SUPPORTING STATEMENT
Notice 97-45

1. CIRCUMSTANCES NECESSITATING COLLECTION OF INFORMATION

Section 1431 of the Small Business Job Protection Act of 1996 ("SBJPA") revised the definition of highly compensated employee ("HCE") under § 414(q) of the Internal Revenue Code ("IRC"). Under § 414(q)(1) as in effect before 1997, an employee was an HCE if, during the year or the preceding year, he (A) was at any time a 5-percent owner, (B) received compensation from the employer in excess of $100,000 (for 1996), (C) received compensation from the employer in excess of $66,000 (for 1996) and was in the top-paid group of employees for the same year, or (D) was an officer who received compensation greater than $66,000 (for 1996). The top-paid group consists of the top 20 percent of employees when ranked on the basis of compensation for the year. In addition, under preSBJPA §414(q)(6), members of an HCE's family working for the same employer were in some cases aggregated with the HCE and treated as a single, highly compensated employee ("family aggregation").

The previous definition of HCE was criticized for being too complicated and for classifying many middle-income workers as HCEs. In addition, family aggregation prevented family members working in the same business from being considered individually for pension purposes.

After revision, § 414(q)(1) defines HCE as any employee who (A) was a 5-percent owner during the year or the preceding year, or (B) for the preceding year (i) had compensation from the employer in excess of $80,000, and (ii) if the employer elects the application of this requirement, was in the top-paid group of employees for the preceding year ("top-paid group election"). In addition, the family aggregation rules are repealed.

Under the notice, HCE status under § 414(q)(1)(B) is generally determined on the basis of employees' compensation and the top-paid group, if applicable, for

the preceding plan year ("look-back year"). However, because employers generally record compensation on a calendar-year basis, the notice permits an employer to make a "calendar year data election," thus treating the calendar year beginning with or within the look-back year as the look-back year.

In general, the definition of HCE is used in applying the nondiscrimination requirements to a qualified employee benefit plan under § 401(a) of the IRC and is not contained in the actual plan document. However, in some cases, a plan contains a definition of HCE because HCE status actually affects an employee's contributions or benefits under the plan. For example, the plan terms might place a limit on plan contributions made for HCEs.

The revised statutory definition under § 414(q) renders plan documents that contain the old definition obsolete. In order to keep the plan document current, the notice requires a plan that contains a definition of HCE to be amended to reflect the revised definition, including any applicable top-paid group or calendar year data election. Later changes to a top-paid group or calendar year data election will also have to be implemented by amending the plan. However, the notice does not require an employer to file notification with the Internal Revenue Service ("IRS") to make or change a top-paid group or calendar year data election. In addition, the notice provides the same period for amendments to reflect the new HCE definition as provided for other SBJPA amendments, that is, until the last day of the first plan year beginning on or after January 1, 1999 (and later for governmental plans).

2. USE OF DATA

The definition is used to determine which employees are HCEs for purposes of administering employee benefit plans.

3. USE OF IMPROVED INFORMATION TECHNOLOGY TO REDUCE BURDEN

IRS Publications, Regulations, Notices and Letters are to be electronically enabled on an as practicable basis

in accordance with the IRS Reform and Restructuring Act of 1998.

4. EFFORTS TO IDENTIFY DUPLICATION

We have attempted to eliminate duplication within the agency wherever possible.

5. METHODS TO MINIMIZE BURDEN ON SMALL BUSINESSES OR OTHER SMALL ENTITIES

The notice requires only plans that contain a definition of HCE to be amended to reflect the revised statutory definition. In addition, by allowing plan amendments to be delayed until other SBJPA amendments are made, the notice avoids multiple plan amendment processes. The notice also allows an employer to base HCE status under § 414(q)(1)(B) on calendar-year data, regardless of the plan year and to make or change a top-paid group or calendar year data election without filing notification with the IRS. These aspects of the notice are particularly helpful to small businesses, for which the per-employee administrative costs of a plan tend to be higher.

6. CONSEQUENCES OF LESS FREQUENT COLLECTION ON FEDERAL PROGRAMS OR POLICY ACTIVITIES

Not applicable.

7. SPECIAL CIRCUMSTANCES REQUIRING DATA COLLECTION TO BE INCONSISTENT WITH GUIDELINES IN 5 CFR 1320.5(d)(2)

Not applicable.

8. CONSULTATION WITH INDIVIDUALS OUTSIDE OF THE AGENCY ON AVAILABILITY OF DATA, FREQUENCY OF COLLECTION, CLARITY OF INSTRUCTIONS AND FORMS, AND DATA ELEMENTS

Notice 97-45 was published in the **Internal Revenue Bulletin** on August 18, 1997 (1997-33 IRB 7).

We received no comments during the comment period in response to the **Federal Register** notice dated September 29, 2009 (74 FR 49911).

9. EXPLANATION OF DECISION TO PROVIDE ANY PAYMENT OR GIFT TO RESPONDENTS

Not applicable.

10. ASSURANCE OF CONFIDENTIALITY OF RESPONSES

Generally, tax returns and tax return information are confidential as required by 26 USC 6103.

11. JUSTIFICATION OF SENSITIVE QUESTIONS

Not applicable.

12. ESTIMATED BURDEN OF INFORMATION COLLECTION

Section VII of the notice requires plans that contain a definition of HCE to be amended to reflect the statutory changes to §414(q) and any top-paid group or calendar year data elections (or changes to those elections). We estimate that 218,683 plans will have to be amended and that each amendment will take an average of 18 minutes. The total estimated burden is therefore 65,605 hours.

Estimates of the annualized cost to respondents for the hour burdens shown are not available at this time.

13. ESTIMATED TOTAL ANNUAL COST BURDEN TO RESPONDENTS

As suggested by OMB, our **Federal Register** notice dated September 29, 2009 (74 FR 49911), requested public comments on estimates of cost burden that are not captured in the estimates of burden hours, i.e., estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. However, we did not receive any response from taxpayers on this subject. As a result, estimates of the cost burdens are not available at this time.

14. ESTIMATED ANNUALIZED COST TO THE FEDERAL GOVERNMENT

Not applicable.

15. REASONS FOR CHANGE IN BURDEN

There is no change in the paperwork burden previously approved by OMB. We are making this submission to renew the OMB approval.

16. PLANS FOR TABULATION, STATISTICAL ANALYSIS AND PUBLICATION

Not applicable.

17. REASONS WHY DISPLAYING THE OMB EXPIRATION DATE IS INAPPROPRIATE

We believe that displaying the OMB expiration date is inappropriate because it could cause confusion by leading taxpayers to believe that the notice sunsets as of the expiration date. Taxpayers are not likely to be aware that the Service intends to request renewal of the OMB approval and obtain a new expiration date before the old one expires.

18. EXCEPTIONS TO THE CERTIFICATION STATEMENT ON OMB FORM 83-I

Not applicable.

Note: The following paragraph applies to all of the collections of information in this submission:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

OMB EXPIRATION DATE

We believe the public interest will be better served by not printing an expiration date on the form(s) in this package.

Printing the expiration date on the form will result in increased costs because of the need to replace inventories that become obsolete by passage of the expiration date each time OMB approval is renewed. Without printing the expiration date, supplies of the form could continue to be used.

The time period during which the current edition of the form(s) in this package will continue to be usable cannot be predicted. It could easily span several cycles of review and OMB clearance renewal. In addition, usage fluctuates unpredictably. This makes it necessary to maintain a substantial inventory of forms in the supply line at all times. This includes supplied owned by both the Government and the public. Reprinting of the form cannot be reliably scheduled to coincide with an OMB approval expiration date. This form may be privately printed by users at their own expense. Some businesses print complex and expensive marginally punched continuous versions, their expense, for use in their computers. The form may be printed by commercial printers and stocked for sale. In such cases, printing the expiration date on the form could result in extra costs to the users.

Not printing the expiration date on the form(s) will also avoid confusion among taxpayers who may have identical forms with different expiration dates in their possession.

For the above reasons we request authorization to omit printing the expiration date on the form(s) in this package.