



National Association of College and University
Business Officers
1110 Vermont Avenue, NW, Suite 800, Washington, DC 20005
T 202.861.2500 F 202.861.2583
www.nacubo.org

August 21, 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 or Madam:

On behalf of the National Association of College and University Business Officers (NACUBO) and the associations listed below, we are providing comments on the proposal to simplify the procedures under which employers substantiate an employee's business use of employer-provided cellular telephones or other similar telecommunications equipment requested by Notice 2009-46. NACUBO is a nonprofit professional organization representing chief financial and administrative officers at more than 2,000 colleges and universities. Our mission is to promote sound financial management and business administration at institutions of higher education.

Legislative Action Required. Before addressing the proposals set forth in Notice 2009-46, we would like to reiterate our strong support for legislative action to remove employer-provided cell phones and digital communications devices from listed property. We were heartened by Commissioner Doug Schulman's statement urging Congress to take action to eliminate tax consequences to employers or employees for personal use of data communications devices such as cell phones provided by employers. The provision adding cell phones as listed property was added to the Internal Revenue Code in 1989. At that time cell phones were used by only a small percentage of the population and were considered a special benefit provided only to select employees. The price of cell phones and cell phone service were also extraordinarily high. Today, cell phones are the primary type of phone used by many individuals and have replaced desk phones for many employees. The price of cell phones and service has been drastically reduced over the years and, in some cases, a cell phone may now be less expensive than the alternative.

Ultimately, legislation that eliminates cell phones and similar devices from listed property would be the best long-term solution to the issues surrounding simplification of the substantiation records. We believe that achieving passage of such legislation should

be a high priority. However, in the absence of such legislation, we appreciate the opportunity to submit comments on this matter.

General Comments. Notice 2009-46 outlines three alternative methods to simplify the substantiation requirements applicable to employee usage of employer-provided cell phones. The notice also requests suggestions for alternative approaches.

We believe it is important to give employers flexibility when adopting policies related to substantiation of business use of employer-provided cell phones. Colleges and universities have complex administrative and accounting procedures and what works for one institution may not work for another. With that in mind, employers should be allowed to adopt the substantiation method which fits best with their administrative and accounting systems. Allowing alternative substantiation methods will make it easier for employers to comply.

Minimal Personal Use Method. The first proposal under this method provides that the entire amount of an employee's use of an employer-provided cell phone will be deemed to be for business purposes if the employee can account to his employer with sufficient records to establish that the employee has a personal cell phone for personal purposes during work hours.

Requiring an employee to provide sufficient records to establish that the employee has a personal cell phone could be unduly burdensome if the requirement is not limited to a particular point in time. For example, requiring an employee to annually produce a cell phone bill containing the employee's name and address might not be onerous for some institutions; however, requiring monthly submissions would. Even the annual requirement would place a burden on a large employer with many cell phone users.

The second proposal under this method would define a specified amount or type of minimal personal use that would be disregarded.

This proposal is preferable to the first proposal provided that the employer is not required to substantiate the minimal personal use. An employer policy limiting personal use should be sufficient substantiation. No additional recordkeeping burden should be imposed upon either the employer or employee under this method. Allowing either a minimal percentage of personal use (for example, the 15% threshold that is used in Treas. Reg. 1.132-6(e)(1) would be appropriate) or a minimal amount of minutes per month would be a reasonable approach.

Safe Harbor Substantiation Method. The second method proposed in the notice offers a safe harbor under which an employer would treat a certain percentage of each employee's use of an employer-provided cell phone as business usage and the remaining percentage would be deemed for personal usage. A business use percentage of 75% is proposed.

Allowing employers to use a safe harbor percentage for business use is a reasonable alternative for employers who do not limit their employees to minimal personal use. For

those employers who limit their employees to minimal personal use, the method above which allows an employer to disregard minimal personal use should be available to an employer.

Alternative Safe Harbor Suggested. Additionally, we propose that the Service consider making available as an alternative, a safe harbor method where the employer would determine that the cell phone plan provided to an employee includes an appropriate number of monthly minutes for business purposes based on the anticipated business use of the device and other employees performing similar work who have been furnished with a cell phone. If the employee does not exceed those minutes, then no personal calls would be taxable and no additional substantiation would be required. If an employee exceeds his or her monthly allotment of business use minutes, taking into account any rollover minutes or pooled minutes available to the employee under the plan, then the excess minutes would have to be substantiated. Employers could, on an annual basis, adjust minutes assigned to the employee, based on the employee's utilization of the plan for the employer's business.

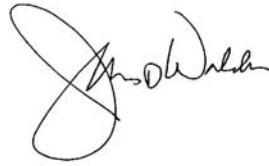
Statistical Sampling Method. The third method proposes allowing employers to use statistical sampling techniques to measure each employee's personal use of an employer-provided cell phone. While this method is preferable to the current requirement of detailed substantiation, it is not preferable to the first two proposed methods. It creates a greater administrative burden on the employer than the above methods. If a statistical sampling method were used, a college or university might need more than one sample due to the diverse nature of its workforce. The goal of reducing the administrative burden on employers is much better served with either of the other methods.

Simplified Fair Market Value (FMV) Determination. The Notice asks whether a simplified valuation method would be helpful and appropriate to determine the market value of cell phone usage. If any portion of an employee's cell phone usage is determined to be taxable income, a simplified valuation safe harbor would reduce the administrative burden for employers. Given the multitude of pricing plans available, without a safe harbor disputes regarding value could easily arise. Developing a safe harbor valuation amount would give employers the option of using such safe harbor or supporting their own valuation with documentation. It is likely that many employers treat the cell phone bill (i.e., actual costs) as the FMV of providing this benefit. We propose that the negotiated price paid by the employer (for equipment and service) less any amount paid by the employee be acceptable as FMV.

We are hopeful that a legislative resolution will be the forthcoming in the near future. In the meantime, we hope that the Service will continue to work on ways to help reduce the administrative burden imposed upon employers who provide employees cellular telephones or other similar telecommunications equipment.

We thank you for the opportunity to provide comments. If you have any questions, please contact Mary Bachinger, director, tax policy, via email at mary.bachinger@nacubo.org or telephone at 202.861.2581.

Sincerely,

A handwritten signature in black ink, appearing to read "John D. Walda". The signature is fluid and cursive, with a large loop at the beginning.

John D. Walda
President & Chief Executive Officer

cc: NACUBO Tax Council
Sarah Hall Ingram, Commissioner, TE/GE, IRS
Lois G. Lerner, Director, Exempt Organizations, IRS

The associations listed below join NACUBO in these comments:

ACUTA: The Association for Information Communications Technology Professionals
in Higher Education
American Council on Education
Association of American Universities
Association of Public and Land-Grant Universities
EDUCAUSE