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September 1, 2009

Internal Revenue Service
Attn: CC:PALPD:PR
(Notice 2009-46), Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

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

Dear Sir or Madam:

On behalf of CTIA-The Wireless Association® (“CTIA”) and its members, this letter provides suggestions for alternative approaches to simplify the procedures under which employers substantiate an employee’s business use of employer-provided cell phones¹ as requested by Notice 2009-46, 2009-23 I.R.B. 1068 (June 8, 2009) (the “Notice”).

CTIA is an international nonprofit membership organization founded in 1984, representing all sectors of wireless communications – cellular, personal communication services and enhanced specialized mobile radio. As an organization, CTIA represents service providers, manufacturers, wireless data and internet companies, as well as other contributors to the wireless universe. CTIA also coordinates the industry’s voluntary efforts to bring consumers a wide variety of choices and information regarding their wireless service.

In regard to the Notice, CTIA and its members strongly believe that:

- 1) Cell phones and similar devices should be removed from the listed property rules, including stricter business substantiation requirements, as recently suggested by Commissioner Shulman;

¹ Although this comment letter and Notice 2009-46 refers to “employer-provided” cell phones, CTIA requests that any guidance also apply to the substantiation of the business use of cellular phones by self-employed individuals.

- 2) Substantiation required of the business use of cellular phones and other similar telecommunications equipment be fair and simple while legislation is pending; and
- 3) The IRS adopt a moratorium on audits with respect to business-related cell phones at least until guidance on this issue has been finalized or legislation has been enacted.

CTIA believes that its suggestions, detailed below, represent a reasonable approach in dealing with the current economic reality surrounding cell phone use, which has changed dramatically since the time the current regulatory framework was initially introduced.

I. General Background

Since 1989, cell phones and other similar telecommunications devices have been included in the definition of "listed property" under section 280F of the Code, which limits the amount of depreciation for certain types of property that can also be used for personal purposes. In addition, the designation of cell phones and similar property as listed property imposes burdensome recordkeeping requirements for both business deduction and fringe benefits purposes with respect to such property. For example, if an employer provides a cellular phone and a service plan to an employee (by either paying for the benefits directly or reimbursing the employee), the exclusions set forth in section 132(d) for working condition fringe benefits and in section 62(c) for tax-free expense reimbursements under the accountable plan rules apply only to the extent that records (including records of both incoming and outgoing calls) are kept to substantiate the business use each calendar year.

If insufficient or no records are kept, the exclusions for working condition fringe benefits and accountable plan reimbursements will not apply to exclude the business use of the cellular phone (and the related service plan expenses) from the employee's gross income. Therefore, the value of the benefits must be included in the employee's gross income and treated as wages for payroll tax purposes. See Treas. Reg. § 1.274-5T(e). IRS audits of this issue during the past five years have unfortunately resulted in business disruption and reduced productivity for many of our customers, and have resulted in counterproductive measures to reduce the risk of tax assessments. For example, some employers have vitiated money-saving contracts with providers in order to place the burden of compliance on employees, only to face increased paperwork when reimbursements are requested.

II. Notice 2009-46

In response to numerous complaints concerning the burdensome and detailed recordkeeping rules under section 274(d)(2), the Internal Revenue Service recently published Notice 2009-46. The Notice requests comments on several methods under consideration that would simplify the procedures by which employees substantiate their business use of employer-provided cell phones for purposes of excluding the value of that

use from the employees' wages. We would like to commend Treasury and the IRS for their efforts to minimize the recordkeeping burden imposed on employees and employers. However, the alternatives proposed by the IRS are either incomplete or inadequate solutions, and several present their own problems.

Before commenting on each of the specific suggested approaches, it is important to note that, notwithstanding the Service's efforts to minimize the burdensome substantiation requirements under section 274(d)(2), the substantiation rules of section 162 of the Code would continue to apply to employee use of cell phones. A description of the various proposals under the Notice and our comments regarding each are discussed below.

1) Minimal Personal Use Method. Under this proposal, all of the employee's usage would be deemed to be business use in two situations. Under the first, if the employee can account to his employer with records that he carries another device for personal use, the use of the employer-provided phone (and related services) will be treated as tax-free. (This is the approach that the IRS uses when providing cell phones to its employees.) There are two problems with this approach: (1) the employee will be required to carry and pay for multiple devices, and (2) the employee will be required to offer written documentation that his personal phone is used for personal calls. In effect, there is still a documentation requirement of sorts that could potentially invade the employee's privacy. Although we agree that evidence that an employee carries a second phone for personal use should be an adequate 'safe harbor' for the employer and employee, we believe that evidence alone should suffice so that additional documentation would not be necessary. Also, this should be an 'elective' choice so that all employees of a single employer would not be required to use this method.

Under the second situation, the IRS proposes a safe harbor of sorts, which would permit employers to treat a certain amount of usage as "minimal" personal use that can be disregarded for tax purposes. The questions raised by this method include: how will the appropriate minimal level be determined, what documentation of cell phone use will be required to determine whether the employee's personal use is minimal, and what happens if the employee exceeds the minimal level? Thus, it is likely that the employee would have to monitor and document all calls, and perhaps data messages, received in order to calculate that the employee's use of the cell phone was within the minimal range permitted. Again, if an employer imposes a standard, e.g. 'not to exceed 40%,' for personal use and uses a reasonable method to verify this standard without burdensome documentation or testing requirements, we believe this option could be made to work for most Americans.

2) Safe Harbor Substantiation Method. This method would permit employers to deem in advance some percentage of total use as personal. The Notice suggests treating 25% as personal use. The problem with this approach is that the proposed personal use safe harbor is arbitrary and will result in the employer and the employee having to pay additional payroll costs on the deemed personal use that might not be justified based on actual use.

In addition, if the entire organization providing cell phones had to adopt this rule for all employees the result would be unfair to individual employees depending on their usage, e.g. some may not use their phone at all for personal calls but they would suffer the same tax as those that do. Again, looking to Commissioner Shulman's statement above, it would be better if up to 25% would be treated as de minimis so as to avoid unfair results.

Here it is helpful to remember that employer provided cell phones are provided for the convenience of the employer and to meet the needs of the business. Rules such as the de minimis one above or this one to presume an arbitrary amount of service 'personal' and therefore taxable do not take this in to account. Such rules measure quantitatively rather than qualitatively. As an example, consider the emergency room doctor on call who carries his hospital provided cell phone but only receives one call over a holiday weekend from the hospital, but saves three lives as a result. If he made four personal calls over the same weekend then only 20% of calls received would be for 'business use' but it would be essential that he receive this single priority 'emergency' call. Should he be forced to pay tax on 80% of the cost of the phone or carry a second phone to comply with the tax laws? We think this is impractical and of little tax benefit to the government. Such rules fail to understand the nature of the business needs for a cell phone in today's society.

(3) Statistical Sampling Method. Under this method, an employer could use statistical sampling methodology currently permitted under the section 274(d)(2) regulations for the purpose of selecting a sample period, calculating the personal use percentage and applying such calculation to the calendar year. The inherent problem with this approach is that it does not take into account variations of use that might occur during the calendar year. Furthermore, the sampling methodology must be applied to each employee. As a result, this approach is documentation-intensive and may only benefit employers who have the resources to conduct such sampling over the representative period on an employee-by-employee basis and apply those results to each employee's total use.

III. Recent Legislative Proposals.

On February 14, 2008, Representatives Sam Johnson (R-TX) and Earl Pomeroy (D-ND) did in fact introduce a bipartisan bill (H.R. 5450), called the MOBILE ("Modernize Our Bookkeeping in the Law for Employee's) Cell Phone Act of 2008, proposing to strike cell phones and similar telecommunications equipment from the category of "listed property" under section 280F(d)(4). Senators John Kerry and John Ensign introduced an identical bill on February 26, 2008 (S. 2668). The proposal passed the House of Representatives as part of H.R. 5719, the Taxpayer Assistance and Simplification Act of 2008. The proposal gained 60 Senate sponsors and was the subject of a colloquy on the Senate floor among leading tax writers.² Earlier this year, the bipartisan bills were re-

² On October 2, 2008, near the end of the Congressional period, Senate Finance Chairman Max Baucus responded to Senators Kerry and Ensign who expressed concern that there was not time to consider their legislation (S. 2668). Senator Baucus said that he wanted "to assure them that we are aware of this problem and we will work with our colleagues to consider legislation to eliminate the burden for employers and employees as early as possible." Senator Grassley,

introduced (S. 144 and H.R. 690) and have quickly gained 62 and 105 co-sponsors respectively.

IV. Recent Statement from Commissioner Shulman.

In a statement on June 16, 2009, the IRS Commissioner acknowledged the difficulties with the current law:

“The current law, which has been on the books for many years, is burdensome, poorly understood by taxpayers, and difficult for the IRS to administer consistently.”

Commissioner Shulman then acknowledged that guidance on record-keeping methods was not the answer:

“Although some of the proposed changes would add clarity, the current law will inevitably leave widespread confusion among employees and businesses.”

Therefore, he stated that Treasury Secretary Geithner and he both “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.”³ Members of Congress applauded the Commissioner’s support for amending the tax law and urged that the IRS announce a moratorium on enforcement activities in this area. However, while we welcome the Commissioner’s statements, employers and self-employed individuals remain confused on the current record keeping requirements applicable to cell phones and related equipment. Greater confusion and consternation has resulted from IRS agents continuing to raise the tax treatment of the personal-use of employer-provided cell phones as an issue in audits.

V. CTIA Requests an Immediate Moratorium on IRS Audit Activity.

Given the current state of confusion, CTIA respectfully requests that the IRS Commissioner consider suspending all audit activity on the taxation of the personal use

Senate Finance Ranking Member, stated that it was his “intent to have the Committee consider legislation that addresses this problem as soon as we can. We should not be imposing unreasonable rules on employees’ use of cell phones and blackberries.”

³ A similar conclusion had been reached by an IRS advisory committee about a year earlier. On June 11, 2008, the IRS Advisory Committee on Tax Exempt and Government Entities (ACT) issued a Report of Recommendations on the Tax Treatment of Cellular Telephones and Internet Provider Allowances. The stated purpose of the report was to “raise awareness that the inclusion of cellular telephones . . . as listed property in IRC Section 280F may be outdated given the technological advancements that have occurred” and to “offer a comparison and contrast with the permissive de minimis allowances of personal use of the desktop telephone and computer within the IRC.”

of employer-provided cell phones, consistent with the comments by the Commissioner and Treasury Secretary, while a long-term solution to this issue is finalized. The IRS has provided similar relief to taxpayers in the past. For example, in IRS Announcement 2002-18, 2002-1 C.B. 621, the IRS announced that it would no longer audit whether the receipt or personal use of frequent flyer miles attributable to a taxpayer's business use or official travel was taxable income. Similar to the tax treatment of the personal use of employer-provided cell phones, the determination of the tax treatment of frequent flyer miles would have involved complex tracking and recordkeeping that would have been extremely inefficient given the value of the benefit derived.

VI. CTIA Supports a Repeal of the Recordkeeping Requirements for Cellular Phones.

CTIA believes that Congress and the Administration should repeal the current rules applicable to the substantiation of business use of personal use of cell phones. The IRS Commissioner summed it up best when he noted, "[t]he passage of time, advances in technology, and the nature of communication in the modern workplace have rendered this law obsolete." At the time of the enactment of the provision treating cell phones as listed property, cell phone technology was in its infancy. In 1989, the average low retail price of a cellular phone was more than \$500, while other phones ranged from almost \$1,000 to more than \$2,600. The per-minute rate for service ranged from almost 50 cents up to a dollar. Cellular phones were truly an executive perquisite. Contrast that with today. Cell phones are a ubiquitous and indispensable part of modern business. The cost of cellular phones has plunged, with most phones costing between \$50 and \$100 and unlimited minutes costing as little as \$50 per month. Under many plans offered by our members and generally used by employers, weekend and evening calls are free. Today, rather than a luxury, cell phones are more like pencils and paper. Costs have come down drastically since the law added cell phones to the listed property rules in 1989, so that including them in a rule that requires increased business substantiation for automobiles and corporate aircraft now seems ludicrous.

CTIA strongly supports current legislative efforts to repeal the current listed property rules and substantiation requirements applicable to cell phones and similar telecommunications devices. We agree with Commissioner Shulman that there should be "no tax consequence to employers or employees for personal use of work-related devices such as cell phones provided by employers." We believe that the adoption of this legislation comports with current business and economic realities of the modern world and will save millions of dollars per year in wasteful tracking and recordkeeping, not to mention auditing costs.

VI. Request for a Conference.

Thank you for your consideration of these comments. Should you have any questions about these comments, or if you disagree with the conclusions we have reached, representatives of CTIA would be pleased to meet with you to discuss this extremely important issue.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Michael Altschul". The signature is written in a cursive style with a large, sweeping initial "M".

Michael Altschul