FORWARD HEALTH
CONSULTING

October 7, 2016

Christina Goe
Chair, National Association of Insurance Commissioners
ERISA (B) Working Group
General Counsel, Montana Office of the Commissioner of Securities and Insurance
840 Helena Avenue
Helena, MT 59601

RE: Draft Revisions to the NAIC ERISA Handbook

Dear Ms. Goe,

I am writing on behalf of The National Association of Health Underwriters (NAHU), a professional association representing more than 100,000 licensed health insurance agents, brokers, general agents, consultants and employee benefit specialists nationally. I am pleased to provide comments from NAHU members outlined below on the National Association of Insurance Commissioners' ERISA (B) Working Group's draft revisions and new sections of the ERISA Handbook for state regulators.

New Section on the Patient Protection and Affordable Care Act

NAHU believes the new section on the ACA generally provides an excellent overview of the applicable provisions of an extremely complicated law. One area where we feel an enhanced explanation might be necessary concerns the ACA's many differing means of determining what constitutes a "large employer" for purposes relative to health insurance coverage. Generally, the ACA's amendments to the Public Health Services Act (PHSA) are applicable to employer plans that may buy state-regulated fully insured group coverage that is segmented into markets based on applicable employer size. Many of these "market-reform" provisions are not applicable to group plans eligible to purchase "large-group market" coverage. To qualify to buy such large-group coverage, an employer plan needs to meet the state's definition of a large employer, which is generally either at least 51 or 101 eligible employees, depending on the state's law. Meanwhile, the ACA's employer shared responsibility provisions outlined in IRC §4980H apply to "applicable large employers," (ALEs) which are employers that employ 50 or more full-time equivalent employees. Part-time employees are counted on a prorated basis when determining the overall number of full-time-equivalent employees counted toward ALE status. ALEs must then offer their full-time employees who work an average of 30 hours a week or more health coverage or face excise tax penalty liability. We also note that the federally facilitated SHOP exchange imposes unique standards for determining eligibility for its coverage options so employers that may qualify for traditional small-group plan coverage based on their number of

eligible employees may not actually be eligible to purchase SHOP exchange coverage marketed to small employers.

Both the IRC §4980H requirements and the PHSA sections referenced in this document that apply to the large-group insurance marketplace are often referred to as ACA requirements that apply to "large employers" or "large groups." However, many American businesses that are subject to the IRC §4980H employer shared responsibility requirements for applicable large employers are actually considered small employers for the purposes of buying health insurance coverage under state law and the applicability of the related PHSA requirements for health plans in that market. This situation can occur for many reasons, including the state's definition of the small-group health insurance market, a small business that employs many part-time employees, and a small business that is part of a larger, controlled group.

NAHU members find this aspect of the ACA to be one of the more confusing requirements to explain to employer clients. Given that this section of the draft handbook, as well as others, often refers to both large-group market requirements and the employer shared responsibility requirements for ALEs, including how ALE actions could have ERISA implications, NAHU suggests a clear and succinct upfront description of the differences in determining what is a large employer for the purposes of purchasing health coverage versus the requirement to offer health coverage be included in this document. This description and explanation would likely be useful to reference in other sections of the handbook as well, including the new sections on professional employer organizations (PEOs) and association plans, as well as the revisions to the sections on multiple employer plans and multiple employer welfare arrangements (MEWAs).

Furthermore, we suggest a thorough review of the use of the terms large and small employer throughout the document to make sure that their usage is always correct. For example, the sentence on page three of this section, "Small employers, under 50, are not subject to the penalties associated with shared responsibility," is not fully accurate. There are numerous other examples in the document where the use of similar language could be confusing in this regard.

NAHU also has some recommendations for changes and clarifications to specific parts of this new section. On page four of the ACA section, NAHU suggests the addition of clarifying language specifying that the 60% minimum value standard referenced is related to the IRC §4980H employer shared responsibility requirements and is not the same standard as 60% actuarial value for the purpose of bronze plan level of coverage. The reference in this section to large employers not being subject to the metal plan standards but having to offer coverage at the minimum actuarial value of 60% in order to avoid IRC §4980H penalty liability is confusing and, as noted above, isn't true for certain businesses that are subject to both the small-group market reforms and the ALE IRC §4980H requirements. Also, in this section the document refers to the minimum-value calculator used by the Department of Treasury but actual development of the calculator and its annual adjustments is under the purview of the Department of Health and Human Services. Further, it is the health

insurance marketplaces under the authority of HHS that determine the applicability of IRC §4980H penalties to employers, so NAHU believes this authority should be reflected in the revised document.

Page five of this section begins a list of significant ACA reform requirements. NAHU suggests that the revised handbook include an introduction to this list noting that it is generally the responsibility of the employer-sponsored group health plan to ensure that the plans it offers to employees meet these requirements, as per ERISA, which is outside the regulatory bounds of state insurance departments. However, state insurance departments approve and regulate the fully insured plan designs that employers large and small offer to their employees, which should include the protections outlined in this section. NAHU believes that one of the most efficient ways to ensure that all beneficiaries of fully insured group health benefit plans are covered by plans compliant with the ACA market reforms outlined in this section is through effective education of state regulators who approve the health insurance policies offered to them. Therefore, we think a note about the important role state regulators can play in carrying out ACA consumer protections through fully insured policy approvals and market conduct examinations is appropriate.

With regard to the list of significant ACA reform requirements, NAHU suggests that number two, "Wellness Program Provisions," be updated to include information about the recent Equal Employment Opportunity Commission (EEOC) rules regarding wellness programs and the applicability of the Genetic Information Nondiscrimination Act (GINA) and the Americans with Disabilities Act (ADA).

In number four, with regard to the note on dependent-coverage requirements for large employers, this reference should specify ALEs, not simply large employers.

In number six of this list, with regard to the explanation of lifetime and annual limits, NAHU suggests that the document make reference to the numerous pieces of IRS and Department of Labor guidance and FAQs on how the prohibition on lifetime and annual dollar limits impact Health Reimbursement Arrangements.

In number eight on this list, with regard to the 90-day waiting period requirement, NAHU suggests inclusion of a reference to the final DOL rules on this matter regarding allowable orientation periods, allowable limited assessment periods to determine plan eligibility for variable-hour employees of employers of all sizes (both ALEs and non-ALEs) and its interplay with the 90-day waiting period requirement, and the specification that the coverage must take effect within 90 days, not the first of the month following 90 days, which was a marketplace norm pre-ACA. Furthermore, we note that in the proposed 2018 Notice of Benefit and Payment Parameters, HHS has proposed alternative and more restrictive waiting-period requirements for federal SHOP exchange purchasers. If this proposal is included in the final rule, this section should be updated to reflect the new requirement.

Number 13 on this list also addresses the prohibition on 90-day waiting periods and could likely be combined with section eight.

Finally, NAHU recognizes that this is the initial draft of the ACA section of the handbook and that other relevant ACA provisions may be included in later drafts. An issue NAHU suggests the committee considers including in future drafts is the law's guaranteed availability of coverage provisions. Specifically we suggest that any future draft address how they relate to state laws and regulation of small and large group market participation and eligibility requirements, an employer's responsibility to offer group plan beneficiaries compliant coverage as per ERISA and the PHSA and then the responsibility of ALEs subject to IRC §4980H to offer all ACA-designated full-time employees and their dependent children coverage or face excise tax penalty liability.

Revisions on PEOs

This section contains a great deal of helpful information about the common-law employee standard and its applicability to MEWAs, collectively bargained multi-employer plans and PEOs. Clearly the focus of the inclusion of this information in the handbook is to clarify the applicability of ERISA and state laws to these plans. However, given the enactment of the ACA, its interplay with state regulation and the promulgation of IRS rules and guidance on the applicability of the IRC §4980H employer shared responsibility requirements, as well as the IRC §6055 reporting requirements on issuers relative to enforcement of the individual shared responsibility requirements on plans involving multiple employers, which also utilizes the common law employee standard, NAHU wonders if at least a reference to this federal guidance and the responsibility of the various types of group health plans involving multiple employers with regard to both coverage offers and information reporting should be included in this section.

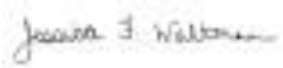
Also in this section, in addition to addressing MEWAs, PEOs and collectively bargained multi-employer plans specifically, NAHU wonders if it is appropriate to specifically address group stop-loss captive arrangements. This part of the handbook could outline the state and federal regulatory authority relative to these arrangements, including how these arrangements are not considered MEWAs.

New Section on Association Plans

In the section on PEOs, the document specifies "marketing on behalf of the PEO will also require licensure as a producer if it includes the solicitation of insurance coverage." NAHU suggests that the new section on association plans include a similar statement.

NAHU sincerely appreciates the opportunity to provide these comments on the draft handbook and we look forward to working with you as the updating process moves forward. If you have any questions, or if we can be of further assistance to you, please feel free to contact me at (703) 496-0796 or Jessica@forwardhealthconsulting.com.

Sincerely,



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CC: Jennifer Cook, NAIC Senior Health Policy & Legislative Analyst & Counsel