Hi Mark,

We received the following comments from HQ in response to the e-mail dated 9/25/09 from Debbie Stoneburner:

Mark, please contact me if you or Debbie have additional questions.

FNS 796-2 is interpreted to mean deferred compensation is an allowable cost and that with specific prior written approval from the State agency, deferrals of compensation costs for officers and employees are allowed when the State agency is able to determine that:

(a) The deferral is in the best interest of the Program; and

(b) The deferral does not represent the establishment of a contingency fund, an attempt to defer compensation as a result of an overclaim, repayment request, or funding limitation or an attempt to acquire program funds for unallowable cost purposes.

Compensation costs that cannot be deferred include those:

(a) Before the officer or employee earns the compensation from which the deferral will be made; or

(b) For more than the amount of officer’s or employee’s salary approved in the institution’s budget.

In addition, the sponsor’s deferred compensation plan must be legal. Its cost cannot be allowable if it does not conform to applicable laws and regulations (such as the Tax Code). Therefore, the sponsor must contact the IRS for more information before submitting a CACFP administrative cost budget that includes a revision to its deferred compensation plan.

The sponsor should also consult its attorney. The link that you included in the question furnishes another link that states that a 401(k) plan, a 403(b) plan, or a 457 plan can be used in conjunction with one of the other plans depending on how the employer is organized and that rollovers between plans is legal, but the employer must consult its attorney to make this determination. If this is so, the administrative costs of both and the contributions to both are allowable as CACFP administrative costs. Again though, the sponsor needs to seek the advice of an attorney before it makes any final decisions.

From Debbie Stoneburner’s 9/25/09 e-mail:

The regulations do identify that the deferred compensation plan is a separate expense then the retirement, but the 403b (deferred compensation plan) is what has been converted to the 401k plan. The 401k portion that is matching is considered a deferred compensation component just as the top
heavy deferral was allowable for the 403b plan to only key employees. When the companies
converted to the 401k plan, they appear to have lost the option that the 403b plan allowed for the top
heavy contributions identified as the 457 plan. In that the regulations were written many years ago, the
regulations allow 457 contributions for the old 403b plan top heavy contributions. The regulations may
continue to offer both plans, but the second plan would likely become unqualified for deferred
compensation. Please help us interpret FNS 796-2 (deferred comp – VIII I 23 k). In addition, here is a
link that could provide little more information about change in plan requirements. The additional top
heavy deferrals appear to be for “profit sharing” purposes and of course our organizations are not for
profits where profit is not allowable as per the regulations. DCR’s plan is a safe harbour plan so
please look at the documentation in that area also.

https://www.mvpplanadmin.com/retirementplantypes.html#403bplans

We have several sponsors that have had 403 (b) Deferred Compensation plans with participation for all
staff but company contributions issued to only key employees (directors) as a 457 plan. With the
recent increased regulation requirements creating increased administrative plan costs by the Internal
Revenue Service for the 403 (b) plans, many have opted to switch to the 401 (k) plans which have
less administrative costs. In a 401(k) plan company contributions are required to be equitable to all
staff in the company match of contributions. It appears from their budgets, the chosen plans no longer
offer the 457 plan option for the directors no longer allow the larger company contribution as the
403(b) plan allowed.

The 401 (k) plan requires equitable contributions to all staff at the percentage in the plan documents.
These sponsors are presenting budgets for FY 2010 requesting an increase in compensation due to
their loss of this top-heavy benefit. We do not believe that these deferred compensation plans can be
converted to compensation. No such guidance is offered through the regulations.

The sponsors are then requesting that the directors be allowed to continue with this additional
retirement benefit for themselves and no other staff if it is not allowed by their chosen plan. Is such an
option available to sponsorships for administrative reimbursement? We do not know the IRS
implications of the two plans for a not for profit company. It is possible the second plan would become
non-qualifying. Can a sponsorship receive reimbursement for both a qualifying and an un-qualifying
plan?

We would appreciate your assistance in an interpretation of the regulations for the sponsor’s allowable
cost reimbursement for the retirement plan and the deferred compensation arrangement.

Maged Hanafi
Senior Program Specialist
Food and Nutrition Service
Midwest Regional Office
United States Department of Agriculture
77 W. Jackson Blvd. 20th Floor
Chicago, Illinois 60604
312-886-4665 (Office)
312-353-4108 (Fax)
maged.hanafi@fns.usda.gov

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