

with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to transport category airplanes and associated appliances to the Director of the System Oversight Division.

### Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

- (1) Is not a "significant regulatory action" under Executive Order 12866,
- (2) Will not affect intrastate aviation in Alaska, and
- (3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

### The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

### PART 39—AIRWORTHINESS DIRECTIVES

- 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

#### § 39.13 [Amended]

- 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

**Embraer S.A.:** Docket No. FAA-2019-0701; Product Identifier 2019-NM-107-AD.

#### (a) Comments Due Date

The FAA must receive comments by November 14, 2019.

#### (b) Affected ADs

None.

#### (c) Applicability

This AD applies to Embraer S.A. Model ERJ 190-100 STD, -100 LR, -100 IGW, -200 STD, -200 LR, and -200 IGW airplanes, certificated in any category, as identified in Agência Nacional de Aviação Civil (ANAC)

Brazilian AD 2019-06-01, effective June 17, 2019 ("Brazilian AD 2019-06-01").

#### (d) Subject

Air Transport Association (ATA) of America Code 57, Wings.

#### (e) Reason

This AD was prompted by reports of structural cracks in the wing lower skin stringers on both half wings. The FAA is issuing this AD to address such cracking, which could result in fuel leakage and reduced structural integrity of the wing.

#### (f) Compliance

Comply with this AD within the compliance times specified, unless already done.

#### (g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, Brazilian AD 2019-06-01.

#### (h) Exceptions to Brazilian AD 2019-06-01

(1) For purposes of determining compliance with the requirements of this AD: Where Brazilian AD 2019-06-01 refers to its effective date, this AD requires using the effective date of this AD.

(2) The "Alternative method of compliance (AMOC)" section of Brazilian AD 2019-06-01 does not apply to this AD.

(3) Where paragraph (a)(1) of Brazilian AD 2019-06-01 specifies an initial inspection time, this AD requires an initial inspection at the applicable time specified in paragraph (h)(3)(i) or (ii) of this AD, whichever occurs later.

(i) Before the accumulation of 17,000 total flight cycles or 27,000 total flight hours, whichever occurs first.

(ii) Within 680 flight cycles or 900 flight hours after the effective date of this AD, whichever occurs first.

(4) Where paragraph (a)(1)(ii) of Brazilian AD 2019-06-01 specifies to do a special detailed inspection (SDI) in case of any "signal" of cracks, this AD requires doing an SDI before further flight after the detection of any "sign" of structural cracks in the inspected area.

#### (i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Section, Transport Standards Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Section, send it to the attention of the person identified in paragraph (j)(2) of this AD. Information may be emailed to: [9-ANM-116-AMOC-REQUESTS@faa.gov](mailto:9-ANM-116-AMOC-REQUESTS@faa.gov). Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Section, Transport Standards Branch, FAA; or ANAC; or ANAC's authorized Designee. If approved by the ANAC Designee, the approval must include the Designee's authorized signature.

#### (j) Related Information

(1) For information about Brazilian AD 2019-06-01, contact National Civil Aviation Agency, Aeronautical Products Certification Branch (GGCP), Rua Laurent Martins, nº 209, Jardim Esplanada, CEP 12242-431—São José dos Campos—SP, Brazil; telephone 55 (12) 3203-6600; email [pac@anac.gov.br](mailto:pac@anac.gov.br); internet [www.anac.gov.br/en/](http://www.anac.gov.br/en/). You may find this IBR material on the ANAC website at <https://sistemas.anac.gov.br/certificacao/DA/DAE.asp>. You may view this Brazilian AD at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206-231-3195. Brazilian AD 2019-06-01 may be found in the AD docket on the internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2019-0701.

(2) For more information about this AD, contact Krista Greer, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206-231-3221.

Issued in Des Moines, Washington, on September 16, 2019.

**Suzanne Masterson,**

*Acting Director, System Oversight Division, Aircraft Certification Service.*

[FR Doc. 2019-20829 Filed 9-27-19; 8:45 am]

BILLING CODE 4910-13-P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Parts 1 and 54

[REG-136401-18]

RIN 1545-BP17

### 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

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document sets forth proposed regulations to clarify the application of the employer shared responsibility provisions and certain nondiscrimination rules under the Internal Revenue Code (Code) to health

reimbursement arrangements (HRAs) and other account-based group health plans integrated with individual health insurance coverage or Medicare (individual coverage HRAs), and to provide certain safe harbors with respect to the application of those provisions to individual coverage HRAs. The proposed regulations are intended to facilitate the adoption of individual coverage HRAs by employers, and taxpayers generally are permitted to rely on the proposed regulations. The proposed regulations would affect employers, employees and their family members, and plan sponsors.

**DATES:** Written or electronic comments and requests for a public hearing must be received by December 30, 2019.

**ADDRESSES:** Submit electronic submissions via the Federal eRulemaking Portal at <https://www.regulations.gov> (indicate IRS and REG-136401-18) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment received to its public docket, whether submitted electronically or in hard copy. Send hard copy submissions to: CC:PA:LPD:PR (REG-136401-18), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-136401-18), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, Jennifer Solomon, (202) 317-5500; concerning submissions of comments and requests for a public hearing, Regina Johnson, (202) 317-6901 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

*A. Individual Coverage HRAs and Related Guidance*

On October 12, 2017, President Trump issued Executive Order 13813, "Promoting Healthcare Choice and Competition Across the United States."<sup>1</sup> The Executive Order directed 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."<sup>2</sup>

In response to the Executive Order, on October 23, 2018, the Departments of the Treasury, Labor, and Health and Human Services (the Departments) issued proposed regulations<sup>3</sup> under Public Health Service Act (PHS Act) section 2711 and the health nondiscrimination provisions<sup>4</sup> of the Health Insurance Portability and Accountability Act of 1996 (HIPAA)<sup>5</sup> and the Patient Protection and Affordable Care Act,<sup>6</sup> as amended by the Health Care Education and Reconciliation Act<sup>7</sup> (collectively, PPACA) (proposed integration regulations). The proposed integration regulations included a proposal to expand the potential use of HRAs and other account-based group health plans<sup>8</sup> (collectively referred to in this preamble as HRAs) by allowing the integration of HRAs with individual health insurance coverage, subject to certain conditions.

On June 14, 2019, the Departments finalized the proposed integration regulations, generally as proposed but with a number of revisions in response to comments (the final integration regulations).<sup>9</sup> The final integration

<sup>2</sup> Id.

<sup>3</sup> See 83 FR 54420 (Oct. 29, 2018).

<sup>4</sup> See Code sections 9802 and 9815, Employee Retirement Income Security Act (ERISA) sections 702 and 715, and PHS Act section 2705. Although Code section 9802 and ERISA section 702 were not amended by PPACA, the requirements of PHS Act section 2705 were also incorporated by reference into Code section 9815 and ERISA section 715. PPACA section 1201 moved the PHS Act nondiscrimination provisions from section 2702 to section 2705, with some modifications.

<sup>5</sup> Public Law 104-191.

<sup>6</sup> Public Law 111-148.

<sup>7</sup> Public Law 111-152.

<sup>8</sup> See § 54.9815-2711(d)(6)(i) for the 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 integration regulations (both proposed and final), the definition does not include an employer arrangement that reimburses the cost of individual health insurance coverage in a cafeteria plan under section 125.

<sup>9</sup> See 84 FR 28888 (June 20, 2019). In addition to the final integration regulations: (1) The Departments issued final regulations setting forth conditions under which certain HRAs will be recognized as limited excepted benefits; (2) the Department of Health and Human Services (HHS) issued final regulations to provide a special enrollment period in the individual market for individuals who newly gain access to an individual coverage HRA or who are newly provided a QSEHRA; (3) the Department of Labor (DOL) finalized a safe harbor to provide assurance that the individual health insurance coverage for which

regulations apply for plan years beginning on or after January 1, 2020.

*B. Premium Tax Credit (Section 36B)*

Section 36B allows the premium tax credit (PTC) to certain taxpayers to help with the cost of individual health insurance coverage enrolled in through an Exchange.<sup>10</sup> 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 satisfies 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 that 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.<sup>11</sup>

In general, 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) for a plan does not exceed a percentage (the required contribution percentage<sup>12</sup>) of the employee's household income.<sup>13</sup> In addition, in general, 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

premiums are reimbursed by an HRA or a QSEHRA does not become part of an ERISA plan, provided certain conditions are satisfied (and the Departments provided a related clarification of the definition of the term "group health insurance coverage"); and (4) the Treasury Department and the IRS finalized regulations regarding premium tax credit eligibility for individuals offered an individual coverage HRA, as explained in this preamble. In this document, this package of regulations is referred to collectively as the "final regulations."

<sup>10</sup> Exchanges are entities established under PPACA section 1311 or 1321, through which qualified individuals and qualified employers can purchase health coverage.

<sup>11</sup> See section 36B(c)(2)(C)(iii) and §§ 1.36B-2(c)(3) and 1.36B-3(c).

<sup>12</sup> See § 1.36B-2(c)(3)(v)(C). The required contribution percentage for 2020 is 9.78 percent (see Rev. Proc. 2019-29).

<sup>13</sup> 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.

<sup>1</sup> 82 FR 48385 (Oct. 17, 2017).

coverage of inpatient hospitalization and physician services.<sup>14</sup>

An eligible employer-sponsored plan includes coverage under a self-insured group health plan<sup>15</sup> and is minimum essential coverage (MEC) unless it consists solely of excepted benefits.<sup>16</sup> An HRA is a self-insured group health plan and, therefore, is an eligible employer-sponsored plan.<sup>17</sup> Accordingly, an individual is ineligible for the PTC for a month if the individual is (1) covered by an HRA, or (2) eligible for an HRA that is affordable and provides MV for the month (provided the HRA does not consist solely of excepted benefits).

On October 23, 2018, in connection with the proposed integration regulations, the Treasury Department and the IRS proposed regulations under section 36B to provide guidance regarding the circumstances in which an individual coverage HRA would be considered to be affordable and to provide MV. On June 14, 2019, in connection with the final integration regulations, the Treasury Department and the IRS finalized the rules under section 36B, substantially as proposed but with some clarifications in response to comments (the final PTC regulations).<sup>18</sup>

Under the final PTC regulations, an individual coverage HRA is considered to be affordable for a month if the employee's required HRA contribution for the month does not exceed  $\frac{1}{12}$  of the product of the employee's household income for the taxable year and the required contribution percentage. The required HRA contribution is the excess of: (1) The monthly premium for the lowest cost silver plan for self-only coverage of the employee offered in the Exchange for the rating area in which the employee resides (the PTC affordability plan<sup>19</sup>), over (2) in general, the self-only amount the employer makes newly available to the employee under the individual coverage HRA for the month (the monthly HRA amount).<sup>20</sup> Under the final PTC

regulations, an individual coverage HRA that is affordable is treated as providing MV. The final PTC regulations apply for taxable years beginning on or after January 1, 2020.

### C. Employer Shared Responsibility Provisions (Section 4980H)

#### 1. In General

The employer shared responsibility provisions under section 4980H apply to an employer that is an applicable large employer (ALE). In general, an employer is an ALE for a calendar year if it had an average of 50 or more full-time employees (including full-time equivalent employees) during the preceding calendar year.<sup>21</sup>

For any month, an ALE may be liable for an employer shared responsibility payment under either section 4980H(a) or 4980H(b), or neither, but an ALE may not be liable for a payment under both sections 4980H(a) and 4980H(b).<sup>22</sup> An ALE generally is liable for 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 through an Exchange. An ALE is liable for a payment under section 4980H(b) for a month if it offers coverage under an eligible employer-sponsored plan to at least 95 percent<sup>23</sup> 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 through an Exchange, which may occur because the ALE did not offer coverage to that particular full-time employee or because the coverage the

including in cases in which the employer makes the same amount available for all employees regardless of the number of individuals covered.

<sup>21</sup> See section 4980H(c)(2) and § 54.4980H-2. See also § 54.4980H-1(a) for definitions of the terms used in this preamble.

<sup>22</sup> For simplicity, this preamble refers to ALEs and employers, but to the extent the preamble is addressing the potential for liability under section 4980H, those terms refer to an ALE member. An ALE member is a person that, together with one or more other persons, is treated as a single employer that is an ALE, if applicable. Liability under section 4980H applies separately to each ALE member. See § 54.4980H-1(a)(5). Further, the reporting obligations under section 6056 also apply to ALE members and references to employers or ALEs with respect to reporting under section 6056 should be read to refer to ALE members.

<sup>23</sup> 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 be liable for an employer shared responsibility payment under section 4980H(a). See § 54.4980H-4.

employer offered was unaffordable or did not provide MV.<sup>24</sup>

#### 2. Section 4980H Affordability Safe Harbors Regarding Household Income

Whether an employee may claim the PTC depends on the rules under section 36B, including the rules for whether an offer of coverage by the employer is affordable and provides MV.<sup>25</sup> However, the regulations under section 4980H provide certain safe harbors for determining whether an ALE is treated as making an offer of coverage that is affordable for purposes of section 4980H. More specifically, as noted earlier in this preamble, whether an offer of an eligible employer-sponsored plan is affordable, both for purposes of section 36B and section 4980H, depends in part on the employee's household income. Because an employer generally does not know an employee's household income, § 54.4980H-5(e) provides that, for purposes of section 4980H(b), an employer may substitute for an employee's household income an amount based on the employee's wages from the Form W-2, "Wage and Tax Statement," the employee's rate of pay, or the federal poverty line, using the household income safe harbors (the HHI safe harbors).<sup>26</sup>

The HHI safe harbors are optional and apply only for purposes of section 4980H(b). 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. If, in applying one of the HHI safe harbors the offer of coverage is considered affordable, then the employer will not be subject to an employer shared responsibility payment under section 4980H(b) with respect to that employee, even if the employee is allowed the PTC.

#### 3. Application of Section 4980H to Individual Coverage HRAs

In implementing the objectives of Executive Order 13813, the Treasury Department and the IRS considered the

<sup>24</sup> See § 54.4980H-5.

<sup>25</sup> See section 4980H(c)(3). See also §§ 54.4980H-1(a)(28) and 54.4980H-5(e)(1).

<sup>26</sup> 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 the regulations thereunder (as opposed to the section 4980H safe harbors).

<sup>14</sup> See section 36B(c)(2)(C)(ii); see also 80 FR 52678 (Sept. 1, 2015).

<sup>15</sup> See § 1.5000A-2(c).

<sup>16</sup> See section 5000A(f)(3) and § 1.5000A-2(g).

<sup>17</sup> See Notice 2013-54, 2013-40 IRB 287, Q&A 10.

<sup>18</sup> See 84 FR 28888 (June 20, 2019).

<sup>19</sup> The term "affordability plan" is also used in this preamble and refers to the lowest cost silver plan used to determine affordability of an individual coverage HRA, which for purposes of section 36B means the PTC affordability plan and for section 4980H means either the PTC affordability plan or the lowest cost silver plan determined under the safe harbors provided in the proposed regulations, if applicable.

<sup>20</sup> See § 1.36B-2(c)(5)(ii) for more information on how the required HRA contribution is determined,

application of section 4980H to an ALE that offers an individual coverage HRA. Accordingly, on November 19, 2018, the Treasury Department and the IRS issued Notice 2018–88,<sup>27</sup> which described a number of potential approaches related to the interaction of the proposed integration regulations and section 4980H.

For clarity, the notice confirmed that an individual coverage HRA is an eligible employer-sponsored plan, and, therefore, an offer of an individual coverage HRA constitutes an offer of an eligible employer-sponsored plan for purposes of section 4980H(a). Consequently, if an ALE offers an individual coverage HRA to at least 95 percent of its full-time employees (and their dependents), the ALE will not be liable for an employer shared responsibility payment under section 4980H(a) for the month, regardless of whether any full-time employee is allowed the PTC.

The notice also explained how section 4980H(b) (including the HHI safe harbors) would apply to an ALE that offers an individual coverage HRA, described potential additional affordability safe harbors related to offers of individual coverage HRAs, requested comments, and provided examples. The Treasury Department and the IRS received a number of comments in response to Notice 2018–88, all of which were considered and are addressed in this preamble. See part II of this preamble for a more detailed discussion of the approaches described in Notice 2018–88 and the extent to which those potential approaches are included in the proposed regulations.

#### D. Section 105

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 expenses for medical care (as defined in section 213(d)) incurred by the employee (for medical care of 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)) (an HCI)<sup>28</sup> under a self-insured medical

reimbursement plan are includible in the gross income of the HCI if either (1) the plan discriminates in favor of HCIs as to eligibility to participate in the plan, or (2) the benefits provided under the plan discriminate in favor of HCIs (nondiscriminatory benefits rule).<sup>29</sup> Section 105(h)(4) provides that a self-insured medical reimbursement plan does not satisfy the nondiscriminatory benefits rule unless all benefits provided to HCIs are also provided to all other participants.<sup>30</sup> However, a plan that reimburses employees solely for premiums paid under an insured plan is treated as an insured plan and is not subject to these rules.<sup>31</sup>

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).<sup>32</sup> 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.”<sup>33</sup> 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 and wages of the HCI.

HRAs generally are subject to the rules under section 105(h) and its related regulations because they are self-insured medical reimbursement plans.<sup>34</sup> However, HRAs that make available reimbursements to employees only for premiums paid to purchase health insurance policies, including individual health insurance policies, but not other expenses, are not subject to the rules under section 105(h) and its related regulations.<sup>35</sup> Notice 2018–88 addressed

among 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).

<sup>29</sup> See section 105(h)(1) and (2).

<sup>30</sup> See § 1.105–11(c)(3)(i).

<sup>31</sup> See § 1.105–11(b)(2).

<sup>32</sup> See § 1.105–11(c)(3)(i).

<sup>33</sup> *Id.*

<sup>34</sup> See § 1.105–11(b)(1); see also Notice 2002–45, 2002–28 CB 93.

<sup>35</sup> 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

the interaction of individual coverage HRAs and section 105(h) and explained potential future guidance. The Treasury Department and the IRS received comments in response to the section 105(h) safe harbor in Notice 2018–88, all of which were considered and are addressed in this preamble. See later in this preamble for a more detailed discussion of the approaches described in Notice 2018–88 and the extent to which those approaches are included in the proposed regulations.

## II. Explanation of Provisions and Summary of Comments

Taking into account the comments received in response to Notice 2018–88, as well as comments received in response to the proposed integration regulations and proposed PTC regulations, the Treasury Department and the IRS propose the following regulations under sections 4980H and 105 to clarify the application of those sections to individual coverage HRAs and to provide related safe harbors to ease the administrative burdens of avoiding liability under section 4980H and avoiding income inclusion under section 105(h). These proposed regulations do not include any changes to the final integration regulations or the final PTC regulations.

### A. Section 4980H Proposed Regulations

The Treasury Department and the IRS note that section 4980H relates only to offers of coverage by an ALE to its full-time employees (and their dependents). As a result, to the extent an employer is not an ALE, or is an ALE but offers an individual coverage HRA to employees who are not full-time employees, the employer need not consider the application of section 4980H in determining those offers, and, therefore, it need not identify an affordability plan for those employees.

#### 1. Location-Related Issues

##### a. Location Safe Harbor—In General

As noted earlier in part I(B) of this preamble, under the final PTC regulations, whether an offer of an individual coverage HRA is affordable for an employee depends, in part, on the monthly premium for the PTC

insurance policies. PHS Act section 2716, as incorporated into the Code by section 9815, applies nondiscrimination rules similar to section 105(h) to insured coverage and may apply to HRAs that only provide for the reimbursement of premiums. However, under Notice 2011–1, 2011–2 IRB 259, the Departments determined that compliance with PHS Act section 2716 should not be required (and, thus, any sanctions for failure to comply would not apply) until after regulations or other administrative guidance of general applicability has been issued under PHS Act section 2716.

<sup>27</sup> See Notice 2018–88, 2018–49 IRB 817.

<sup>28</sup> Generally, section 105(h)(5) and § 1.105–11(d) define an HCI to include any employee that is

affordability plan for that employee (that is, the lowest cost silver plan for self-only coverage of the employee offered through the Exchange for the rating area in which the employee resides). In Notice 2018–88, the Treasury Department and the IRS expressed concerns about the burden on employers that could result from requiring affordability to be determined based on each employee's place of residence, noting that employees' places of residence might change over time and employers may have difficulty keeping their records up to date. Accordingly, Notice 2018–88 described a potential safe harbor under which, for purposes of determining affordability under section 4980H(b), an ALE would be allowed to use the lowest cost silver plan for the employee for self-only coverage offered through the Exchange in the rating area in which the employee's primary site of employment is located, instead of the lowest cost silver plan for the employee in the rating area in which the employee resides (the location safe harbor). The Treasury Department and the IRS requested comments on the location safe harbor and whether an alternative safe harbor would be preferable and, if so, why.

One commenter was not supportive of the need for a location safe harbor, asserting that employers will likely want to determine affordability based on the cost of the lowest cost silver plan where the employee resides and disagreeing with the premise that it is difficult for employers to track employees' current addresses. However, a number of commenters indicated that a location safe harbor is needed, but that the anticipated safe harbor is too narrow because it would require employers with worksites located in multiple rating areas, including national employers, to calculate affordability for section 4980H(b) purposes separately for numerous rating areas. One commenter suggested that larger employers may be unwilling to offer individual coverage HRAs if employers are required to track and align HRAs on a rating-area basis, noting that for traditional employer-sponsored coverage, employers generally need only look to the cost of a single plan to determine affordability.

Some commenters suggested that one lowest cost silver plan be used to determine affordability employer-wide, such as the lowest cost silver plan in the rating area in which the employer's headquarters is located. Some commenters suggested employers be allowed to use one lowest cost silver plan to determine affordability for all employees with a worksite in a

particular state or metropolitan statistical area, which, at least one suggested, the Centers for Medicare & Medicaid Services (CMS) could determine and make available to the public. Some commenters suggested a nationwide affordability plan should be provided for purposes of section 4980H, which could apply for all employers, and could be calculated based on the national average cost of lowest cost silver plans, perhaps averaged over multiple years. One commenter noted that although a nationwide plan may have a relatively high cost, it would provide simplicity. Some commenters opposed broadening the location safe harbor, including providing a nationwide safe harbor, due to concerns about evasion of section 4980H and enabling lower contributions to individual coverage HRAs, relative to amounts determined based on an employee's actual residence.

As a general matter, the Treasury Department and the IRS acknowledge that in determining the affordability of traditional employer-sponsored coverage, employers generally use the cost of one plan (that is, the lowest cost plan providing MV that the employer offers to the employees) and that the cost of that plan does not vary by employee (or, in general, varies by broad categories of employees). In contrast, the affordability test for individual coverage HRAs is based on the cost of the applicable lowest cost silver plan for each employee, which will vary by employee, by virtue of the fact that the cost of individual health insurance coverage varies on an individual basis, including based on an individual's residence and age. The Treasury Department and the IRS recognize that this difference may impose additional complexity with respect to the application of section 4980H to individual coverage HRAs, as compared to traditional employer-sponsored coverage. However, for purposes of section 36B, whether coverage is affordable is an employee-by-employee determination and for an individual coverage HRA, where there is no traditional employer-sponsored coverage on which to base an employee contribution, the employee's required contribution must be based on the cost of an individual health insurance plan, as employees generally are required to have individual health insurance coverage in order to enroll in the individual coverage HRA. The Treasury Department and the IRS have considered ways in which, consistent with the law, application of the affordability test under the final PTC

regulations can and should be modified in applying section 4980H. However, by virtue of the ways in which individual coverage HRAs differ from traditional employer-sponsored coverage, the determination of affordability under section 36B (and, accordingly, under section 4980H) differs for these two types of coverage, and the Treasury Department and the IRS expect that employers will take those differences into account in determining whether, and to whom, to offer an individual coverage HRA.

The Treasury Department and the IRS continue to be concerned about the burden imposed on employers in determining each full-time employee's place of residence, due to the fact that employees' places of residence might change with some frequency, and it could be difficult for employers to keep their records up to date. The Treasury Department and the IRS also recognize the administrative simplicity for employers with workers in different locations of being able to use the cost of a single plan to determine affordability for all workers. However, none of the suggested expansions of the location safe harbor would be based on a reasonable proxy for the cost that would determine whether the employee would be allowed the PTC (which is the basis for the employer shared responsibility payment under section 4980H(b)), and none would provide a substitute for a cost that the employer would otherwise be unable to identify in advance of the plan year. As a result, adoption of any of the suggested expansions of the location safe harbor could lead to a significant number of cases in which one or more of an ALE's full-time employees are allowed the PTC while the ALE is treated as providing those full-time employees affordable coverage, with the result that the ALE is not liable for an employer shared responsibility payment.

These concerns are particularly acute because of significant differences in individual health insurance plan premiums that exist in different geographic locations, including from rating area to rating area, not only across the country, but also within many states. Accordingly, an affordability plan based on a nationwide average cost or, in many cases, a statewide average cost, would allow an ALE with full-time employees in locations with above-average lowest cost silver plan premiums to offer an individual coverage HRA, the amount of which is based on an affordability calculation using the average cost. The ALE could then ensure that employees were informed of the ability to enroll in an

Exchange plan subsidized by a potentially larger PTC, if they declined the individual coverage HRA. In that case, the ALE would not only avoid an employer shared responsibility payment, but also would avoid the cost of funding the employees' individual coverage HRAs (or any other healthcare benefits). Meanwhile, those employers with employees in below-average cost locations generally could use the actual cost in those lower-cost locations to determine affordability for those employees.<sup>36</sup> This result would run counter to the language and intent of section 4980H, which directly ties liability for an employer shared responsibility payment to one or more full-time employees being allowed the PTC.

The Treasury Department and the IRS recognize that a safe harbor based on the employee's primary site of employment could raise similar issues of avoidance of the employer shared responsibility payment, but it would be on a much more limited scale. It is possible that the premium for the lowest cost silver plan based on an employee's worksite will be more expensive or less expensive than the premium for the lowest cost silver plan based on the employee's residence, in cases in which the employee resides in a location that has a different lowest cost silver plan than the location in which the worksite is located. However, the Treasury Department and the IRS expect that many employees live in relatively close proximity to where they work, in which case it is likely that the location used to determine the affordability plan for purposes of sections 4980H and 36B would be the same. Further, the Treasury Department and the IRS also expect that even if an employee does not live and work in the same location for purposes of determination of the lowest cost silver plan, the employee is likely to live and work in locations that are relatively close, in which case the variation between the cost of the lowest cost silver plan where the employee lives versus the cost of the lowest cost silver plan where the employee works is likely to be less significant than the variation that would be introduced by a statewide or national average plan cost.

Thus, the Treasury Department and the IRS have concluded that the cost of the affordability plan at an employee's primary site of employment is a

reasonable proxy for the cost of the affordability plan at the employee's residence for purposes of section 4980H, while avoiding the burdens that may arise for some employers in keeping records of their employees' current residences. Therefore, the proposed regulations provide that for purposes of section 4980H(b), an employer may use the lowest cost silver plan for the employee for self-only coverage offered through the Exchange where the employee's primary site of employment is located for determining whether an offer of an individual coverage HRA to a full-time employee is affordable. Further, the proposed regulations provide that the location safe harbor may be used in combination with the other safe harbors provided in the proposed regulations.

In response to comments asking for a single affordability plan for purposes of section 4980H, the Treasury Department and the IRS note that an ALE that wants to contribute one set amount to individual coverage HRAs that would protect the ALE from liability under section 4980H(b) could set the amount by determining affordability based on the lowest cost silver plan that has the highest cost premium for self-only coverage for any of its full-time employees (that is, nationally or based on multiple rating areas or states). This would result, however, in employees who live in locations with lower premiums receiving a benefit beyond the minimum required to protect against liability under section 4980H (and, thus, a higher cost to the employer than necessary solely to protect against that liability), and permit those same employees to purchase more generous plans than employees living in the higher-premium locations.

Nonetheless, in view of the many differences in premiums geographically, and in view of the comments requesting a broader location safe harbor, the Treasury Department and the IRS recognize the simplicity that one or more such safe harbors could provide and the value to employers of being able to design uniform health coverage for all employees, without needing to tie the uniform amount to the highest cost affordability plan. Consequently, the Treasury Department and the IRS request comments regarding other methods of determining affordability under section 4980H that would not result in significant discrepancies between full-time employees being allowed the PTC and ALEs avoiding liability under section 4980H, or otherwise allow ALEs to avoid the costs of providing healthcare benefits by shifting those costs to the Federal

government through access to the PTC. To the extent any method relies on data such as cost variances across geographic locations, variations of employee populations across geographic locations, or other similar data, considerations should include the availability of the data, including availability of that data at times sufficiently in advance to be usable by employers for determining plan designs for a subsequent year, how the data would be used both by employers and the IRS in determining the affordability plan for purposes of section 4980H, and how changes in the data over time would be integrated into the suggested methodology.

#### b. Identifying the Primary Site of Employment Under the Location Safe Harbor

With respect to the location safe harbor, commenters raised a number of questions as to how and when to determine an employee's primary site of employment. More specifically, commenters noted that determining the primary worksite for employees who work in multiple locations and do not have a set worksite could be challenging and asked that rules allow employers flexibility in making this determination. Commenters also asked for clarification on how the primary site of employment is determined for employees who telework, which commenters noted is increasing the geographic distribution of workers. In addition, commenters also asked for clarification about when in relation to the plan year an employee's worksite is determined, with one suggesting it be determined based on the worksite six months prior to the plan year or as of the date of hire. Commenters further requested that the proposed regulations address mid-year changes in worksite locations and that employers be able to use the initial affordability plan for the plan year regardless of later worksite changes.

In response to these comments, for purposes of the location safe harbor, the proposed regulations provide that 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 (or on the first day the individual coverage HRA may take effect, for an employee who is not eligible for the individual coverage HRA on the first day of the plan year), except that the employee's primary site of employment is treated as changing if the location at which the employee performs services changes and the employer expects the change to be

<sup>36</sup> The Treasury Department and the IRS note that, in addition to considering section 4980H, employers will also need to take into account other applicable guidance in determining amounts to make available in individual coverage HRAs, including the same terms requirement (§ 54.9802-4(c)(3)) under the final integration regulations.

permanent or indefinite.<sup>37</sup> In that case, in general, the employee's primary site of employment is treated as changing no later than the first day of the second calendar month after the employee has begun performing services at the new location. This rule is intended to strike the appropriate balance between requiring that employee-specific, up-to-date information be used to determine affordability under section 4980H and allowing employers time to address the administrative aspects of accounting for an employee's change in primary worksite.

The proposed regulations also include a special rule for determining primary worksite for the first plan year that an employer offers an individual coverage HRA (or first offers an individual coverage HRA to a particular class of employees). Specifically, if an employer is first offering an individual coverage HRA to a class of employees, and the change in worksite occurs prior to the individual coverage HRA's initial plan year, the employee's primary site of employment is treated as changing no later than the later of the first day of the plan year or the first day of the second calendar month after the employee has begun performing services at the new location. This is to provide certainty to employers first offering individual coverage HRAs to account for changes in circumstances that may occur in the months leading up to the plan year, including in close proximity to the first day of the plan year. For subsequent plan years, the general rule should take into account, for instance, changes in residence after an open enrollment period but before the beginning of the plan year.

In the case of an employee who regularly works from home or at another worksite that is not on the employer's premises but who may be required by his or her employer to work at, or report to, a particular worksite, such as a teleworker with an assigned office space, the worksite to which the employee would report to provide services if requested is the applicable primary site of employment. The proposed regulations provide that in the case of an employee who works remotely from home or at another worksite that is not on the employer's

premises and who otherwise does not have a particular assigned office space or a worksite to which to report, the employee's residence is the primary site of employment.

The Treasury Department and the IRS recognize that the manner in which employees report to work varies widely across employers and industries. Therefore, the Treasury Department and the IRS request comments on whether any further clarification is needed regarding determination of the primary site of employment for purposes of the section 4980H location safe harbor.

#### c. Employee Residence

Notwithstanding the location safe harbor, one commenter expressed an interest in using each employee's residence to determine affordability for purposes of section 4980H. The use of the location safe harbor under the proposed regulations is optional for an employer, and if an employer opts not to use the location safe harbor, then the PTC affordability plan (that is, the lowest cost silver plan for the employee based on the employee's residence) would be used to determine the affordability of the offer of the individual coverage HRA.<sup>38</sup> However, the Treasury Department and the IRS expect that most employers will choose to use the location safe harbor, in part because under the final integration regulations, an employer may offer and vary individual coverage HRAs for a class of employees whose primary site of employment is in the same rating area, but the final integration regulations do not provide a class of employees based on an employee's residence.<sup>39</sup> Thus, because the final integration regulations do not provide for a class of employees based on the location of employees' residences, an employer basing affordability on the residences of employees would need to use the lowest cost silver plan with the highest cost premium for self-only coverage at the residence of any employees in the class.

This commenter also requested clarification regarding when an employer may determine an employee's residence during the calendar year to identify the appropriate plan to be used

to determine affordability, and included specific suggestions including a snapshot date six months prior to the plan year or date of hire for those not employed at that time. The proposed regulations do not provide any rules addressing the ability of an employer to identify the residence of the employee in the case of an employer who chooses to determine the affordability of the individual coverage HRA based on the residence of each employee instead of using the location safe harbor. However, the Treasury Department and the IRS request comments on whether, in the case of an individual coverage HRA and for purposes of determining the location of the employee's residence, rules allowing the use of a snapshot date in a specified period prior to the beginning of the plan year, rules allowing a short delay in the application of any change in residence, or a rule similar to one of those alternatives would be helpful to employers, or whether the availability of the location safe harbor, in conjunction with the final integration regulations, generally eliminates the need for such rules. Similar to the location safe harbor, any residence safe harbor would need to include rules providing when a change in an employee's residence must be taken into account.

#### d. Multiple Affordability Plans in One Rating Area

Although the final PTC regulations refer to the lowest cost silver plan offered through an Exchange for an employee in a rating area, there is not necessarily one lowest cost silver plan per rating area. Rather, CMS has advised the Treasury Department and the IRS that, in some rating areas, there are different lowest cost silver plans in different parts of the rating area because some issuers only offer coverage in parts of rating areas (specifically, by county or zip code). For purposes of the PTC, whether an offer of an individual coverage HRA to an employee is affordable depends, in part, on the premium for the lowest cost silver plan available to that employee, which may differ from the lowest cost silver plan available to another employee located in another part of the same rating area.

For the sake of clarity, the proposed regulations, therefore, provide that the lowest cost silver plan for an employee for a month, for purposes of the safe harbors in the proposed regulations, is the lowest cost silver plan in the part of the rating area that includes the employee's applicable location. For purposes of this preamble and the proposed regulations, an employee's applicable location is either the employee's primary worksite, if the

<sup>37</sup> The final integration regulations allow individual coverage HRAs to be offered based on different classes of employees. One class of employees, as set forth in § 54.9802-4(d)(2)(v), is employees whose primary site of employment is in the same rating area (with rating area defined in 45 CFR 147.102(b)). The final integration regulations do not provide a specific definition for primary site of employment, and the definition provided in the proposed regulations applies only for purposes of section 4980H.

<sup>38</sup> Note that, as discussed in part II(A)(4) of this preamble, although the safe harbors in the proposed regulations are optional, if an ALE chooses to use them, it must do so based on the classes of employees set forth in the final integration regulations. Also note that, later in this preamble, the Treasury Department and the IRS explain the extent to which the other safe harbors provided under the proposed regulations may apply to the PTC affordability plan, for purposes of section 4980H.

<sup>39</sup> Section 54.9802-4(d)(2)(v).

employer uses the location safe harbor, or the employee's residence, if the employer chooses not to use the location safe harbor.

ALEs should be aware of how this rule interacts with the final integration regulations. Specifically, for an ALE using the location safe harbor with multiple worksites within a rating area, it may be the case that for some employees one lowest cost silver plan applies and for other employees, with a worksite in another part of the same rating area, a different lowest cost silver plan applies, perhaps with substantially different premiums. In that sense, the amount the employer needs to make available under the individual coverage HRA, for purposes of avoiding potential liability for an employer shared responsibility payment under section 4980H(b), may vary by zip code or county, rather than by rating area. However, under the final integration regulations, employers may not create classes of employees based on a geographic area smaller than a rating area.<sup>40</sup> Accordingly, to the extent an ALE has multiple worksites in one rating area, the ALE will need to take these different rules into account in determining the amounts to be made available under an individual coverage HRA, and, in order to avoid potential liability for an employer shared responsibility payment under section 4980H(b), may need to base amounts made available in the HRA in a rating area on the most expensive lowest cost silver plan in any part of the rating area in which at least one employee has a primary worksite.

## 2. Age-Related Issues

### a. Consideration of Age Safe Harbor

Under the final PTC regulations, for any given employee, the premium for the PTC affordability plan is based on the particular employee's relevant circumstances, including the particular employee's age. Consequently, even for employees residing in the same location (or working at the same location if the location safe harbor is applied), the cost of the applicable affordability plan is determined on an employee-by-employee basis.<sup>41</sup> In Notice 2018–88,

the Treasury Department and the IRS acknowledged that determining the premium for the affordability plan for each employee based on his or her age might be burdensome for some employers, and requested comments on the administrative issues and burdens the age-based determination may raise and on safe harbors that would ease this burden and be consistent with the purpose and policies underlying section 4980H.

One commenter supported an employee-by-employee age-based affordability determination and, therefore, opposed an age-based safe harbor, asserting that employers will want to make HRA contributions based on employee ages. Therefore, the commenter did not see the need for an age-based safe harbor. However, several commenters stated that requiring the determination of affordability on an employee-by-employee basis, based on age, would be very burdensome for employers. These commenters requested an age-based safe harbor and indicated that the lack of such a safe harbor could discourage some larger employers from offering individual coverage HRAs, in particular for employers that want to provide a flat amount in the individual coverage HRA regardless of age.

Commenters provided various suggestions for how an age-based safe harbor could be designed. One commenter suggested that the safe harbor might provide that affordability may be determined based on a composite premium for an employer's employees, at a minimum, at a particular worksite, and preferably at a combination of regional or national worksites. The commenter also suggested a composite premium based on the lowest cost silver plan at a specified age (for example, the lowest cost silver plan for a 40-year-old person in the rating area of the worksite), which an employer could use to determine the cost of the affordability plan for all of its employees at the particular worksite. Another commenter suggested employers should be allowed to use the average age of all employees in each class of employees on the first day of the plan year to determine the premium for the section 4980H affordability calculation for all employees in that class of employees. One commenter suggested an age safe harbor could be based on age bands adopted in a state, while another commented that the use of age bands to develop a safe harbor would introduce too much complexity and variation.

section 4980H in designing an individual coverage HRA offered to full-time employees.

The Treasury Department and the IRS acknowledge that determining the premium for the affordability plan for purposes of section 4980H for each full-time employee, based on age, may be burdensome for some employers. However, section 4980H incorporates section 36B for purposes of determining whether an ALE is subject to an employer shared responsibility payment under section 4980H(b), and the authority of the Treasury Department and the IRS to provide safe harbors under section 4980H that deviate significantly from the section 36B rules is limited. More specifically, as noted earlier in this preamble, the Treasury Department and the IRS have provided other section 4980H safe harbors, namely the HHI safe harbors, which have been designed to offer a reasonable proxy for information that the employer may not know or would bear significant burdens in determining. By contrast, an employer typically knows the ages of its employees for a variety of unrelated purposes; consequently, it is not the case that employers do not know, or would bear a significant burden in determining, an employee's age. In addition, the average age of a group of employees generally will not be a reasonable proxy for a particular employee's age because, depending on the group, the average age may differ markedly from the ages of the older and younger members of the group. Accordingly, any age-based safe harbor would likely result in a number of employees (those with an age greater than the safe harbor age) receiving the PTC while the employer would not be subject to an employer shared responsibility payment under section 4980H(b), including in some cases by employer design.

For these reasons, the proposed regulations do not provide a safe harbor for the age used to determine the premium of an employee's affordability plan. Rather, under the proposed regulations as under section 36B, affordability of the offer of an individual coverage HRA for purposes of section 4980H is determined, in part, based on each employee's age.

The Treasury Department and the IRS also note that as a practical matter, if an employer wants to make a single amount available under an individual coverage HRA to a class of employees and ensure it avoids an employer shared responsibility payment under section 4980H(b), in general, the employer can use the age of the oldest employee in the class of employees to determine the amount to make available under the HRA to that class of employees. However, if the employer does not make

<sup>40</sup> Section 54.9802–4(d)(2)(v).

<sup>41</sup> Also note that, under the final integration regulations, a plan sponsor of an individual coverage HRA may increase amounts made available under the HRA based on increases in the ages of participants in a class of employees subject to certain conditions. See § 54.9804–2(c)(3). Nothing in the proposed regulations affects the rules allowing plan sponsors of individual coverage HRAs to vary amounts made available based on participants' ages. However, ALEs that offer individual coverage HRAs will need to take into account both the final integration regulations and

available the full amount of the cost of the affordability plan under the HRA, the employer will also need to compare each full-time employee's required contribution to the applicable amount under an HHI safe harbor to ensure the offer is affordable for all full-time employees. Further, the employer would need to take into account any geographic variation in the cost of the affordability plan (that is, the employer would need to ensure that it is basing affordability on the most expensive lowest cost silver plan available to any employee in the class, which may not be the lowest cost silver plan for the oldest employee in the class depending on whether the lowest cost silver plan of a younger employee in the class in a different geographic location has a higher cost).

#### b. Age Used To Determine Premium for Affordability Plan for an Employee

One commenter requested information regarding when employers may determine the employee's age for purposes of determining the premium of the affordability plan, for purposes of section 4980H. To align with the rules issued under 45 CFR 147.102(a)(1)(iii) concerning the ability of issuers in the individual and small group markets to vary health insurance premiums based on age, the commenter requested that the Treasury Department and the IRS provide that an employee's age may be determined at the time of the policy issuance or renewal or, if an individual is added after the policy issuance or renewal date, the date the individual is added or enrolled in coverage.<sup>42</sup>

In response to this comment, and to provide clarity to employers, the proposed regulations specify the date as of which an employee's age is to be determined for a plan year for purposes of determining affordability under the section 4980H safe harbors.<sup>43</sup> Specifically, the proposed regulations

<sup>42</sup> Under 45 CFR 147.102(a)(1)(iii), issuers are required to use the enrollee's age as of the date of policy issuance or renewal.

<sup>43</sup> The age identification rule in the proposed regulations does not apply for purposes of the final integration regulations, under which, in determining age with respect to variation in amounts made available to participants based on age in an individual coverage HRA, plan sponsors may determine the age of the participant using any reasonable method for a plan year, so long as the plan sponsor determines each participant's age using the same method for all participants in the class of employees for the plan year and the method is determined prior to the plan year. See § 54.9802-4(c)(3)(iii)(B). However, to the extent an ALE is offering an individual coverage HRA, the ALE will need to take into account both the final integration regulations and any rules under section 4980H; therefore, the Treasury Department and the IRS have provided a proposed rule under section 4980H that allows compliance with both sets of rules.

provide that for an employee who is or will be eligible for an individual coverage HRA on the first day of the plan year, the employee's age for the plan year is the employee's age on the first day of the plan year, and for an employee who becomes eligible for an individual coverage HRA during the plan year, the employee's age for the remainder of the plan year is the employee's age on the date the HRA can first become effective for the employee. This rule is based on, but not an exact incorporation of, the age determination rule that applies for purposes of rate setting in the individual and small group markets, which is tied to the individual market policy issuance or renewal date. The proposed regulations include a rule based on the HRA plan year and HRA effective date instead, to provide more certainty and simplicity for employers.

#### c. Age Band Used To Identify Affordability Plan for All Employees

The Treasury Department and the IRS understand that, in almost all cases, the plan that is the lowest cost silver plan at one age in a particular location will be the lowest cost silver plan for individuals of all ages in that location. However, CMS has advised the Treasury Department and the IRS that it is theoretically possible that, in some cases, one plan might be the lowest cost silver plan at one age and another plan might be the lowest cost silver plan at another age, in the same location. If that were to occur, however, the differences in premium amounts of the different plans at the same age would be extremely small (less than two dollars).

Therefore, in order to avoid the need for employers to determine different lowest cost silver plans in one location for employees of different ages, and to simplify the information that the Exchanges will make available to employers, the proposed regulations provide that for purposes of the proposed safe harbors, the lowest cost silver plan for an employee for a month is the lowest cost silver plan for the lowest age band in the individual market for the employee's applicable location.

### 3. Look-Back Month Safe Harbor

#### a. In General

Under the final PTC regulations, the affordability of an individual coverage HRA for a month is determined, in part, based on the cost of the PTC 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 PTC affordability plan for January 2020. Further, 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 generally begins on November 1 of the prior calendar year.<sup>44</sup> In Notice 2018-88, the Treasury Department and the IRS noted that while this time frame is sufficient for individuals and Exchanges to determine potential 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 (including the employees' required contributions) well in advance of the start of the plan year. Therefore, for an individual coverage HRA 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 plan year, well before mid-to-late fall of the prior calendar year. Further, the Treasury Department and the IRS noted that under section 4980H, ALEs are intended to be able to decide whether to offer coverage sufficient to avoid an employer shared responsibility payment. ALEs are only able to make that choice if they have timely access to the necessary information.

To address this issue, Notice 2018-88 provided that the Treasury Department and the IRS anticipated issuing guidance that would allow an ALE sponsoring an individual coverage HRA with a calendar-year plan year to determine affordability for a year using the cost of the affordability plan for the employee's applicable location for the prior calendar year.<sup>45</sup>

A number of commenters supported this safe harbor, asserting that it would be problematic for employers to be required to wait until the fall to determine individual coverage HRA amounts for the upcoming year. However, one commenter opposed the safe harbor, based on concerns that, according to the commenter, the significant volatility in premiums in the individual market from year to year could impose additional costs on employees because individual coverage HRA amounts would be based on prior year individual market premiums and would not reflect current year individual market premiums.

The Treasury Department and the IRS acknowledge that premiums in the

<sup>44</sup> See 45 CFR 155.410(e)(3).

<sup>45</sup> This safe harbor was referred to in Notice 2018-88 as the calendar year safe harbor.

individual market may vary from year to year and that a safe harbor based on prior premium information would allow ALEs to determine affordability based on premiums that likely will differ from the actual current year premiums. However, under section 4980H, ALEs 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 the relevant information. Therefore, the proposed regulations include a safe harbor that allows employers to use prior premium information to determine affordability for purposes of section 4980H (the look-back month safe harbor), but with some modifications as compared to the anticipated safe harbor in Notice 2018–88, as described in the remainder of this section of the preamble.

As anticipated in Notice 2018–88, under the proposed regulations, an employer offering an individual coverage HRA with a calendar-year plan year may use the look-back month safe harbor. However, the proposed regulations provide additional specificity, to take into account that even within a calendar year, from calendar month to calendar month, the lowest cost silver plan in an employee's applicable location may change due to plan termination or because the plan that was the lowest cost silver plan closes to enrollment (sometimes referred to as plan suppression). Therefore, the proposed regulations provide that in determining an employee's required contribution for any calendar month, for purposes of section 4980H(b), an employer offering an individual coverage HRA with a calendar-year plan year may use the monthly premium for the lowest cost silver plan for January of the prior calendar year.

In addition, the proposed regulations provide that employers offering individual coverage HRAs with non-calendar year plan years (non-calendar year individual coverage HRAs) may also use the look-back month safe harbor, although in that case the look-back month is different. In this respect, the proposed regulations differ from Notice 2018–88, which provided that the Treasury Department and the IRS did not anticipate allowing employers offering non-calendar year individual coverage HRAs to use this safe harbor. However, the rule anticipated in Notice 2018–88 was based on the assumption that employers offering non-calendar year individual coverage HRAs would have the relevant premium information by November of the prior calendar year. The Treasury Department and the IRS now understand that this would not

necessarily be the case as the affordability plan may change from month to month during the calendar year; thus, which plan is the affordability plan for a month generally will not be known until shortly before the relevant month.

Further, in Notice 2018–88, the Treasury Department and the IRS requested comments on whether this safe harbor should be allowed to be used by employers that offer non-calendar year individual coverage HRAs and, if so, the range of plan year start dates to which the safe harbor should apply. Some commenters requested that the safe harbor extend to non-calendar year individual coverage HRAs. One commenter recommended allowing, as a general rule, all employers with an individual coverage HRA to use the premiums for the affordability plan in effect six months prior to the first day of the plan year. Another commenter recommended allowing, as a general rule, all employers with individual coverage HRAs to use the premiums for the affordability plan in effect or published no longer than 12 months prior to the start of the plan year.

Based on these comments and that the affordability plan may change from month to month during the year and, therefore, may not be known by November of the prior year, the proposed regulations allow employers offering non-calendar year individual coverage HRAs to use the look-back month safe harbor, in order to provide those employers timely access to the information they need to determine the coverage sufficient to avoid an employer shared responsibility payment, as contemplated by section 4980H(b). More specifically, for an employer offering a non-calendar year individual coverage HRA, the proposed regulations provide that in determining an employee's required contribution for a calendar month, for purposes of section 4980H(b), an employer may use the monthly premium for the affordability plan for January of the current calendar year. The proposed regulations provide a different look-back month for employers offering non-calendar year individual coverage HRAs (that is, January of the current year) than those offering individual coverage HRAs with a calendar-year plan year (that is, January of the prior year) in order to strike the appropriate balance between providing employers with access to information sufficiently in advance of the plan year and avoiding the use of premium information that could be significantly out of date. The Treasury Department and the IRS note that the relevant premium information for non-

calendar year individual coverage HRAs (that is, the premium for January of the current year) will be available by November 1 of the prior year, and, therefore, generally ALEs sponsoring non-calendar year individual coverage HRAs should have access to the necessary premium information sufficiently in advance of the start of the plan year. The Treasury Department and the IRS request comments on whether the proposed look-back month for non-calendar year individual coverage HRAs will be sufficient for individual coverage HRAs with plan years that begin relatively early in the calendar year and whether ALEs intend to offer individual coverage HRAs on a non-calendar year basis, including with plan years that begin early in the calendar year.

The proposed regulations provide that an ALE may use the look-back month safe harbor in addition to the other safe harbors included in the proposed regulations, and that an ALE may apply the look-back month safe harbor even if the ALE decides not to use the location safe harbor and, instead, bases the affordability plan on employee residence.

The proposed regulations also clarify that, although the look-back month safe harbor allows the employer to use premium information from the applicable look-back month to determine the cost of the affordability plan for each month of the current plan year, in determining the applicable premium, the employer must use the employee's applicable age for the current plan year and the employee's applicable location for the current month. In general, this means that the ALE may use the same premium (that is, the premium based on the applicable look-back month, applying current employee information) for each month of the plan year. However, to the extent the employee's applicable location changes during the plan year, although the ALE may continue to determine the monthly premium for the applicable lowest cost silver plan based on the applicable look-back month, the ALE must use the employee's new applicable location to determine that monthly premium. See parts II(A)(1)(b) and II(A)(2)(b) of this preamble for a discussion of the date as of which an employee's age is determined for purposes of the section 4980H safe harbors and the date as of which an employee's worksite is considered to have changed, for purposes of the location safe harbor.

Relatedly, Notice 2018–88 also included an anticipated safe harbor which allowed ALEs offering individual

coverage HRAs to assume that the cost of the affordability plan for the first month of the plan year is the cost of the affordability plan for all months of the plan year (the non-calendar year safe harbor). This safe harbor was primarily intended to provide certainty to non-calendar year individual coverage HRAs, for which the cost of the affordability plan would change mid-plan year (that is, upon the changing of the calendar year). Commenters supported the non-calendar year safe harbor, and the Treasury Department and the IRS continue to be of the view that ALEs need predictability with respect to the affordability plan that will apply for each month of the plan year. However, the proposed regulations do not include the non-calendar year safe harbor because it is generally subsumed by the look-back month safe harbor under the proposed regulations. Specifically, under the proposed regulations, the look-back month safe harbor applies to non-calendar year individual coverage HRAs and provides a look-back month to determine the cost of the affordability plan for each month of the plan year. As a result, the look-back month safe harbor addresses the issue underlying the non-calendar year safe harbor, and the Treasury Department and the IRS determined that a separate non-calendar year safe harbor would be largely duplicative and confusing. However, the Treasury Department and the IRS request comments on whether any employers do not intend to use the look-back month safe harbor and would, therefore, need 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.

#### b. Adjustment to Look-Back Month Premium Amounts

Notice 2018–88 noted that the Treasury Department and the IRS considered whether to apply an adjustment to the cost of the affordability plan under the look-back month safe harbor, but did not anticipate proposing such an adjustment, to avoid complexity and due to uncertainty regarding how to determine an appropriate adjustment in all circumstances and for all years. The Treasury Department and the IRS requested comments on whether such an adjustment should be included in future guidance and, if so, how the adjustment should be calculated.

A number of commenters opposed applying an adjustment, asserting that, because of volatility in healthcare costs, it would be difficult to develop a

benchmark that is representative of the market, and an adjustment could contribute to increasing healthcare costs, further complicate an already complicated rule, and cause confusion for employers. In contrast, a number of commenters supported an adjustment, suggesting that without an adjustment an employee with an individual coverage HRA may be priced out of the market and employer contributions required to satisfy section 4980H would be systematically undervalued.

Regarding the method for calculating an adjustment, commenters suggested basing the adjustment on the average of the three prior years' premium increases in the relevant individual market or PPACA's premium adjustment percentage. Commenters requested that the Treasury Department and the IRS work with HHS to compute these amounts and make them available to plan sponsors in a timely manner.

The Treasury Department and the IRS have considered these comments and continue to be concerned about the complexity and burdens that would be imposed by the application of an adjustment to the prior premiums under the look-back month safe harbor, and agree with commenters regarding the difficulty of producing an accurate adjustment. The Treasury Department and the IRS are concerned about the ability to produce a sufficiently accurate adjustment due to geographic variation in premiums (including geographic variations in the relative annual increases or decreases in premiums) and that the timing of access to information would hamper the ability to apply an adjustment based on up-to-date information. The Treasury Department and the IRS also considered applying more general adjustments (such as the Consumer Price Index overall medical care component or PPACA's premium adjustment percentage<sup>46</sup>) but are concerned that those adjustments would add complexity to the safe harbor while not reflecting premium changes in a way that is sufficiently specific to the employer's employees, including their geographic location. Therefore, under the proposed regulations, the look-back month safe harbor does not include an adjustment to the prior premium information. However, the Treasury Department and the IRS request comments on this issue and will continue to consider whether an adjustment is warranted, and how any such adjustment would be calculated, including in the event that the Treasury Department and the IRS observe that use of the look-back month safe harbor

results in significant discrepancies in the affordability determinations as separately applied for purposes of sections 36B and 4980H.

#### 4. Consistency Requirement and Conditions for the Safe Harbors

Notice 2018–88 provided that ALEs would not be required to use any of the anticipated section 4980H safe harbors for individual coverage HRAs, but that the Treasury Department and the IRS anticipated that some level of consistency would be required in the application of the anticipated safe harbors by an employer to its employees. The notice requested comments on the scope of such a requirement, including 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), which apply for purposes of the HHI safe harbors.<sup>47</sup> One commenter supported the use of consistency requirements based on the current categories of employees used under § 54.4980H–5(e)(2)(i).

Under the proposed regulations, use of any of the safe harbors is optional for an ALE. However, rather than providing that a consistency requirement applies based on reasonable categories of employees as set forth in § 54.4980H–5(e)(2)(i), the proposed regulations provide that an ALE may choose to apply the safe harbors for any class of employees as defined in the final integration regulations,<sup>48</sup> provided the ALE does so on a uniform and consistent basis for all employees in the class. The proposed regulations base the consistency requirement for the safe harbors in the proposed regulations on the classes of employees in the final integration regulations for the sake of consistency with those rules and to reduce complexity for employers in complying with both sets of rules.

In addition, the proposed regulations clarify the conditions for using the proposed safe harbors, including the HHI safe harbors as applied to offers of individual coverage HRAs. Current regulations under section 4980H provide that an ALE may only use an HHI safe harbor if the ALE offers its full-time employees (and their dependents)

<sup>47</sup> Under § 54.4980H–5(e)(2)(i), reasonable categories generally include specified job categories, the nature of compensation (hourly or salary), geographic location, and similar bona fide business criteria.

<sup>48</sup> Section 54.9802–4(d)(2). The proposed regulations refer to the definition of classes of employees in the final integration regulations but do not incorporate other related rules, such as the minimum class size requirement set forth in § 54.9802–4(d)(3).

<sup>46</sup> See PPACA section 1302(c)(4).

eligible employer-sponsored coverage that provides MV with respect to the self-only coverage offered to the employee. Because an individual coverage HRA is deemed to provide MV by virtue of being affordable (and is not an independent determination as it is for other types of employer-sponsored coverage), the proposed regulations do not separately impose this MV requirement on the use of the safe harbors in the proposed regulations.

#### 5. Application of Current HHI Safe Harbors to Individual Coverage HRAs

As described earlier in this preamble, under section 36B, whether an offer of coverage under an eligible employer-sponsored plan is affordable is based on whether the employee's required contribution exceeds the required contribution 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 HHI 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.<sup>49</sup>

Notice 2018–88 provided that 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(b). Several commenters supported the intent to allow the use of the HHI safe harbors to determine the affordability of individual coverage HRAs.

As with other types of employer-sponsored coverage, employers that offer individual coverage HRAs will not know employees' household incomes. Therefore, the proposed regulations provide that an employer offering an individual coverage HRA to a class of employees may use the HHI safe harbors in determining whether the offer of the HRA is affordable for purposes of section 4980H(b).

The proposed regulations clarify how the HHI safe harbors apply to an offer of an individual coverage HRA. Specifically, the current 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 proposed regulations clarify that, in applying the HHI safe harbors to an offer of an individual coverage HRA, the employee's required

HRA contribution is to be used, taking into account any other applicable safe harbors under the proposed regulations.

Further, the proposed regulations include technical updates to the current HHI safe harbors to reflect that the percentage used to determine affordability is the required contribution percentage (rather than a static 9.5 percent), which is adjusted in accordance with section 36B(c)(2)(C)(iv) and the regulations thereunder. The Treasury Department and the IRS clarified this issue in Notice 2015–87 and now have the opportunity to reflect that clarification in the regulation text.<sup>50</sup> The proposed regulations do not make substantive changes to the current HHI safe harbors as applied to employer-sponsored coverage that is not an individual coverage HRA.<sup>51</sup>

#### 6. Minimum Value

As described earlier in this preamble, 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.<sup>52</sup> Because of the differences between individual coverage HRAs and traditional group health plans, the final PTC regulations provide that an individual coverage HRA that is affordable is treated as providing MV.<sup>53</sup>

Notice 2018–88 explained that 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 any affordability safe harbors) would be treated as providing MV for purposes of section 4980H.

One commenter supported the MV rules for individual coverage HRAs, and one commenter opposed the rules, suggesting that any metal level plan

should be allowed to be used to determine if an offer provides MV (rather than looking to the lowest cost silver plan). Some commenters suggested the use of a different metal level plan in determining affordability and MV for individual coverage HRAs more generally. The Treasury Department and the IRS considered these issues in connection with the final PTC regulations and addressed comments on these topics in the preamble to the final PTC regulations.<sup>54</sup> Further, section 4908H applies the MV standard by reference to section 36B, and no basis has been provided for applying a different standard under section 4980H. Therefore, under the proposed regulations, an individual coverage HRA that is affordable (as determined under the applicable section 36B rules, in combination with any applicable section 4980H safe harbors), is deemed to provide MV.

#### 7. Reporting Under Sections 6055 and 6056

##### a. Section 6056

Section 6056 requires ALEs to file with the IRS and furnish to full-time employees information about whether the employer offers coverage to full-time employees and, if so, information about the coverage offered. An ALE that offers an individual coverage HRA to its full-time employees, just like all ALEs, is required to satisfy the section 6056 reporting requirements. ALEs use Form 1094–C, "Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns," and Form 1095–C, "Employer-Provided Health Insurance Offer and Coverage," to satisfy the section 6056 reporting requirements.

Section 6056 and Form 1095–C require ALEs to report each full-time employee's required contribution.<sup>55</sup> Notice 2018–88 provided that the Treasury Department and the IRS anticipated that an ALE would not be required to report the employee's required contribution that is calculated under the proposed PTC regulations. An ALE would, instead, be required to report the employee's required contribution determined under the applicable safe harbors that were anticipated to be provided with respect to the calculation of an employee's required contribution for an individual coverage HRA under section 4980H. Notice 2018–88 also stated that the Treasury Department and the IRS were continuing to consider the application

<sup>50</sup> See Notice 2015–87, 2015–52 IRB 889, Q&A 12. In Notice 2015–87, the Treasury Department and the IRS clarified a number of issues related to section 4980H. The proposed regulations do not affect the guidance provided in that notice, which remains in effect. See also 81 FR 91755, 91758 (Dec. 19, 2016).

<sup>51</sup> The proposed regulations also provide technical updates to § 54.4980H–4(b), regarding mandatory offers of coverage, where the use of 9.5 percent needed to be updated to refer instead to the required contribution percentage. The updates incorporate the clarification provided in Notice 2015–87, Q&A 12 and are not substantive changes.

<sup>52</sup> See section 36B(c)(2)(C)(ii); see also 80 FR 52678 (Sept. 1, 2015).

<sup>53</sup> See § 1.36B–2(c)(3)(i)(B).

<sup>54</sup> See 84 FR 28888 (June 20, 2019), 28943–28946.

<sup>55</sup> See also § 301.6056–1(d)(1)(vi).

<sup>49</sup> See § 54.4980H–5(e)(2).

of section 6056 to an ALE that offers an individual coverage HRA and were anticipating providing additional guidance on these issues.

One commenter requested new reporting guidance as soon as possible. Another commenter requested that any new reporting guidance be provided at least 12 months prior to the effective date of any changes in reporting and asked the Treasury Department and the IRS to consider whether good faith reporting relief would be warranted. Some commenters urged the Treasury Department and the IRS to simplify and minimize section 6056 reporting generally and with respect to individual coverage HRAs.

The proposed regulations do not propose to amend the regulations under section 6056. It is anticipated that guidance regarding reporting in connection with individual coverage HRAs will be provided in other administrative guidance, including forms and instructions. It is also anticipated that the guidance would permit the reporting of the employee's required contribution based on the section 4980H safe harbor(s) used by the ALE, rather than the employee's required contribution determined under the final PTC regulations without application of the relevant safe harbors. The Treasury Department and the IRS continue to consider whether and how to revise the codes used in Form 1095-C reporting to account for the new individual coverage HRA safe harbors. The Treasury Department and the IRS recognize the need for timely guidance in this area to assist taxpayers, plan administrators, and software developers to prepare for the reporting associated with individual coverage HRAs.

#### b. Section 6055

Section 6055 provides that all persons who provide MEC to an individual must report certain information to the IRS that identifies covered individuals and the period of coverage, and must furnish a statement to the covered individuals including the same information. Information returns under section 6055 generally are filed using Form 1095-B, "Health Coverage." However, self-insured ALEs are required to file Form 1095-C and use Part III of that form, rather than Form 1095-B, to report information required under section 6055.

Individual coverage HRAs are group health plans and, therefore, are eligible employer-sponsored plans that are MEC. Accordingly, reporting under section 6055 is required for individual coverage

HRAs. In general, the employer is the entity responsible for this reporting.<sup>56</sup>

The Treasury Department and the IRS note that there are regulations under § 1.6055-1(d) that provide exceptions for certain plans from the section 6055 reporting requirements.<sup>57</sup> These regulations include exceptions for certain duplicative coverage or supplemental coverage providing MEC. More specifically, the regulations provide that: (1) If an individual is covered by more than one MEC plan or program provided by the same reporting entity, reporting is required for only one of the plans or programs; and (2) reporting is not required for an individual's MEC to the extent that the individual is eligible for that coverage only if the individual is also covered by other MEC for which section 6055 reporting is required, but for eligible employer-sponsored coverage this exception only applies if the supplemental coverage is offered by the same employer that offers the eligible employer-sponsored coverage for which section 6055 reporting is required.<sup>58</sup> Although an individual enrolled in an individual coverage HRA is required to be enrolled in individual health insurance coverage, Medicare Part A and B, or Medicare Part C, the employer providing the individual coverage HRA generally is not the same entity that provides the individual health insurance coverage. Accordingly, these section 6055 exceptions generally do not apply to individual coverage HRAs.

The proposed regulations do not propose to amend the regulations under section 6055. However, the Treasury Department and the IRS note that because the individual shared responsibility payment under section 5000A was reduced to zero for months beginning after December 31, 2018, the Treasury Department and the IRS are studying whether and how the reporting requirements under section 6055 should change, if at all, for future years.

#### 8. Application of Tobacco Surcharge and Wellness Incentives to Affordability Determination

One commenter noted that whether an individual is a tobacco user can have an impact on premiums for individual health insurance coverage. This commenter requested that the Treasury Department and the IRS permit employers to use the non-tobacco rate in

determining affordability for purposes of the PTC and section 4980H.

In response, and consistent with current related guidance,<sup>59</sup> the final PTC regulations provide that for purposes of determining the premium for the lowest cost silver plan used to determine the employee's required HRA contribution: (1) If the premium differs for tobacco users and non-tobacco users, the premium taken into account is the premium that applies to non-tobacco users; and (2) the premium is determined without regard to any wellness program incentive that affects premiums unless the wellness program incentive relates exclusively to tobacco use, in which case the incentive is treated as earned.<sup>60</sup> The proposed regulations incorporate these rules by reference for purposes of determining the affordability plan and the associated premium.

#### 9. Implementation of Section 4980H Safe Harbors and Reliance on Exchange Information

A number of commenters requested that the Treasury Department and the IRS ensure that employers have access to the information needed to apply section 4980H to individual coverage HRAs. Some commenters asked for an online affordability calculator and for lowest cost silver plan data to be made available by zip code, for each month, and to be retained historically, for use by employers and the IRS.

The Treasury Department and the IRS recognize that access to location-specific lowest cost silver plan premium data, on a month-by-month basis, which is preserved and includes prior year information, is necessary for employers to use the safe harbors included in the proposed regulations. As noted in the preamble to the final integration regulations, lowest cost silver plan data will be made available by HHS for employers in all states that use the Federal *HealthCare.gov* platform to determine whether the individual coverage HRA offer is affordable for purposes of section 4980H, and the Treasury Department and the IRS are working with HHS to ensure that the necessary information is made available. With regard to states that do not use the Federal *HealthCare.gov* platform (State Exchanges), HHS has begun discussing the information it plans to make available in order to help the State Exchanges prepare to make this information available, and the Treasury Department and the IRS also intend to

<sup>56</sup> Section 1.6055-1(c)(2).

<sup>57</sup> See § 1.6055-1(d)(2). See also Prop. Reg. § 1.6055-1(d)(2) and (3), in 81 FR 50671 (Aug. 2, 2016) (these regulations may be relied upon for calendar years ending after December 31, 2013) and Notice 2015-68, 2015-41 IRB 547.

<sup>58</sup> Prop. Reg. § 1.6055-1(d)(2) and (3). *Id.*

<sup>59</sup> See §§ 1.36B-2(c)(3)(v)(A)(4) and 1.36B-3(e).

<sup>60</sup> Section 1.36B-2(c)(5)(iii)(A). See 84 FR 28888 (June 20, 2019), 28496-28497.

work with State Exchanges on this aspect of implementation.

Further, the Treasury Department and the IRS recognize that employers are not in a position to verify whether the lowest cost silver plan premium information posted by an Exchange for this purpose has been properly computed and identified, and, therefore, employers will need to be able to rely on the premium information that Exchanges make available. Accordingly, the proposed regulations provide that ALEs may rely on the lowest cost silver plan premium information made available by an Exchange for purposes of determining affordability under section 4980H. Employers are encouraged to retain relevant records.<sup>61</sup>

#### 10. Other Comments Related to Section 4980H

One commenter requested clarification that the offer of an individual coverage HRA is an offer of coverage for purposes of section 4980H, even if the individual offered the individual coverage HRA does not take the HRA or enroll in individual health insurance coverage. To avoid an employer shared responsibility payment, section 4980H requires an ALE to offer its full-time employees (and their dependents) an opportunity to enroll in an eligible employer-sponsored plan. Section 4980H does not require that the full-time employees (or their dependents) actually enroll, in order for the employer to avoid an employer shared responsibility payment. Moreover, as group health plans, individual coverage HRAs are eligible employer-sponsored plans. Therefore, the Treasury Department and the IRS confirm, for the sake of clarity, that the offer of an individual coverage HRA is an offer of an eligible employer-sponsored plan for purposes of section 4980H, without regard to whether the employee accepts the offer. The proposed regulations do not affect existing guidance with respect to this issue.

One commenter requested clarification that, for purposes of section 4980H, an employer that offers an individual coverage HRA will be treated as offering the HRA to Medicare-enrolled and Medicare-eligible employees, even if those employees are unable to obtain individual health insurance coverage on account of their Medicare status. Under section 4980H and the regulations thereunder, in

general, an employer is considered to offer coverage to an employee if the employee has an effective opportunity to elect to enroll in coverage at least once with respect to the plan year.<sup>62</sup> Whether an employee has an effective opportunity to enroll is determined based on all the relevant facts and circumstances. Further, under the final integration regulations, an individual coverage HRA may be integrated with Medicare Part A and B or Medicare Part C; therefore, an employee enrolled in Medicare may enroll in the HRA, even though the employee may not be able to obtain individual health insurance coverage due to his or her status as a Medicare enrollee.<sup>63</sup> Thus, if a particular individual coverage HRA may be integrated with Medicare, the offer of the HRA to an employee who is enrolled in Medicare provides the employee an effective opportunity to enroll in the HRA and constitutes an offer of coverage to the employee for purposes of section 4980H. As a result, the offer is taken into account in determining if the ALE offered coverage to a sufficient number of full-time employees (and their dependents) for purposes of avoiding an employer shared responsibility payment under section 4980H(a). In addition, because an individual enrolled in Medicare is not eligible for the PTC<sup>64</sup> and an ALE will only be liable for an employer shared responsibility payment for a month with respect to a full-time employee under section 4980H(b) if the full-time employee is allowed the PTC for that month, an ALE will not be liable for an employer shared responsibility payment under section 4980H(b) for a month with respect to a full-time employee enrolled in Medicare for that month.<sup>65</sup>

Some commenters inquired about the interaction between section 4980H and an offer of an excepted benefit HRA,<sup>66</sup> including the consequences to an ALE if the excepted benefit HRA is used to purchase short-term, limited-duration insurance (STLDI). Among other requirements, in order for an ALE to avoid an employer shared responsibility payment, it must offer an eligible employer-sponsored plan that is MEC to

its full-time employees (and their dependents). Although group health plans generally are eligible employer-sponsored plans that are MEC, excepted benefits are not MEC.<sup>67</sup> Consequently, the offer of an excepted benefit HRA is not treated as an offer of an eligible employer-sponsored plan that is MEC for purposes of section 4980H, regardless of whether the excepted benefit HRA is, or may be, used to purchase STLDI.

However, in order for an HRA to be an excepted benefit HRA, the employer must offer the employees who are offered the excepted benefit HRA other group health plan coverage that is not limited to excepted benefits and that is not an HRA or other account-based group health plan.<sup>68</sup> Because the other group health plan may not be limited to excepted benefits, that offer of coverage is an offer of an eligible employer-sponsored plan that is MEC for purposes of section 4980H. Whether the offer of coverage under the other group health plan in connection with the excepted benefit HRA is an affordable, MV offer depends on the particular characteristics of the group health plan and the coverage offered under that plan. The proposed regulations do not affect existing guidance with respect to this issue.

#### B. Proposed Regulations Under Section 105(h)

Under the final integration regulations, employers may limit the offer of an individual coverage HRA to certain classes of employees and may vary the amounts, terms, and conditions of individual coverage HRAs between the different classes of employees.<sup>69</sup> Further, within any class of employees offered an individual coverage HRA, the employer must offer the HRA on the same terms and conditions to all employees in the class, subject to certain exceptions (the same terms requirement).<sup>70</sup> One of the exceptions to the same terms requirement is that the employer may increase the maximum dollar amounts made available under an individual coverage HRA as the age of the participant increases provided that (1) the same maximum dollar amount attributable to the increase in age is made available to all participants in a class of employees who are the same age, and (2) the maximum dollar amount made available to the oldest participant(s) is not more than three times the maximum dollar amount

<sup>62</sup> See § 54.4980H-4(b)(1). The regulations also provide guidance on the circumstances in which an employer is considered to have made an offer of coverage even if the employee does not have an effective opportunity to decline to enroll in the coverage.

<sup>63</sup> See 84 FR 28888 (June 20, 2019), 28928-28931.

<sup>64</sup> See section 36B(c)(2)(B) and § 1.36B-2(a)(2).

<sup>65</sup> The rules under section 4980H for employees eligible for, but not enrolled in, Medicare apply as they do for non-Medicare-eligible employees.

However, note that an individual eligible for Medicare generally is ineligible for the PTC. See *id.*

<sup>66</sup> See § 54.9831-1(c)(3)(viii).

<sup>67</sup> See section 5000A(f)(3).

<sup>68</sup> See § 54.9831-1(c)(3)(viii)(A).

<sup>69</sup> See § 54.9802-4(d).

<sup>70</sup> See § 54.9802-4(c)(3).

<sup>61</sup> The regulations under section 4980H do not include specific recordkeeping requirements; the otherwise generally applicable substantiation and recordkeeping requirements in section 6001 apply.

made available to the youngest participant(s).<sup>71</sup> Other exceptions to the same terms requirement include rules allowing the employer to prorate amounts made available for employees and dependents who enroll in the HRA after the beginning of the HRA plan year, to make available carryover amounts, and for employees with amounts remaining in other HRAs, to make available those remaining amounts in the current individual coverage HRA, each subject to the conditions set forth in the final integration regulations.<sup>72</sup>

As explained earlier in this preamble, HRAs, including individual coverage HRAs, generally are subject to section 105(h) and the regulations thereunder.<sup>73</sup> Further, the regulations under section 105(h) 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.”<sup>74</sup> In Notice 2018–88, the Treasury Department and the IRS explained that varying the maximum amounts made available under an individual coverage HRA for different classes of employees would conflict with the requirement in § 1.105–11(c)(3)(i) that any maximum limit attributable to employer contributions must be uniform for all participants and that, without further guidance, certain amounts paid to an HCI under an individual coverage HRA that implements an age-based increase would be includible in the income of the HCI because the HRA would fail to satisfy the requirement in § 1.105–11(c)(3)(i) that prohibits the maximum limit attributable to employer contributions to the HRA from being modified by reason of a participant’s age.

To facilitate the offering of individual coverage HRAs, Notice 2018–88

<sup>71</sup> Section 54.9802–4(c)(3)(iii)(B). The proposed integration regulations included the same terms requirement, including the exception for age variation, but did not include the limit on the extent to which amounts made available may be increased based on age, which was added to the final integration regulations in response to comments. See 84 FR 28888 (June 20, 2019), 28904–28907.

<sup>72</sup> Section 54.9802–4(c)(3)(ii) and (v).

<sup>73</sup> As noted earlier in this preamble, an HRA that, by its terms, only reimburses premiums for individual health insurance coverage is not subject to section 105(h) (see § 1.105–11(b)(2)). Further, section 105(h) and the regulations thereunder, including these proposed regulations, are only relevant to an individual coverage HRA offered to one or more HCIs and are not relevant for an individual coverage HRA that is not offered to any HCI.

<sup>74</sup> See § 1.105–11(c)(3)(i).

described a potential safe harbor under which an individual coverage HRA would be treated as not failing to satisfy the nondiscrimination 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. Specifically, Notice 2018–88 described a potential safe harbor under which the HRA would be treated as not failing to satisfy this requirement if it provided 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, and further provided that the same maximum dollar amount attributable to the increase in age would be made available to all employees who are members of that class of employees who are the same age. Notice 2018–88 also stated that the Treasury Department and the IRS anticipated that future guidance would provide that an individual coverage HRA would be treated as not failing to satisfy the more general requirement in § 1.105–11(c)(3)(i) that any maximum limit attributable to employer contributions must be uniform for all participants, if the HRA provides the same maximum dollar amount to all employees who are members of a particular class of employees, limited to the classes specified in the proposed integration regulations, and subject to the exceptions allowed under the same terms requirement.

Commenters generally supported the potential section 105(h) safe harbors, but some commenters requested clarification as to how the potential section 105(h) safe harbors would function in practice, and commenters requested examples.<sup>75</sup>

In light of the final integration regulations, and for the reasons described in Notice 2018–88 and earlier in this section of the preamble, it continues to be the case that safe harbors are needed under the section 105(h) regulations to facilitate the offering of individual coverage HRAs. However, with respect to age variance, instead of proposing the anticipated safe harbor set forth in Notice 2018–88, to

<sup>75</sup> Some commenters addressed the ability to vary individual coverage HRA amounts by age for purposes of integration of HRAs with individual health insurance coverage, and a full response to those comments is included in the preamble to the final integration regulations. See 84 FR 28888 (June 20, 2019), 28904–28907.

minimize the complexity and employer burden in complying with multiple regulatory requirements, the proposed regulations provide that an individual coverage HRA that satisfies the age variation exception under the same terms requirement at § 54.9802–4(c)(3)(iii)(B) will not be treated as failing to satisfy the requirements to provide nondiscriminatory benefits under § 1.105–11(c)(3)(i) solely due to the variation based on age. More generally, and as anticipated in Notice 2018–88, the proposed regulations also provide that if the maximum dollar amount made available varies for participants within a class of employees, or varies between classes of employees, then with respect to that variance, the individual coverage HRA does not violate the requirement in § 1.105–11(c)(3)(i) that any maximum limit attributable to employer contributions must be uniform for all participants, if within each class of employees, the maximum dollar amount only varies in accordance with the same terms requirement and, with respect to differences in the maximum dollar amount made available for different classes of employees, the classes of employees are classes of employees set forth in § 54.9802–4(d).

Nonetheless, the Treasury Department and the IRS note that satisfying the terms of the safe harbors under the proposed regulations does not automatically satisfy the prohibition on nondiscriminatory operation under § 1.105–11(c)(3)(ii). Thus, among other situations, if a disproportionate number of HCIs qualify for and utilize the maximum HRA amount allowed under the same terms requirement based on age in comparison to the number of non-HCIs who qualify for and use lower HRA amounts based on age, the individual coverage HRA may be found to be discriminatory, with the result that excess reimbursements of the HCIs will be included in their income.<sup>76</sup>

### *C. Application of Section 125 Cafeteria Plan Rules to Arrangements Involving Individual Coverage HRAs*

The preamble to the proposed and final HRA integration regulations noted that some employers may want to allow employees to pay the portion of the premium for individual health insurance coverage that is not covered by an individual coverage HRA, if any, through a salary reduction arrangement under a section 125 cafeteria plan. Pursuant to section 125(f)(3), an employer generally may not provide a qualified health plan purchased through

<sup>76</sup> See § 1.105–11(c)(3).

an Exchange as a benefit under its cafeteria plan. Therefore, an employer may not permit employees to make salary reduction contributions to a cafeteria plan to purchase a qualified health plan (including individual health insurance coverage) offered through an Exchange. However, section 125(f)(3) does not apply to individual health insurance coverage that is not offered through an Exchange (referred to as “off Exchange”). Therefore, for an employee who purchases off-Exchange individual health insurance coverage, the employer may permit the employee to pay the balance of the premium for the coverage through its cafeteria plan. The Treasury Department and the IRS appreciate the comments received on this topic in response to the proposed integration regulations and request additional comments regarding any specific issues raised by the application of the section 125 cafeteria plan rules to arrangements involving individual coverage HRAs for which clarification is needed or for which a modification of the applicable rules may decrease burdens.

Some commenters in response to the proposed integration regulations requested that individuals be allowed to use a cafeteria plan to pay premiums for qualified health plans offered through an Exchange with salary reduction. As discussed in the preceding paragraph, section 125(f)(3) prohibits using a cafeteria plan to allow employees to pay premiums for a qualified health plan offered through an Exchange.

#### Proposed Applicability Date

The proposed regulations under section 4980H are proposed to apply for periods beginning after December 31, 2019, and the proposed regulations under section 105(h) are proposed to apply for plan years beginning after December 31, 2019. The Treasury Department and the IRS recognize that employers may want to offer individual coverage HRAs beginning on January 1, 2020, and, therefore, may need applicable guidance with respect to sections 4980H and/or 105(h) to design and implement programs involving individual coverage HRAs prior to the issuance of any final regulations and in advance of the plan year for which the individual coverage HRAs will be offered. Accordingly, taxpayers may rely on the proposed regulations under section 4980H for periods during any plan year of individual coverage HRAs beginning before the date that is six months following the publication of any final regulations, and taxpayers may rely on the proposed regulations under section 105(h) for plan years of individual coverage HRAs beginning

before the date that is six months following the publication of any final regulations.

#### Statutory Authority

The regulations are proposed to be adopted pursuant to the authority contained in sections 7805 and 9833.

#### Special Analyses

This regulation is not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Department of the Treasury and the Office of Management and Budget regarding review of tax regulations. Because this regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

#### Comments and Requests for Public Hearing

The Treasury Department and the IRS request comments on all aspects of the proposed regulations. Before the proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** heading. All comments will be available at <https://www.regulations.gov>. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, then notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

#### Drafting Information

The principal author of the proposed regulations is Jennifer Solomon of the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). However, other personnel from the Treasury Department and the IRS participated in the development of the proposed regulations.

#### Statement of Availability of IRS Documents

The Notices cited in this document are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC

20402, or by visiting the IRS website at <http://www.irs.gov>.

#### List of Subjects

##### 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

##### 26 CFR Part 54

Excise taxes, Health care, Health insurance, Pensions, Reporting and recordkeeping requirements.

#### Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 54 are proposed to be amended as follows:

#### PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

■ **Par. 2.** Section 1.105–11 is amended by revising paragraphs (c)(3)(i) and (j) to read as follows:

#### § 1.105–11 Self-insured medical reimbursement plan.

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \*

(i) *In general—(A) Benefits.* In general, benefits subject to reimbursement under a plan must not discriminate in favor of highly compensated individuals. Plan benefits will not satisfy the requirements of this paragraph (c)(3)(i)(A) unless all the benefits provided for participants who are highly compensated individuals are provided for all other participants. In addition, all the benefits available for the dependents of employees who are highly compensated individuals must also be available on the same basis for the dependents of all other employees who are participants. A plan that provides optional benefits to participants will be treated as providing a single benefit with respect to the benefits covered by the option provided that all eligible participants may elect any of the benefits covered by the option and there are either no required employee contributions or the required employee contributions are the same amount. This test is applied to the benefits subject to reimbursement under the plan rather than the actual benefit payments or claims under the plan. The presence or absence of such discrimination will be determined by considering the type of benefit subject to reimbursement provided highly compensated individuals, as well as the amount of the benefit subject to reimbursement.

(B) *Maximum limits*—(1) *Uniformity rule*. A plan may establish a maximum limit for the amount of reimbursement which may be paid a participant for any single benefit, or combination of benefits. However, except as otherwise provided in paragraph (c)(3)(i)(B)(2) of this section, 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.

(2) *Exception to uniformity rule*. With respect to an individual coverage HRA, as defined in § 54.9802–4(b) of this chapter, if the maximum dollar amount made available varies for participants within a class of employees set forth in § 54.9802–4(d) of this chapter, or varies between classes of employees offered the individual coverage HRA, the plan does not violate the requirements of this paragraph (c)(3) by virtue of that variance; provided that, within a class of employees, the maximum dollar amount made available varies only in accordance with the same terms requirement set forth in § 54.9802–4(c)(3) of this chapter, and, with respect to differences in the maximum dollar amount made available for different classes of employees, each of the classes of employees is one of the classes of employees set forth in § 54.9802–4(d) of this chapter. Specifically, with respect to age-based variances, in the case of an individual coverage HRA, if the maximum dollar amount made available to participants who are members of a particular class of employees increases based on the age of each participant and the increases in the maximum dollar amount comply with the age-variation rule under the same terms requirement set forth under § 54.9802–4(c)(3)(iii)(B) of this chapter, the plan does not violate the requirements of this paragraph (c)(3) with respect to those increases.

(C) *Reference to employee compensation*. If a plan covers employees who are highly compensated individuals, and the type or the amount of benefits subject to reimbursement under the plan are in proportion to employee compensation, the plan discriminates as to benefits.

(j) *Applicability date*. Section 105(h) and this section, except for paragraph (c)(3)(i)(B)(2) of this section, are applicable for taxable years beginning after December 31, 1979 and for amounts reimbursed after December 31, 1979. In determining plan discrimination and the taxability of excess reimbursements made for a plan

year beginning in 1979 and ending in 1980, a plan's eligibility and benefit requirements as well as actual reimbursements made in the plan year during 1979, will not be taken into account. In addition, this section does not apply to expenses which are incurred in 1979 and paid in 1980. Paragraph (c)(3)(i)(B)(2) of this section is applicable for plan years beginning after December 31, 2019.

**PART 54—PENSION EXCISE TAXES**

■ **Par. 3.** The authority citation for part 54 continues to read in part as follows:

Authority: 26 U.S.C. 7805 \* \* \*

**§ 54.4980H–4 [Amended]**

■ **Par. 4.** Section 54.4980H–4 is amended by removing “9.5 percent of” and adding in its place “the product of the required contribution percentage (as defined in § 1.36B–2(c)(3)(v)(C) of this chapter) and” in the first sentence of paragraph (b)(1).

■ **Par. 5.** Section 54.4980H–5 is amended by:

- a. Revising paragraph (e)(2) introductory text;
- b. In paragraph (e)(2)(i):
  - i. Removing “an” and adding in its place “a general” in the heading; and
  - ii. Removing “affordability” and adding in its place “general affordability” in the first sentence;
- c. Removing “9.5 percent of” and adding in its place “the product of the required contribution percentage (as defined in § 1.36B–2(c)(3)(v)(C)) and” in the first sentence of paragraphs (e)(2)(ii)(A) and (B), the first and second sentences of paragraph (e)(2)(iii), and the first sentence of paragraph (e)(2)(iv);
- d. In paragraph (e)(2)(v):
  - i. Adding a sentence to the end of the introductory text; and
  - ii. Designating *Examples 1* through *6* as paragraphs (e)(2)(v)(A) through (F), respectively;
- e. In newly designated paragraphs (e)(2)(v)(A) through (F), redesignating the paragraphs in the first column as the paragraphs in the second column:

Old paragraphs	New paragraphs
(e)(2)(v)(A)(i) and (ii) .....	(e)(2)(v)(A)(1) and (2).
(e)(2)(v)(B)(i) and (ii) .....	(e)(2)(v)(B)(1) and (2).
(e)(2)(v)(C)(i) and (ii) .....	(e)(2)(v)(C)(1) and (2).
(e)(2)(v)(D)(i) and (ii) .....	(e)(2)(v)(D)(1) and (2).
(e)(2)(v)(E)(i) and (ii) .....	(e)(2)(v)(E)(1) and (2).
(e)(2)(v)(F)(i) and (ii) .....	(e)(2)(v)(F)(1) and (2).

- f. Redesignating paragraphs (f) and (g) as paragraphs (g) and (h), respectively;
- g. Adding a new paragraph (f); and
- h. Revising newly redesignated paragraph (h).

The revisions and additions read as follows:

**§ 54.4980H–5 Assessable payments under section 4980H(b).**

\* \* \* \* \*

(e) \* \* \*  
 (2) *Affordability safe harbors for section 4980H(b) purposes*. The affordability safe harbors set forth in paragraphs (e)(2)(ii) through (iv) of this section (general affordability safe harbors) apply solely for purposes of section 4980H(b), so that an applicable large employer member that offers minimum essential coverage providing minimum value will not be subject to an assessable payment under section 4980H(b) with respect to any employee receiving the applicable premium tax credit or cost-sharing reduction for a period for which the coverage is determined to be affordable under the requirements of a general affordability safe harbor. The preceding sentence applies even if the applicable large employer member's offer of coverage that meets the requirements of a general affordability safe harbor is not affordable for a particular employee under section 36B(c)(2)(C)(i) and § 1.36B–2(c)(3)(v) of this chapter, and an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to that employee. The general affordability safe harbors apply with respect to offers of minimum essential coverage other than the offer of an individual coverage HRA, as defined in paragraph (f)(7) of this section. Paragraph (f) of this section sets forth affordability and minimum value safe harbors that apply to the offer of an individual coverage HRA (individual coverage HRA safe harbors).

\* \* \* \* \*

(v) \* \* \* For purposes of simplicity, the examples in this paragraph (e)(2)(v) assume 9.5 percent is the required contribution percentage for 2015 and 2016, although the required contribution percentage in 2015 and 2016 was adjusted for those years pursuant to § 1.36B–2(c)(3)(v)(C) of this chapter.

\* \* \* \* \*

(f) *Affordability and minimum value safe harbors for individual coverage HRAs*—(1) *In general*. Whether an offer of an individual coverage HRA is treated as affordable and providing minimum value, in general, is determined under § 1.36B–2(c)(3)(i)(B), (c)(3)(vi), and (c)(5) of this chapter. This paragraph (f) sets forth safe harbors that an applicable large employer member may use in determining whether an offer of an individual coverage HRA is affordable or provides minimum value for purposes of section 4980H(b), even if the offer of the individual coverage HRA

is not affordable or does not provide minimum value under § 1.36B–2(c)(3)(i)(B), (c)(3)(vi), and (c)(5) of this chapter. An applicable large employer member that offers an individual coverage HRA is not subject to an assessable payment under section 4980H(b) with respect to any full-time employee receiving the applicable premium tax credit or cost-sharing reduction for a period for which the individual coverage HRA is determined to be affordable and to provide minimum value applying the safe harbors provided in this paragraph (f). The preceding sentence applies even if the applicable large employer member's offer of an individual coverage HRA that is affordable and provides minimum value applying the safe harbors under this paragraph (f) is not affordable or does not provide minimum value for a particular employee under § 1.36B–2(c)(3)(i)(B), (c)(3)(vi), and (c)(5) of this chapter, and an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to that employee. To the extent not addressed in this paragraph (f), the rules under § 1.36B–2(c)(3)(i)(B), (c)(3)(vi), and (c)(5) of this chapter apply in determining whether an offer of an individual coverage HRA is affordable and provides minimum value for purposes of section 4980H(b). Further, an applicable large employer member may rely on information provided by an Exchange in determining whether the offer of an individual coverage HRA is affordable and provides minimum value. See paragraph (f)(7) of this section for definitions that apply to this paragraph (f), which are in addition to the definitions set forth in § 54.4980H–1(a).

(2) *Conditions of using an individual coverage HRA safe harbor.* An applicable large employer member may use one or more of the safe harbors described in this paragraph (f) only with respect to the full-time employees and their dependents to whom the applicable large employer member offered the opportunity to enroll in an individual coverage HRA. The safe harbors in this paragraph (f) apply only to the offer of an individual coverage HRA, but to the extent an applicable large employer member offers some full-time employees and their dependents an individual coverage HRA and other full-time employees and their dependents other coverage under an eligible employer-sponsored plan that provides minimum value with respect to the self-only coverage offered to the employee, the applicable large employer member may use the safe harbors under this

paragraph (f) for the offers of the individual coverage HRA and the general affordability safe harbors under paragraph (e)(2) of this section for the offers of other coverage. Use of any of the safe harbors in this paragraph (f) is optional for an applicable large employer member, and an applicable large employer member may choose to apply the safe harbors for any class of employees (as defined in paragraph (f)(7) of this section), provided it does so on a uniform and consistent basis for all employees in the class of employees. Each of the safe harbors set forth in this paragraph (f) may be used in combination with the other safe harbors provided in this paragraph (f), subject to the conditions of the safe harbors.

(3) *Minimum value.* An individual coverage HRA that is affordable for a calendar month under § 1.36B–2(c)(5) of this chapter, taking into account any applicable safe harbors under this paragraph (f), is treated as providing minimum value for the calendar month, for purposes of section 4980H(b).

(4) *Look-back month safe harbor—(i) In general.* In determining an employee's required HRA contribution for a calendar month, for purposes of section 4980H(b), an applicable large employer member may use the monthly premium for the applicable lowest cost silver plan for the month specified in either paragraph (f)(4)(i)(A) or (B) of this section, as applicable (the look-back month):

(A) *Calendar year plan.* For an individual coverage HRA with a plan year that is the calendar year, an applicable large employer member may use the monthly premium for the applicable lowest cost silver plan for January of the prior calendar year.

(B) *Plan year that is not the calendar year.* For an individual coverage HRA with a plan year that is not the calendar year, an applicable large employer member may use the monthly premium for the applicable lowest cost silver plan for January of the current calendar year.

(ii) *Application of look-back month safe harbor to employee's current circumstances.* In determining the monthly premium for the applicable lowest cost silver plan based on the applicable look-back month, the applicable large employer member must use the employee's applicable age for the current plan year and the employee's applicable location for the current calendar month. In general, the applicable large employer member may use the monthly premium of the applicable lowest cost silver plan for the applicable look-back month for all calendar months of the plan year. However, to the extent the employee's

applicable location changes during the plan year, although the applicable large employer member may continue to determine the monthly premium based on the applicable look-back month, the applicable large employer member must use the employee's new applicable location, in accordance with the rules set forth under paragraph (f)(6) of this section if applicable, to determine the applicable lowest cost silver plan used to determine the monthly premium.

(5) *Application of the general affordability safe harbors to individual coverage HRAs.* The general affordability safe harbors set forth in paragraphs (e)(2)(ii), (iii), and (iv) of this section may apply to an offer of an individual coverage HRA by an applicable large employer member to a full-time employee for purposes of section 4980H(b), subject to the modifications set forth in this paragraph (f)(5).

(i) *Form W–2 safe harbor applied to individual coverage HRAs.* An applicable large employer member satisfies the Form W–2 safe harbor of paragraph (e)(2)(ii) of this section with respect to an offer of an individual coverage HRA to an employee for a calendar year, or if applicable, part of a calendar year, if the individual coverage HRA is affordable under the Form W–2 safe harbor under paragraph (e)(2)(ii) of this section but substituting “the employee's required HRA contribution, as determined taking into account any other safe harbors in paragraph (f) of this section, if applicable” for each of the following phrases—“that employee's required contribution for the calendar year for the employer's lowest cost self-only coverage that provides minimum value”, “the required employee contribution”, “the employee's required contribution”, and “the employee's required contribution for the employer's lowest cost self-only coverage that provides minimum value.”

(ii) *Rate of pay safe harbor applied to individual coverage HRAs.* An applicable large employer member satisfies the rate of pay safe harbor of paragraph (e)(2)(iii) of this section with respect to an offer of an individual coverage HRA to an employee for a calendar month if the individual coverage HRA is affordable under the rate of pay safe harbor of paragraph (e)(2)(iii) of this section but substituting “the employee's required HRA contribution, as determined taking into account any other safe harbors in paragraph (f) of this section, if applicable,” for “the employee's required contribution for the calendar month for the applicable large employer

member's lowest cost self-only coverage that provides minimum value."

(iii) *Federal poverty line safe harbor applied to individual coverage HRAs.* An applicable large employer member satisfies the Federal poverty line safe harbor of paragraph (e)(2)(iv) of this section with respect to an offer of an individual coverage HRA to an employee for a calendar month if the individual coverage HRA is affordable under the federal poverty line safe harbor of paragraph (e)(2)(iv) of this section but substituting "the employee's required HRA contribution, as determined taking into account any other safe harbors in paragraph (f) of this section, if applicable," for "the employee's required contribution for the calendar month for the applicable large employer member's lowest cost self-only coverage that provides minimum value."

(6) *Location safe harbor—(i) In general.* For purposes of section 4980H(b), an applicable large employer member may determine an employee's required HRA contribution for a calendar month based on the cost of the applicable lowest cost silver plan for the location of the employee's primary site of employment.

(ii) *Primary site of employment—(A) In general.* An employee's primary site of employment generally is the location at which the applicable large employer member reasonably expects the employee to perform services on the first day of the plan year (or on the first day the individual coverage HRA may take effect, for an employee who is not eligible for the individual coverage HRA on the first day of the plan year). However, the employee's primary site of employment is treated as changing if the location at which the employee performs services changes and the employer expects the change to be permanent or indefinite; in that case, in general, the employee's primary site of employment is treated as changing no later than the first day of the second calendar month after the employee has begun performing services at the new location. Nonetheless, if an applicable large employer member is first offering an individual coverage HRA to a class of employees, and the change in location occurs prior to the individual coverage HRA's initial plan year, the employee's primary site of employment is treated as changing no later than the first day of the plan year or the first day of the second calendar month after the employee has begun performing services at the new location.

(B) *Remote workers.* In the case of an employee who regularly performs services from home or another location

that is not on the applicable large employer member's premises, but who may be required by his or her employer to work at, or report to, a particular location, such as a teleworker with an assigned office space or available workspace at a particular location to which he or she may be required to report, the location to which the employee would report to provide services if requested is the primary site of employment. In the case of an employee who works remotely from home or at another location that is not on the premises of the applicable large employer member and who otherwise does not have an assigned office space or a particular location to which to report, the employee's residence is the primary site of employment.

(7) *Definitions.* The definitions in this paragraph (f)(7) apply for purposes of this paragraph (f).

(i) *Applicable age.* For an employee who is or will be eligible for an individual coverage HRA on the first day of the plan year, the employee's applicable age for the plan year is the employee's age on the first day of the plan year. For an employee who becomes eligible for an individual coverage HRA during the plan year, the employee's applicable age for the remainder of the plan year is the employee's age on the date the individual coverage HRA can first become effective with respect to the employee.

(ii) *Applicable location.* An employee's applicable location is where the employee resides for the calendar month, or, if the applicable large employer member is applying the location safe harbor under paragraph (f)(6) of this section, the employee's primary site of employment for the calendar month.

(iii) *Applicable lowest cost silver plan—(A) In general.* The applicable lowest cost silver plan for an employee for a calendar month generally is the lowest cost silver plan for self-only coverage of the employee offered through the Exchange for the employee's applicable location for the month.

(B) *Different lowest cost silver plans in different parts of the same rating area.* If there are different lowest cost silver plans in different parts of a rating area, an employee's applicable lowest cost silver plan is the lowest cost silver plan in the part of the rating area in which the employee's applicable location is located.

(C) *Lowest cost silver plan identified for use for employees of all ages.* The applicable lowest cost silver plan for an employee is the lowest cost silver plan

for the lowest age band in the individual market for the employee's applicable location.

(iv) *Class of employees.* A class of employees means a class of employees as set forth in § 54.9802-4(d)(2).

(v) *Individual coverage HRA.* An individual coverage HRA means an individual coverage HRA as set forth in § 54.9802-4.

(vi) *Required contribution percentage.* Required contribution percentage means the required contribution percentage as defined in § 1.36B-2(c)(3)(v)(C) of this chapter.

(vii) *Required HRA contribution.* In general, the required HRA contribution means the required HRA contribution as defined in § 1.36B-2(c)(5)(ii) of this chapter. However, for purposes of the safe harbors set forth in this paragraph (f), the required HRA contribution is determined based on the applicable lowest cost silver plan as defined in paragraph (f)(7)(iii) of this section and the monthly premium for the applicable lowest cost silver plan is determined based on the employee's applicable age, as defined in paragraph (f)(7)(i) of this section, and the employee's applicable location, as defined in paragraph (f)(7)(ii) of this section.

(8) *Examples.* The following examples illustrate the application of the safe harbors under this paragraph (f) to applicable large employer members that offer an individual coverage HRA to at least some of their full-time employees.

(i) *Example 1 (Location safe harbor and look-back month safe harbor applied to calendar-year individual coverage HRA)—(A) Facts.* For 2020, Employer Y offers all full-time employees and their dependents an individual coverage HRA with a calendar-year plan year and makes \$6,000 available in the HRA for the 2020 calendar-year plan year to each full-time employee without regard to family size, which means the monthly HRA amount for each full-time employee is \$500. All of Employer Y's employees have a primary site of employment in City A. Employer Y chooses to use the location safe harbor and the look-back month safe harbor. Employer Y also chooses to use the rate of pay safe harbor for its full-time employees. Employee M is 40 years old on January 1, 2020, the first day of the plan year. The monthly premium for the applicable lowest cost silver plan for a 40 year old offered through the Exchange in City A for January 2019 is \$600. Employee M's required HRA contribution for each month of 2020 is \$100 (cost of the applicable lowest cost silver plan determined under the location safe harbor and the look-back month safe harbor (\$600) minus the monthly HRA amount (\$500)). The monthly amount determined under the rate of pay safe harbor for Employee M is \$2,000 for each month in 2020.

(B) *Conclusion.* Employer Y has made an offer of affordable, minimum value coverage to Employee M for purposes of section

4980H(b) for each month of 2020 because Employee M's required HRA contribution (\$100) is less than the amount equal to the required contribution percentage for 2020 multiplied by the monthly amount determined under the rate of pay safe harbor for Employee M (9.78 percent of \$2,000 = \$196). Employer Y will not be liable for an assessable payment under section 4980H(b) with respect to Employee M for any calendar month in 2020. (Also, Employer Y will not be liable for an assessable payment under section 4980H(a) for any calendar month in 2020 because it offered an individual coverage HRA, an eligible employer-sponsored plan that is minimum essential coverage, to all full-time employees and their dependents for each calendar month in 2020.)

(ii) *Example 2 (Location safe harbor and look-back month safe harbor applied to non-calendar year individual coverage HRA)*—(A) *Facts.* Employer Z offers all full-time employees and their dependents an individual coverage HRA with a non-calendar year plan year of July 1, 2020 through June 30, 2021, and makes \$6,000 available in the HRA for the plan year to each full-time employee without regard to family size, which means the monthly HRA amount for each full-time employee is \$500. All of Employer Z's employees have a primary site of employment in City B. Employer Z chooses to use the location safe harbor and the look-back month safe harbor. Employer Z also chooses to use the rate of pay safe harbor for its full-time employees. Employee N is 40 years old on July 1, 2020, the first day of the plan year. The monthly premium for the applicable lowest cost silver plan for a 40 year old offered through the Exchange in City B for January 2020 is \$600. Employee N's required HRA contribution for each month of the plan year beginning July 1, 2020, is \$100 (cost of the applicable lowest cost silver plan determined under the location safe harbor and the look-back month safe harbor (\$600) minus the monthly HRA amount (\$500)). The monthly amount determined under the rate of pay safe harbor for Employee N is \$2,000 for each month of the plan year beginning July 1, 2020.

(B) *Conclusion.* Employer Z has made an offer of affordable, minimum value coverage to Employee N for purposes of section 4980H(b) for each month of the plan year beginning July 1, 2020, because Employee N's required HRA contribution (\$100) is less than the amount equal to the required contribution percentage for plan years beginning in 2020 multiplied by the monthly amount determined under the rate of pay safe harbor for Employee N (9.78 percent of \$2,000 = \$196). Employer Z will not be liable for an assessable payment under section 4980H(b) with respect to Employee N for any calendar month in the plan year beginning July 1, 2020. (Also, Employer Z will not be liable for an assessable payment under section 4980H(a) for any calendar month in the plan year beginning July 1, 2020, because it offered an individual coverage HRA, an eligible employer-sponsored plan that is minimum essential coverage, to all full-time employees and their dependents for each calendar month in that plan year.)

\* \* \* \* \*

(h) *Applicability date.* Paragraphs (a) through (e) and (g) of this section are applicable for periods after December 31, 2014. Paragraph (f) of this section is applicable for periods after December 31, 2019.

**Kirsten Wielobob,**

*Deputy Commissioner for Services and Enforcement.*

[FR Doc. 2019-20034 Filed 9-27-19; 8:45 am]

**BILLING CODE 4830-01-P**

## **PENSION BENEFIT GUARANTY CORPORATION**

### **29 CFR Part 4022**

**RIN 1212-AB41**

### **Lump Sum Payment Assumptions**

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would modify the assumptions the Pension Benefit Guaranty Corporation (PBGC) uses to determine de minimis lump sum benefits in PBGC-trusted terminated single-employer defined benefit pension plans and would discontinue monthly publication of PBGC's lump sum interest rate assumption.

**DATES:** Comments must be submitted on or before November 29, 2019 to be assured of consideration.

**ADDRESSES:** Comments may be submitted by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for sending comments.
- *Email:* [reg.comments@pbgc.gov](mailto:reg.comments@pbgc.gov). Refer to RIN 1212-AB41 in the subject line.

- *Mail or Hand Delivery:* Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005-4026.

All submissions must include the agency's name (Pension Benefit Guaranty Corporation or PBGC) and the Regulation Identifier Number for this rulemaking (RIN 1212-AB41). Comments received will be posted without change to PBGC's website, <https://www.pbgc.gov>, including any personal information provided. Copies of comments may also be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005-4026, or calling 202-326-4040 during normal business hours. TTY users may call the Federal relay service toll-free at 1-800-

877-8339 and ask to be connected to 202-326-4040.

**FOR FURTHER INFORMATION CONTACT:** Gregory Katz ([katz.gregory@pbgc.gov](mailto:katz.gregory@pbgc.gov)), Attorney, Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005-4026; 202-326-4400, extension 3829. TTY users may call the Federal relay service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4400 extension 3829.

### **SUPPLEMENTARY INFORMATION:**

#### **Executive Summary—Purpose and Authority**

This rulemaking arises from PBGC's ongoing review of its regulations to ensure they are up-to-date, efficient, and satisfy existing needs with a minimum of burden. It is intended to modernize the methodology used to determine de minimis lump sums in terminated underfunded single-employer plans. Specifically, under this proposed rule, PBGC would adopt the interest and mortality assumptions from section 417(e)(3) of the Internal Revenue Code (Code)<sup>1</sup> for this purpose.

It would also discontinue PBGC's monthly calculation and publication of the interest rates used for this purpose. Because some private-sector plans use PBGC's lump sum interest rates, the proposal would provide a final interest rate set for private-sector plans to use for valuation dates on or after the effective date of the final rule.

Legal authority for this action comes from section 4002(b)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), which authorizes PBGC to issue regulations to carry out the purposes of title IV of ERISA and section 4022 of ERISA (Single-Employer Plan Benefits Guaranteed).

#### **Background**

##### *Use of Lump Sum Assumptions by PBGC*

The Pension Benefit Guaranty Corporation (PBGC) administers two insurance programs for private-sector defined benefit pension plans under title IV of the Employee Retirement Income Security Act of 1974 (ERISA): A single-employer plan termination insurance program and a multiemployer plan insolvency insurance program. This proposed rule applies only to the single-employer program.

Covered single-employer plans that are underfunded may terminate in

<sup>1</sup> Section 417(e)(3) of the Code and section 205(g)(3) of the Employee Retirement Income Security Act of 1974 (ERISA) are parallel provisions in ERISA and the Code.