

**National Association of Counties  
Government Finance Officers Association  
International City/County Management Association  
National League of Cities  
The United States Conference of Mayors**

September 4, 2009

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

RE: Notice 2009-46

Dear Sir/Madam:

The organizations listed above submit the following comments in response to Notice 2009-46, *Substantiating Business Use of Employer-Provided Cell Phones*, issued by the Internal Revenue Service. The notice seeks comments on several proposals aimed to simplify the procedures by which employers can substantiate employees' business use of employer-provided cell phones and other similar telecommunications equipment.

Under current regulations, if an employer provides a cell phone to an employee, the employee receives a fringe benefit. As long as the phone is used for business purposes, the fair market value of that fringe benefit is excluded from the employee's gross income and the cell phone expense is treated as a deductible business expense for the employer – provided the substantiation requirements of section 274(d) are met. (Section 274(d) requires the taxpayer to substantiate, by adequate records, the (1) amount of such expense; (2) the use of the property; (3) the business purpose of the expense; and (4) the business relationship to the taxpayer of the person using the property.) The IRS recommends that: "At a minimum, the employee should keep a record of each call and its business purpose."

These burdensome substantiation requirements were first imposed in 1989 when cell phones were considered a luxury item and service was expensive. However, in today's business environment, cell phones are as commonplace as employer-provided desk phones, which allow the employer to utilize a *de minimus* personal use policy. In addition, because cell phone usage is transitory in nature and access to log books and other record keeping materials may be hindered, the user is generally unable to keep simultaneous records detailing each and every call and the business purpose behind it. In addition, detailed records may create problems in communities where employer-provided cell phones are used for public safety purposes. For example, detailed call logs could reveal information concerning on-going police investigations.

Furthermore, in the current financial climate, many jurisdictions lack the personnel necessary to review phone records and make any adjustments to payroll records.

Unfortunately, these burdensome substantiation requirements are being enforced and numerous local governments across the nation have been subjected to IRS audits. One of the most highly publicized audits occurred in 2008 where, pursuant to two employment tax audits, the University of California Los Angeles and the University of California San Diego paid tax assessments of more than \$400,000 associated with the personal use of cell phones and personal digital assistants (PDAs). In addition, the University agreed to change its cell phone policy to bring it into compliance with IRS regulations. In June 2009, the University announced that it would treat employer-provided cell phone and similar equipment as a taxable fringe benefit “because compliance with the IRS’s current substantiation rules would be impractical.”

Recognizing that its rules are onerous, the IRS released this notice setting forth three proposals for simplified substantiation reporting: 1) minimal personal use; 2) safe harbor substantiation; and 3) statistical sampling. While each may ease the substantiation burden, they still require both the employer and employee to account for the business versus the personal use of the cell phone and fail to recognize the fundamental fact that cell phones and similar equipment should be removed as “listed property.”

Our organizations have long advocated that cell phones be removed from the definition of “listed property” and we are especially appreciative that IRS Commissioner Doug Shulman and Treasury Secretary Timothy Geithner agree with our position. In a statement released shortly after announcing the notice for comments, Commissioner Shulman stated: “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. . . . Although some of the proposed changes would add clarity, the current law will inevitably leave widespread confusion among employees and businesses. Therefore, Secretary Geithner and I ask that Congress act to make clear that there will be no tax consequences 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.”

Congress must make any changes to current law and that is why we support the *Modernize Our Bookkeeping In the Law for Employee’s Cell Phone Act of 2009* (S. 144) and its House companion bill H.R. 690. Both bills have wide bipartisan support and will modernize the tax code by removing cell phones and similar telecommunications equipment from the listed property rules. Compliance with the IRS’s substantiation requirements burdens the business use of cell phones, dampens the use of advanced technology, and is impractical given their use in a fast-paced global work environment.

Thank you for the opportunity to comment on this issue. While the IRS struggles with finding the means to simplify the substantiation requirements, we strongly urge the Service to cease taking any enforcement action on this issue until Congress takes the necessary legislative action to remove cell phones and similar telecommunications equipment from the listed property rules.

Sincerely,

National Association of Counties, Steve Traylor, 202-942-4254  
Government Finance Officers Association, Susan Gaffney, 202-393-8468  
International City/County Management Association, Elizabeth Kellar, 202-289-4262  
National League of Cities, Lars Etzkorn, 202-626-3173  
The United States Conference of Mayors, Larry Jones, 202-861-6709