, we feel the language in any final rule should be clarified to read "reasonable categories generally include specified job categories, nature of compensation (hourly or salary), geographic location and similar bona fide business criteria."

NAHU generally supports the decision to deem ICHRAs that meet the "affordability" standard as outlined in the final ICHRA rule and this proposed rule as also meeting the Affordable Care Act's "minimum value standard." This proposal is relatively consistent with the current IRS approach of treating any metal-level small-group plan as automatically meeting the minimum-value standard. NAHU members do not see any other way to assess the minimum value of an ICHRA contribution and any related individual market coverage premium reimbursement. To make this policy even more consistent, NAHU recommends that future guidance limit ICHRA reimbursements to coverage subject to the qualified health plan requirements with a metal-level actuarial value designation of bronze, silver, gold or platinum.

Proposed Location Safe Harbor

According to the final HRA rule, the health insurance exchange marketplaces will calculate the affordability of ICHRA offerings for potential subsidy recipients on an individual basis. They will use both the cost of the lowest silver plan in the rating area where the person lives and the person's age to account for the individual-market age rating. However, employers considering offering ICHRAs to their employees will also need to calculate the affordability of their contribution for each employee. It is necessary both for penalty liability purposes and, if the employer is subject to the Fair Labor Standards Act (FLSA), to populate the exchange notice they must give to every new hire. The proposed rule acknowledges it would be very burdensome for employers to calculate the cost of the lowest silver plan for each employee based on their home address. To rectify this situation, your agency proposes a location safe harbor whereby an employer could use each employee's primary worksite location to obtain the lowest silver plan cost for that individual. The proposed rule anticipates that, in many business scenarios, all or many employees will share the same primary worksite, providing some administrative simplicity for applicable large employers (ALEs). The proposed rule also explains how employers may determine what an employee's primary worksite is, and how to handle the myriad issues that arise for businesses with multiple worksites and employees that work at more than one location.

Our association appreciates the intent of this safe harbor. NAHU members agree that calculating affordability based on each employee's home address, which can change during a plan year and is beyond an employer's control, is overly burdensome. However, as you note in the proposed rule, how employees report to work varies widely across employers and industries, so NAHU would like to request that any final rule provide greater clarification about the determination of the primary site of employment for purposes of the section 4980H location safe harbor.

In particular, our members feel that the proposed rules concerning employees who telework are confusing and could lead to manipulation. Telework arrangements vary widely, but it is relatively common for employees who work almost entirely from a remote location to come to a traditional worksite on occasion for a meeting or other event. Does this type of irregular and occasional presence at a particular worksite constitute being "required by his

or her employer to work at, or report to, a particular worksite"? Another standard listed is "a teleworker with an assigned office space." There are certainly millions of employees who work from home some days during a week and come to assigned office space for others. However, there are also millions of employees who work from home almost exclusively but have a desk or office to access should they visit the home office. How would the safe harbor apply in a case like that? NAHU members and their employer clients are not sure. And since individual-market premiums can vary so significantly across geographic and rating areas, NAHU members believe an unclear standard regarding the treatment of employees who telework could be engineered to serve a particular entity or individual financially. Perhaps a better standard of how to measure an employee's primary worksite, particularly for telework, would be a measure of time spent working at one location versus another.

NAHU members also continue to have concerns about the utility of the location safe harbor for large employers with multiple worksites. NAHU members work with employers on their group benefit design options every day. In our experience, the employers that express interest in offering an ICHRA rather than a traditional group health plan are seeking significant administrative burden savings. Our members report that employers with multiple worksites, such as any type of large chain establishment, that inquire about an ICHRA are quickly turning away from the concept when they realize implementation will require individual affordability calculations for each employee, based not just on employee age but also location. Since this calculation becomes even more complicated for employers with multiple worksites within a rating area, and for employers with employees that may work at various worksites or change permanent worksites throughout the year, the ICHRA concept is being judged as untenable for specific industry sectors.

Finally, in the proposed rule, you request comments about whether the IRS should create additional rules addressing the ability of an employer to identify the residence of the employee in the case of an employer that chooses to determine the affordability of the individual coverage HRA based on the residence of each employee instead of using the location safe harbor. NAHU agrees that most employers that elect to offer an ICHRA will use the location safe harbor. However, given that safe harbors inherently are optional, our association believes that clear rules should be in place for employers that elect not to use them.

Lack of a Safe Harbor to Address Individual-Market Price Variations Due to Age

As we have already mentioned, the biggest stumbling blocks brokers and their applicable large employer clients have concerning ICHRAs is the issue of coverage affordability as it relates to both the employer shared responsibility requirements codified under IRC §4980H and the refundable tax credit eligibility requirements detailed in IRC §36B. Employers are seeking administrative simplifications when it comes to offering health coverage. The failure to provide a safe harbor for age-rating variations, in particular, has been and will continue to be problematic and a significant barrier to entry for any ALE considering offering an ICHRA instead of traditional group coverage. Employers are concerned about the cost and complication of making employee-by-employee affordability calculations to adjust for age-rated individual market premiums. They are also worried about the cost, liability and age-discrimination concerns that abound due to the lack of a safe harbor.

NAHU members report that the mere prospect of the administrative burden related to employee-by-employee affordability calculations is already being cited as the reason why ALEs are dismissing the concept of an ICHRA offering for all, or specific classes of, employees. NAHU appreciates the clarification that, for affordability purposes, an ALE only needs to account for an employee's age on the first day of the plan year or the date the employee first

becomes eligible for the ICHRA for new plant entrants. This clarification, combined with the lookback safe harbor provisions employers ensures that ALEs will not have to recalculate affordability on a month-to-month basis. Employers will only need to revisit the affordability calculation if an employee has a significant salary change mid-year. This stipulation is very substantial, as it does reduce the administrative burden associated with an ICHRA. However, even with this protection, our members who work with the type of employers most likely to be interested in offering an ICHRA report dissatisfaction with the prospect of employer-specific calculations.

This dissatisfaction, though, is dwarfed by the cost and liability concerns posed by employers regarding their options when it comes to the type of HRA contribution and the lack of an age-based safe harbor. Employers generally have two choices when it comes to an ICHRA contribution formula: They could either make a level contribution to all employees in a class or they could make an employee-specific contribution based on the IRC §4980H affordability test. Both options raise unsettling concerns.

Some employers want to make a level HRA contribution to all employees in a class. However, since each employee's age is part of the affordability calculation process, ALEs would need to ensure a quite significant level contribution amount to avoid "B" penalty exposure for older workers. Also, this strategy raises discrimination concerns since the "value" of the level contribution will vary significantly from worker to worker based on their age.

Equally concerning is the prospect of an employer varying its contribution level based on employee age. The liability concerns associated with this strategy affects employers of all sizes considering an ICHRA offering, not just ALEs. Age-based contributions increase the potential for employee discord within the workplace and, more significantly, employers face genuine exposure concerning the Age Discrimination in Employment Act (ADEA) rules. Since the ACA small-group age rating provisions forever changed the pre-ACA notion of employer group composite rating, NAHU members and their clients are already familiar with this issue on a lower level. However, with traditional small-group policies, there are ways to make scaled premium contributions and limited options for composite pricing. These options can help limit ADEA exposure and employee complaints. However, these options are not available to employers offering an ICHRA, and that is untenable to many businesses considering this as a policy option. NAHU members also worry that the lack of an age-based safe harbor could lead to age discrimination in hiring since employers will know that the older the new hire, the more substantial the needed contribution.

Solving this issue is imperative and complicated. However, NAHU believes that unless the IRS develops a solution to allow employers to make ICHRAs contributions without worry, it will be a significant participation barrier for any employer considering the ICHRA concept.

Lookback Safe Harbor

Any ALE considering offering employees an ICHRA must annually calculate the affordability of coverage for each eligible employee several months prior to the start of the plan year to set their ICHRA contribution appropriately. Accordingly, the ALE will need to know the cost of the lowest silver plan in each rating area. However, the timing of the release of individual-market qualified health plan rates each year could pose a challenge for ALEs, as the cost of the lowest silver plan in a rating area might not be known in time for an employer to set their HRA contributions for the year ahead. To address this issue, the proposed rule creates a lookback safe harbor. It allows calendar-year plans to rely on the rates of the lowest-cost silver plan in each rating area on January 1 of the prior year. In the case

of non-calendar-year plans, an ALE can use the rates from January 1 of that calendar year. NAHU supports this proposed lookback safe harbor and appreciates the consideration for non-calendar-year plans. In the proposed rule, you ask if all ALEs with non-calendar-year plans will use the lookback safe harbor or if there should be a separate safe harbor allowing the use of the premium for the first month of the current plan year to determine affordability for all months of the plan year. NAHU believes the IRS should allow both safe harbors to provide ALEs with maximum flexibility.

Reliance on Exchange Information and the HHS Tool to Calculate Premium Amounts for the Application of the Safe Harbors

For ALEs to seriously consider an ICHRA as a plan offering and utilize the IRC §4980H safe harbors proposed in this rule, they will need to be able to rely on premium information from both the federal health insurance marketplace and state-based exchanges. Employers will need ready access to the cost of the lowest silver plan for all employees offered ICHRA coverage to calculate the affordability of their ICHRA contribution for each employee. ALEs will need to do so for penalty liability purposes. Also, employers of any size that are subject to the Fair Labor Standards Act require this data to calculate coverage affordability annually for the exchange notice they must give to every new hire.

In concert with the release of this proposed rule, the federal Centers for Medicare and Medicaid Services published the ICHRA Employer LCSP Premium Look-up Table. The table allows users in states participating in the federally facilitated exchange and state-based exchanges on the federal platform to access individual-market qualified health plans (QHP) lowest-cost silver plan (LCSP) data by geographic location. NAHU appreciates the publication of this table, and we appreciate the clarification provided in the proposed rule that for IRC §4980H compliance and enforcement, employers may rely on the affordability and cost information supplied by the exchanges. However, NAHU members have concerns with the utility of the CMS tool and the limitations of the provisions of this proposed rule about the availability of reliable premium information for employers attempting to make ICHRA affordability calculations.

First of all, as the proposed rule acknowledges, the Trump Administration has not required state-based exchanges that do not utilize the federal platform to readily make lowest-cost silver plan rate data available for employers for ICHRA implementation purposes. Our members who live and work in states that operate their own exchanges have had discussions with those entities about their data needs. These members have expressed concerns that sufficient information will be available early enough for ALEs in many state-based exchanges states. Without easy-to-access, accurate affordability information for all 50 states, ALEs, particularly those with employees in more than one state, will not be able to consider the ICHRA concept confidently.

As for the affordability tables published by CMS, our members report that they and their employer clients have utility concerns. Since CMS did not build a user-friendly online tool but instead published tables online for download, potential users of the tables are registering their disapproval with their brokers. People are concerned about downloading public files from the CMS website and the stability of the Excel-based files. To address these concerns, NAHU urges the Trump Administration to build a simple, 50-state online LCSP calculator that does not require a data download. This calculator should allow employers to select their year of rate data using the lookback safe harbor and then let the employers enter any ZIP code nationwide, as well as the premium by age for each employee at the start of the plan year into the calculator. Then any employer could easily use the tool to calculate

affordability employee by employee and determine the minimum affordability contribution by the employer.

Need for Immediate Guidance Regarding IRC §§ 6055 and 6056 Health Information Reporting Requirements

ICHRAs are available as an employer-sponsored plan option beginning on January 1, 2020. However, for any applicable large employer subject to IRC §4980H and IRC §§6055 and 6056 to be able to offer this option in the next year, employers will need the terms of this guidance finalized as soon as possible. They also need detailed guidance about how ICHRA requirements will impact IRC §§ 6055 and 6056 reporting forms and processes on a near-immediate basis. Employer-reporting compliance vendors also need detailed regulatory guidance and an appropriate amount of time to build software components, update information systems and test new arrangements with the IRS. Another consideration is states and jurisdictions that now require reporting, like New Jersey and the District of Columbia. Based on NAHU's discussions with multiple large health information reporting vendors, ALEs and brokers that specialize in this market space, stakeholders need at least one year of implementation time.

A long implementation window is necessary because employers will need final guidance and the opportunity to confer with their licensed advisors to determine how to make an ICHRA affordable to their employees. That determination process happens in the three to six months before their annual plan-year date. For these employers, the plan-renewal date can fall at any time during the calendar year, but the two most common periods are January 1 and July 1. To be able to offer an ICHRA confidently to employees, plans with a July 1 renewal will need this guidance and employer reporting requirements finalized by March of 2020. ALEs with a January 1 renewal might be able to consider this option for the 2021 plan year.

As for reporting-compliance vendors, they begin working with clients in the summer/early fall to collect all of the data needed for ACA reporting for that tax year. As such, they will need to be able to advise employers that have elected an ICHRA as a plan option about what data to provide at that time. To be at this stage of readiness, they will not only need several months to build any required system modification, but they will also have to update the systems that store all of this information and conduct extensive testing. These processes will take a minimum of several months. To be ready to help employers report on ICHRA health coverage offerings during the 2020 tax year, reporting compliance vendors and software developers also need detailed guidance from the IRS within the next three months.

NAHU also recommends that any further guidance regarding both ICHRAs and IRC §4980H and IRC§§ 6055 and 6056 provide employers and issuers with at least two years of specific transitory good faith compliance relief. When developing such guidance, NAHU urges the IRS to use precise and straightforward terminology to minimize confusion. Concerning revised reporting forms, we suggest that your agency include a box that indicates "no safe harbors selected" or a "yes/no" option for each safe harbor, rather than allowing employers to leave boxes blank. NAHU believes that such a modification will reduce the possibility of safe-harbor errors and ease the IRC§ 4980H enforcement.

Applicability of IRC §105(h) to ICHRAs

NAHU members appreciate the IRC §105(h) nondiscrimination rule safe harbor in the proposed rule that provides protections to employers that offer ICHRAs limited to reimbursement for qualified individual-market policy

premiums. We believe it will greatly simplify things for smaller employers. However, there are no protections for ICHRAs that provide payment for other qualified medical expenses. As such, virtually all employers will still encounter IRC §105(h) discrimination issues, since employers may contribute varying amounts to ICHRAs due to employee age variances and the lack of an age-based rating safe harbor. Also, businesses may wish to offer different contribution levels to separate classes of employees. Even with the proposed safe harbor, NAHU members are concerned that §105(h) will be an enormous administrative burden that employers will resist, particularly small employers.

Application of Section 125 Cafeteria Plan Rules to Arrangements Involving Individual Coverage HRAs
The proposed rule provides clarity about how existing IRC §125 plan rules and exchange rules do not permit §125 cafeteria plans integrated with an ICHRA to reimburse for individual qualified health plans purchased through an exchange. However, the proposed rule does allow for §125 cafeteria plans combined with an ICHRA to reimburse for policies bought off-exchange. NAHU members and their employer clients believe that the possibility of integrating ICHRAs as envisioned by the proposed rule with §125 cafeteria plans would be a complicated and not necessarily advisable endeavor. Additional detailed guidance is necessary before employers would feel comfortable with combining the two types of plan offerings.

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

Conclusion
The members of NAHU sincerely appreciate the opportunity to ask these questions and voice our views about how the proposed rule could function more effectively for employers and employees. If you have any questions about our comments or if NAHU can be of assistance as you move forward, please do not hesitate to contact me at either (202) 595-0787 or jtrautwein@nahu.org.

Sincerely,

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