September 18, 2009

Jeffrey T. Rodrick
Office of the Associate Chief Counsel
Internal Revenue Service
Attn: CC:PA:LPD:PR
(Notice 2009-46), Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments on Notice 2009-46, Substantiating Business Use of Employer-Provided Cell Phones

Dear Mr. Rodrick:

The American Institute of Certified Public Accountants (AICPA) respectfully offers the attached comments on Notice 2009-46 on substantiating business use of employer-provided cell phones. The enclosed comments were developed by members of our Individual Income Taxation Technical Resource Panel and approved by the Tax Executive Committee.

The AICPA appreciates and respects the IRS and Treasury Department's efforts to simplify and modernize the traditional tax treatment of cell phones. However, classifying cell phones and similar property as "listed property" under § 280F is clearly outdated in a business environment where employees are increasingly becoming expected to stay connected 24/7. The AICPA thinks statutory change is the best simplification and these provisions should be repealed.

Nonetheless, each of the three simplification proposals suggested in Notice 2009-46 represents a tremendous improvement over the existing rules. The AICPA thinks that all of the methods (with minor modifications) should be included as permissible options when an employee does not have a personal cell phone. In addition, the AICPA proposes that no detailed documentation should be needed if the employer can verify that its cell phone plan is an unlimited usage arrangement for a fixed fee, regardless of the number or distance of calls, and a significant majority of employees with an employer-provided cell phone also have a personal cell phone. Finally, if any employee has a personal cell phone, it should be deemed that there is no personal use of the employer-provided phone for that particular employee (regardless of the employer's calling plan). Employers and the IRS could verify that employees have personal cell phones by requiring certain documentation (e.g., a form that indicates the employee's name, a phone

number for the personal cell phone, and a statement signed by the employee that he or she will carry and use a personal cell phone for personal calls during work hours).

We would be pleased to discuss these comments with you or a member of your staff at any time. If you have any questions, please contact either Ellen Cook, Chair of the Individual Taxation Technical Resource Panel, at (337) 482-6212 or edcook@louisiana.edu; or Melissa M. Labant, AICPA Technical Manager, at (202) 434-9234 or mlabant@aicpa.org.

Sincerely,

Alan R. Einhorn
Chair, Tax Executive Committee

Encl.

AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

Comments on Notice 2009-46

Substantiating Business Use of Employer-Provided Cell Phones

Developed by the

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Background

Special rules for "listed property" were created as part of the Tax Reform Act of 1984 (P.L. 98-369, 7/18/84). These rules limited depreciation and other tax benefits for business property that was prone to personal use, such as cars and computers. As expensive mobile phones started to be used by some employees, Congress added cellular telephones and "similar telecommunications equipment" to the category of "listed property" with the Revenue Reconciliation Act of 1989 (P.L. 101-239, 12/19/89).

The relevance of property being "listed property" under § 280F(d) is that various deduction limitations and documentation requirements apply. If listed property is not used over 50% for business purposes, straight-line depreciation must be used. An employee who purchases or leases listed property may only claim deductions if the property is for the convenience of the employer *and* required as a condition of employment. In addition, § 274(d) denies any deduction or credit for listed property "unless the taxpayer substantiates by adequate records or by sufficient evidence corroborating the taxpayer's own statement (A) the amount of such expense or other item, (B) the time and place of the travel, entertainment, amusement, recreation, or use of the facility or property, or the date and description of the gift, (C) the business purpose of the expense or other item, and (D) the business relationship to the taxpayer of persons entertained, using the facility or property, or receiving the gift. The Secretary may by regulations provide that some or all of the requirements of the preceding sentence shall not apply in the case of an expense which does not exceed an amount prescribed pursuant to such regulations."

The rules for listed property are also relevant in determining if an employee's use of employer-provided property can be excluded as a working condition fringe benefit under § 132 (Treas. Reg. §§ 1.132-5(a)(1)(ii) and (c)(1)). Thus, detailed recordkeeping is crucial to allow for a proper deduction for an employer and to avoid additional income to an employee using the employer-provided property. The IRS recommends that "at a minimum, the employee should keep a record of each call and its business purpose."[1]

Changes in Technology and Business Practices Since 1989

In 1989, cell phones were quite expensive (easily over $2,000), generated per minute charges of about 50 cents, and were not pocket-size.[2] Thus, it was appropriate then to limit accelerated depreciation and ensure that any personal use was taxed to the employee.

But, times have changed and today, cell phones cost under $100, monthly service plans are inexpensive, and over 50% of adults have cell phones.[3] There is also a higher expectation from

[1]IRS, Employee Cell Phones; available at http://www.irs.gov/govt/fslg/article/0,,id=167154,00.html.
[2]Becky Waring, "1988 vs. 2008: A Tech Retrospective," *PC World*, 2/22/08, p. 7; available at http://www.pcworld.com/article/142550-7/1988_vs_2008_a_tech_retrospective.html.

employers, for the employers' convenience, that employees be accessible during non-business hours. Finally, cell phones are not viewed as something only a business can afford or need. For example, about 26% of children ages 8 to 12 have their own cell phone in the United States.[4] With the pervasiveness of cell phones today, most employees have their own cell phone and the employer's cost of any personal use of an employer-provided phone is minimal, if any.

Issue

With cell phones becoming more widely used in business by many employees due to the low cost and business efficiencies they create, employers and employees are unnecessarily burdened by the detailed recordkeeping currently required for proper tax compliance. In addition, billing systems have changed such that for many businesses, occasional personal use of the phone by the employee does not increase costs for the employer.

IRS Remedy – Notice 2009-46 Proposals

In June 2009, the IRS issued Notice 2009-46 proposing, for comment, recordkeeping simplifications for cell phones. The IRS and Treasury Department are considering the following proposals:

(1) Minimal Personal Use Method: An employer-provided cell phone will be deemed solely for business use if employees establish that they have and use a personal cell phone. A variation of this method would allow a minimal amount of personal use to be disregarded as *de minimis*.

(2) Safe Harbor Substantiation Method: Employers would be able to treat 75% of the costs as business use and the balance as personal use without the need to maintain records.

(3) Statistical Sampling Method: Employers could use "an approved statistical sampling methodology" to separate costs/use between business and personal.

Employers would not be required to use a simplified method but could continue to use the current documentation rules.

Comments were also requested on other specified items including how to define "minimal" personal use.

AICPA Comments on Notice 2009-46 Proposals and Questions

***Statutory Change Is The Best Simplification*:** The AICPA appreciates and respects the IRS and Treasury Department's efforts to simplify and modernize the traditional tax treatment of cell phones. However, classifying cell phones and similar property as "listed property" under § 280F

[3]John Horrigan, "Internet and Cell Phone Facts," The Pew Internet Project, 7/26/05; available at http://www.pewinternet.org/Commentary/2005/July/Internet-and-Cell-Phone-Facts.aspx.

[4]"U.S. Mobile Market Dialing Into Tween Population," Nielson Wire, 9/11/08; available at http://blog.nielsen.com/nielsenwire/media_entertainment/us-mobile-maket-dialing-into-tween/.

is clearly outdated and such provisions should be completely repealed by Congress. We have supported S. 144 and H.R. 690, which were introduced in the 111th Congress; and we also agree with IRS Commissioner Douglas Shulman's June 2009 statement:[5]

> … Secretary Geithner and I ask that Congress act to make clear that there will be no tax consequence to employers or employees for personal use of work-related devices such as cell phones provided by employers. The passage of time, advances in technology, and the nature of communication in the modern workplace have rendered this law obsolete.

***Comments on Specified Simplified Substantiation Methods*:** Absent a repeal of the outdated tax provisions classifying cell phones and similar property as "listed property" under § 280F, we support a change to the current rules. We therefore believe each of the three simplification proposals suggested in Notice 2009-46 represents a tremendous improvement. In order to leverage the relief provided by the notice, the AICPA suggests that the IRS adopt a broad definition of "cell phones and similar telecommunications equipment" to include any device with voice or data transmission or receiving capabilities, including BlackBerries, iPhones, Pres, smartphones, personal digital assistants, and other devices. We also think that given the low cost of cell phones today and the high likelihood that most employees with an employer-provided phone also have a personal cell phone, safe harbor provisions should be provided that allow employers and employees to avoid detailed recordkeeping. To that end, we recommend the following approaches:

1. Employers with a Fixed Fee Arrangement

No detailed documentation is needed if: (a) the employer's cell phone service plan is a fixed fee arrangement regardless of the number or distance of calls and (b) on the first day of the employer's fiscal year, a majority of employees with an employer-provided cell phone have met the "employees using a personal cell phone" approach described below. We believe this approach recognizes today's realities that personal use likely poses no cost to the employer (other than work time, which is the employer's dilemma) and that very few employees rely on an employer-provided cell phone to make personal phone calls (due to employees having a personal phone and perhaps not wanting an employer to have a record of their personal calls).

2. Employers without a Fixed Fee Arrangement

For employers without a fixed fee arrangement with their cell phone provider, documentation may be required to deem the employer-provided cell phone usage as business. Such documentation, if any, will vary depending on whether the employee uses a personal cell phone and which permissible method the employer adopts for other employees.

[5]Statement of Commissioner Douglas Shulman on June 16, 2009 available at http://www.irs.gov/newsroom/article/0,,id=209795,00.html.

Employees Using a Personal Cell Phone

For employees who use a personal cell phone, if the employer obtains sufficient documentation, it will be deemed that there is no personal use of the employer-provided cell phone. Sufficient proof should be a form collected at the same time that the employer issues a cell phone to an employee. This form should indicate:

1. Employee's name;
2. Phone number for the personal cell phone; and
3. A statement signed by the employee that he or she will carry a personal phone during work hours and use it for personal calls, and will notify the employer if he or she stops using a personal cell phone.

We do not support the proposal to deem employer-provided cell phones to be for business use if the employee can adequately establish to the employer via "sufficient records" that he or she has and uses a personal cell phone during work hours. We are concerned that IRS examining agents may not find an employer's records to be sufficient leading to dire tax consequences for both the employer and employees. In addition, an employer would still need to keep fairly detailed records to verify that employees do not intentionally or accidentally use the business phone for personal use.

Employees Without a Personal Cell Phone

For employees who do not have a personal cell phone, the employer should be allowed to adopt any one of the following methods (which were addressed in Notice 2009-46):

1. Disregard of a "minimal" amount of personal use

We support the proposed method that disregards a minimal amount of personal use. We recommend that "minimal" be defined in terms of the number of calls. Any personal use of 10% or less should be disregarded. Alternatively, the rules should specify that the employer must have a policy either prohibiting personal use of company cell phones except for emergencies, or limiting company cell phone use to no more than 5 calls per week.

2. The safe harbor substantiation method

We support the proposed safe harbor substantiation method. However, we recommend that the 25% personal use threshold be changed to 10% due to the reality that the cost of personal calls is minimal under most calling plans today.

3. The statistical sampling method

We support the statistical sampling method. However, because this method would be burdensome for many employers, it should be one of a number of safe harbor options, rather than an only option.

***Valuation of Employee's Fringe Benefit*:** Finally, in order to determine the fair market value of a cell phone when necessary to determine the amount taxable to an employee, we suggest that the IRS publish values based on data from the cell phone industry. Such guidance could be issued annually along with the inflation adjustments for depreciation on luxury automobiles under § 280F(a).