

# **PART 250—DONATION OF FOODS FOR USE IN THE UNITED STATES, ITS TERRITORIES AND POSSESSIONS AND AREAS UNDER ITS JURISDICTION**

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AUTHORITY: 5 U.S.C. 301; 7 U.S.C. 612c, 612c note, 1431, 1431b, 1431e, 1431 note, 1446a-1, 1859, 2014, 2025; 15 U.S.C. 713c; 22 U.S.C. 1922; 42 U.S.C. 1751, 1755, 1758, 1760, 1761, 1762a, 1766, 3030a, 5179, 5180.

SOURCE: 53 FR 20426, June 3, 1988, unless otherwise noted.

## **Subpart A—General Purpose and Administration**

SOURCE: 81 FR 23100, Apr. 19, 2016, unless otherwise noted.

### **§250.1 Purpose and use of donated foods.**

(a) *Purpose.* The Department purchases foods and donates them to State distributing agencies for further distribution and use in food assistance programs, or to provide assistance to eligible persons, in accordance with legislation:

(1) Authorizing donated food assistance in specific programs (*e.g.*, the Richard B. Russell National School Lunch Act for the National School Lunch Program (NSLP)); or

(2) Authorizing the removal of surplus foods from the market or the support of food prices (*i.e.*, in accordance with Section 32, Section 416, and Section 709, as defined in §250.2).

(b) *Use of donated foods.* Donated foods must be used in accordance with the requirements of this part and with other Federal regulations applicable to specific food assistance programs (*e.g.*, 7 CFR part 251 includes requirements for the use of donated foods in The Emergency Food Assistance Program (TEFAP)). Such use may include activities designed to demonstrate or test the effective use of donated foods (*e.g.*, in nutrition classes or cooking demonstrations) in any programs. However, donated foods may not be:

(1) Sold or exchanged, or otherwise disposed of, unless approved by FNS, or specifically permitted elsewhere in this part or in other Federal regulations (*e.g.*, donated foods may be used in meals sold in NSLP);

(2) Used to require recipients to make any payments or perform any services in exchange for their receipt, unless approved by FNS, or specifically permitted elsewhere in this part or in other Federal regulations; or

(3) Used to solicit voluntary contributions in connection with their receipt, except for donated foods provided in the Nutrition Services Incentive Program (NSIP).

(c) *Legislative sanctions.* In accordance with the Richard B. Russell National School Lunch Act (42 U.S.C. 1760) and the Agriculture and Consumer Protection Act of 1973 (7 U.S.C. 612c note), any person who embezzles, willfully misapplies, steals, or obtains by fraud any donated foods (or funds, assets, or property deriving from such donated foods) will be subject to Federal criminal prosecution and other penalties. Any person who receives, conceals, or retains such donated foods or funds, assets, or property deriving from such foods, with the knowledge that they were embezzled, willfully misapplied, stolen, or obtained by fraud, will also be subject to Federal criminal prosecution and other penalties. The distributing agency, or other parties, as applicable, must immediately notify FNS of any such violations.

## **§250.2 Definitions.**

*2 CFR part 200* means the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards published by OMB. The Part reference covers applicable: Acronyms and Definitions (subpart A), General Provisions (subpart B), Post Federal Award Requirements (subpart D), Cost Principles (subpart E), and Audit Requirements (subpart F). (NOTE: Pre-Federal Award Requirements and Contents of Federal Awards (subpart C) do not apply to the National School Lunch Program).

*ACL* means the Administration for Community Living, which is the DHHS agency that administers NSIP.

*Administering agency* means a State agency that has been approved by the Department to administer a food assistance program. If such agency is also responsible for the distribution of donated foods, it is referred to as the distributing agency in this part.

*Adult care institution* means a nonresidential adult day care center that participates independently in CACFP, or that participates as a sponsoring organization, and that may receive donated foods or cash-in-lieu of donated foods, in accordance with an agreement with the distributing agency.

*Bonus foods* means Section 32, Section 416, and Section 709 donated foods, as defined in this section, which are purchased under surplus removal or price support authority, and provided to distributing agencies in addition to legislatively authorized levels of assistance.

*CACFP* means the Child and Adult Care Food Program.

*Carrier* means a commercial enterprise that transports donated foods from one location to another, but does not store such foods.

*Charitable institutions* means public institutions or private nonprofit organizations that provide a meal service on a regular basis to predominantly eligible persons in the same place without marked changes. Some types of charitable institutions are included in §250.67.

*Child care institution* means a nonresidential child care center that participates independently in CACFP, or that participates as a sponsoring organization, in accordance with an agreement with the distributing agency.

*Child nutrition program* means NSLP, CACFP, SFSP, or SBP.

*Commodity offer value* means the minimum value of donated foods that the distributing agency must offer to a school food authority participating in NSLP each school year. The commodity offer value is equal to the national per-meal value of donated food assistance multiplied by the number of reimbursable lunches served by the school food authority in the previous school year.

*Commodity school* means a school that operates a nonprofit food service, in accordance with 7 CFR part 210, but that receives additional donated food assistance rather than the cash assistance available to it under Section 4 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1753).

*Consignee* means an entity (*e.g.*, the distributing or recipient agency, a commercial storage facility, or a processor) that receives a shipment of donated foods from a vendor or Federal storage facility.

*Contract value of the donated foods* means the price assigned by the Department to a donated food which must reflect the Department's current acquisition price. This may alternatively be referred to as the USDA purchase price.

*Contracting agency* means the distributing agency, subdistributing agency, or recipient agency which enters into a processing contract.

*CSFP* means the Commodity Supplemental Food Program.

*Department* means the United States Department of Agriculture (USDA).

*DHHS* means the United States Department of Health and Human Services.

*Disaster* means a Presidentially declared disaster or emergency, in accordance with Section 412 or 413 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5179-5180), in which Federal assistance, including donated food assistance, may be provided to persons in need of such assistance as a result of the disaster or emergency.

*Disaster organization* means an organization authorized by FNS or a distributing agency, when appropriate, to provide assistance to survivors of a disaster or a situation of distress.

*Distributing agency* means a State agency selected by the Governor of the State or the State legislature to distribute donated foods in the State, in accordance with an agreement with FNS, and with the requirements in this part and other Federal regulations, as applicable (*e.g.*, a State agency distributing donated foods in CSFP must comply with requirements in 7 CFR part 247). Indian Tribal Organizations may act as a distributing agency in the distribution of donated foods on, or near, Indian reservations, as provided for in applicable Federal regulations (*e.g.*, 7 CFR part 253 or 254 for FDPIR). A distributing agency may also be referred to as a State distributing agency.

*Distribution charge* means the cumulative charge imposed by distributing agencies on school food authorities to help meet the costs of storing and distributing donated foods, and administrative costs related to such activities.

*Distributor* means a commercial food purveyor or handler who is independent of a processor and charges and bills for the handling of donated foods, and/or sells and bills for the end products delivered to recipient agencies.

*Donated foods* means foods purchased by USDA for donation in food assistance programs, or for donation to entities assisting eligible persons, in accordance with legislation authorizing such purchase and donation. Donated foods are also referred to as USDA Foods.

*Elderly nutrition project* means a recipient agency selected by the State Unit on Aging to receive assistance in NSIP, which may include donated food assistance.

*Eligible persons* means persons in need of food assistance as a result of their:

- (1) Economic status;
- (2) Eligibility for a specific food assistance program; or
- (3) Eligibility as survivors of a disaster or a situation of distress.

*End product* means a food product that contains processed donated foods.

*Entitlement* means the value of donated foods a distributing agency is authorized to receive in a specific program, in accordance with program legislation.

*Entitlement foods* means donated foods that USDA purchases and provides in accordance with levels of assistance mandated by program legislation.

*FDPIR* means the Food Distribution Program on Indian Reservations and the Food Distribution Program for Indian Households in Oklahoma.

*Federal acceptance service* means the acceptance service provided by:

- (1) The applicable grading branches of the Department's Agricultural Marketing Service (AMS);
- (2) The Department's Federal Grain Inspection Service; and
- (3) The National Marine Fisheries Service of the U.S. Department of Commerce.

*Fee-for-service* means the price by pound or case representing a processor's cost of ingredients (other than donated foods), labor, packaging, overhead, and other costs incurred in the conversion of the donated food into the specified end product.

*Fiscal year* means the period of 12 months beginning October 1 of any calendar year and ending September 30 of the following calendar year.

*FNS* means the Food and Nutrition Service of the Department of Agriculture.

*Food recall* means an action to remove food products from commerce when there is reason to believe the products may be unsafe, adulterated, or mislabeled. The action is taken to protect the public from products that may cause health problems or possible death.

*Food service management company* means a commercial enterprise, nonprofit organization, or public institution that is, or may be, contracted with by a recipient agency to manage any aspect of a recipient agency's food service, in accordance with 7 CFR part 210, 225, or 226, or, with respect to charitable institutions, in accordance with this part. To the extent that such management includes the use of donated foods, the food service management company is subject to the applicable requirements in this part. However, a school food authority participating in NSLP that performs such functions is not considered a food service management company. Also, a commercial enterprise that uses donated foods to prepare meals at a commercial facility, or to perform other activities that meet the definition of processing in this section, is considered a processor in this part, and is subject to the requirements in subpart C, and not subpart D, of this part.

*Household* means any of the following individuals or groups of individuals, exclusive of boarders or residents of an institution:

- (1) An individual living alone;
- (2) An individual living with others, but customarily purchasing food and preparing meals for home consumption separate and apart from the others;
- (3) A group of individuals living together who customarily purchase and prepare meals in common for home consumption; and
- (4) Other individuals or groups of individuals, as provided in FNS regulations specific to particular food assistance programs.

*Household programs* means CSFP, FDPIR, and TEFAP.

*In-kind replacement* means the replacement of a loss of donated food with the same type of food of U.S. origin, of equal or better quality as the donated food, and at least equal in value to the lost donated food.

*In-State processor* means a processor that has entered into agreements with distributing or recipient agencies that are located only in the State in which all of the processor's processing facilities are located.

*Multi-food shipment* means a shipment from a Federal storage facility that usually includes more than one type of donated food.

*Multi-State processor* means a processor that has entered into agreements with distributing or recipient agencies in more than one State, or that has entered into one or more agreements with distributing or recipient agencies that are located in a State other than the State in which the processor's processing facilities or business office is located.

*National per-meal value* means the value of donated foods provided for each reimbursable lunch served in NSLP in the previous school year, and for each reimbursable lunch and supper served in CACFP in the previous school year, as established in sections 6(c) and 17(h)(1)(B) of the Richard B. Russell National School Lunch Act ((42 U.S.C. 1755(c) and 1766(h)(1)(B)).

*Nonprofit organization* means a private organization with tax-exempt status under the Internal Revenue Code. Nonprofit organizations operated exclusively for religious purposes are automatically tax-exempt under the Internal Revenue Code.

*Nonprofit school food service* means all food service operations conducted by the school food authority principally for the benefit of schoolchildren, all of the revenue from which is used solely for the operation or improvement of such food services.

*NSIP* means the Nutrition Services Incentive Program administered by the DHHS ACL.

*NSLP* means the National School Lunch Program.

*Out-of-condition donated foods* means donated foods that are no longer fit for human consumption as a result of spoilage, contamination, infestation, adulteration, or damage.

*Performance supply and surety bond* means a written instrument issued by a surety company which guarantees performance and supply of end products by a processor under the terms of a processing contract.

*Processing* means a commercial enterprise's use of a commercial facility to:

(1) Convert donated foods into an end product;

(2) Repackage donated foods; or

(3) Use donated foods in the preparation of meals.

*Processor* means a commercial enterprise that processes donated foods at a commercial facility.

*Recipient agencies* means agencies or organizations that receive donated foods for distribution to eligible persons or for use in meals provided to eligible persons, in accordance with agreements with a distributing or subdistributing agency, or with another recipient agency. Local agencies in CSFP, and Indian Tribal Organizations distributing donated foods to eligible persons through FDPIR in a State in which the State government administers FDPIR, are considered recipient agencies in this part.

*Recipients* means persons receiving donated foods, or a meal containing donated foods, provided by recipient agencies.

*Reimbursable meals* means meals that meet the nutritional standards established in Federal regulations pertaining to NSLP, SFSP, or CACFP, and that are served to eligible recipients.

*SAE funds* means Federal funds provided to State agencies for State administrative expenses, in accordance with 7 CFR part 235.

*SBP* means the School Breakfast Program.

*School food authority* means the governing body responsible for the administration of one or more schools, and that has the legal authority to operate NSLP or be otherwise approved by FNS to operate NSLP.

*School year* means the period of 12 months beginning July 1 of any calendar year and ending June 30 of the following calendar year.

*Section 4(a)* means section 4(a) of the Agriculture and Consumer Protection Act of 1973 (7 U.S.C. 612c note), which authorizes the Department to purchase donated foods to maintain the traditional level of assistance for food assistance programs authorized by law, including, but not limited to, CSFP, FDPIR, and disaster assistance.

*Section 6* means section 6 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1755), which authorizes the Department to provide a specified value of donated food assistance in NSLP.

*Section 14* means section 14 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1762a), which authorizes the Department to use Section 32 or Section 416 funds to maintain the annually programmed levels of donated food assistance in child nutrition programs.

*Section 27* means section 27 of the Food and Nutrition Act of 2008 (7 U.S.C. 2036), which authorizes the purchase of donated foods for distribution in TEFAP.

*Section 32* means section 32 of Public Law 74-320 (7 U.S.C. 612c), which authorizes the Department to purchase primarily perishable foods to remove market surpluses, and to donate them for use in domestic food assistance programs or by charitable institutions.

*Section 311* means section 311 of the Older Americans Act of 1965 (42 U.S.C. 3030a), which permits State Units on Aging to receive all or part of their NSIP grant as USDA donated foods.

*Section 416* means section 416 of the Agricultural Act of 1949 (7 U.S.C. 1431), which authorizes the Department to purchase nonperishable foods to support market prices, and to donate them for use in domestic food assistance programs or by charitable institutions.

*Section 709* means section 709 of the Food and Agricultural Act of 1965 (7 U.S.C. 1446a-1), which authorizes the Department to purchase dairy products to meet authorized levels of assistance in domestic food assistance programs when such assistance cannot be met by Section 416 food purchases.

*Service institution* means recipient agencies that participate in SFSP.

*SFSP* means the Summer Food Service Program.

*Similar replacement* means the replacement of a loss of donated food with another type of food from the same food category (*e.g.*, dairy, grain, meat/meat alternate, vegetable, fruit, etc.) that is of U.S. origin, of equal or better quality than that type of donated food, and at least equal in value to the lost donated food.

*Single inventory management* means the commingling in storage of donated foods and foods from other sources, and the maintenance of a single inventory record of such commingled foods.

*Situation of distress* means a natural catastrophe or other event that does not meet the definition of disaster in this section, but that, in the determination of the distributing agency, or of FNS, as applicable, warrants the use of donated foods to assist survivors of such catastrophe or other event. A situation of distress may include, for example, a hurricane, flood, snowstorm, or explosion.

*SNAP* means the Supplemental Nutrition Assistance Program.

*Split shipment* means a shipment of donated foods from a vendor that is split between two or more distributing or recipient agencies, and that usually includes more than one stop-off or delivery location.

*State* means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, and American Samoa.

*State Unit on Aging* means:

(1) The State agency that has been approved by DHHS to administer NSIP; or

(2) The Indian Tribal Organization that has been approved by DHHS to administer NSIP.

*Storage facility* means a publicly-owned or nonprofit facility or a commercial enterprise that stores donated foods or end products, and that may also transport such foods to another location.

*Subdistributing agency* means a State agency, a public agency, or a nonprofit organization selected by the distributing agency to perform one or more activities required of the distributing agency in this part, in accordance with a written agreement between the parties. A subdistributing agency may also be a recipient agency.

*Substitution* means:

(1) The replacement of donated foods with like quantities of domestically produced commercial foods of the same generic identity and of equal or better quality.

(2) A processor can substitute commercial product for donated food, as described in paragraph (1) of this definition, without restrictions under full substitution. The processor must return to the contracting agency, in finished end products, the same number of pounds of donated food that the processor originally received for processing under full substitution. This is the 100-percent yield requirement.

(3) A processor can substitute commercial product for donated foods, as described in paragraph (1) of this definition, with some restrictions under limited substitution. Restrictions include, but are not limited to, the prohibition against substituting for backhauled poultry product. FNS may also prohibit substitution of certain types of the same generic food. (For example, FNS may decide to permit substitution for bulk chicken but not for canned chicken.)

*Summer camp* means a nonprofit or public camp for children aged 18 and under.

*TEFAP* means The Emergency Food Assistance Program.

*USDA Foods* means donated foods.

*USDA implementing regulations* mean the following: 2 CFR part 400, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards; 2 CFR part 415, General Program Administrative Regulations; 2 CFR part 416, General Program Administrative Regulations for Grants and Cooperative Agreements to State and Local Governments; and 2 CFR part 418, New Restrictions on Lobbying.

*Vendor* means a commercial food company from which the Department purchases foods for donation.

### **§250.3 Administration at the Federal level.**

(a) *Food and Nutrition Service.* Within the Department, Food and Nutrition Service (FNS) must act on behalf of the Department to administer the distribution of donated foods to distributing

agencies for further distribution and use at the State level, in accordance with the requirements of this part.

(b) *Audits or inspections.* The Department, the Comptroller General of the United States, or any of their authorized representatives, may conduct audits or inspections of distributing, subdistributing, or recipient agencies, or the commercial enterprises with which they have contracts or agreements, in order to determine compliance with the requirements of this part, or with other applicable Federal regulations.

(c) *Suspension or termination.* Whenever it is determined that a distributing agency has materially failed to comply with the provisions of this part, or with other applicable Federal regulations, FNS may suspend or terminate the distribution of donated foods, or the provision of administrative funds, to the distributing agency. FNS must provide written notification of such suspension or termination of assistance, including the reasons for the action and the effective date. The distributing agency may appeal a suspension or termination of assistance if such appeal is provided for in Federal regulations applicable to a specific food assistance program (e.g., as provided for in §253.5(l) of this chapter for FDPIR). FNS may also take other actions, as appropriate, including prosecution under applicable Federal statutes.

## **§250.4 Administration at the State level.**

(a) *Distributing agency.* The distributing agency, as defined in §250.2, is responsible for ensuring compliance with the requirements in this part, and in other Federal regulations referenced in this part, in the distribution and control of donated foods. In order to receive, store, and distribute donated foods, the distributing agency must enter into a written agreement with FNS (the *Federal-State Agreement*, form FNS-74) for the distribution of donated foods in accordance with the provisions of this part and other applicable Federal regulations. The Federal-State agreement is permanent, but may be amended with the concurrence of both parties. FNS may terminate the Federal-State agreement if the distributing agency fails to meet its obligations, in accordance with §250.3(c). Each distributing agency must also provide adequate personnel to administer the program in accordance with this part. The distributing agency may impose additional requirements related to the distribution and control of donated foods in the State, as long as such requirements are not inconsistent with the requirements in this part or other Federal regulations referenced in this part.

(b) *Subdistributing agency.* The distributing agency may enter into a written agreement with a subdistributing agency, as defined in §250.2, to perform specific activities required of the distributing agency in this part. However, the distributing agency may not assign its overall responsibility for donated food distribution and control to a subdistributing agency or to any other organization, and may not delegate its responsibility to ensure compliance with the performance standards in §250.22. The agreement entered into with the subdistributing agency must include the provisions in paragraph (c) of this section, and must indicate the specific activities for which the subdistributing agency is responsible.

(c) *Recipient agencies.* The distributing agency must select recipient agencies, as defined in §250.2, to receive donated foods for distribution to eligible persons, or for use in meals provided

to eligible persons, in accordance with eligibility criteria for specific programs or outlets, and must enter into a written agreement with a recipient agency prior to distribution of donated foods to it. However, for child nutrition programs, the distributing agency must enter into agreements with those recipient agencies selected by the State administering agency to participate in such programs, prior to distribution of donated foods to such recipient agencies. The distributing agency must confirm such recipient agencies' approval for participation in the appropriate child nutrition program with the State administering agency. For household programs, distributing agencies must consider the past performance of recipient agencies when approving applications for participation. Agreements with recipient agencies must include the provisions in this paragraph (c), as well as provisions required in Federal regulations applicable to specific programs (*e.g.*, agreements with local agencies in CSFP must include the provisions in §247.4(b) of this chapter). The agreements with recipient agencies and subdistributing agencies must:

- (1) Ensure compliance with the applicable requirements in this part, with other Federal regulations referenced in this part, and with the distributing agency's written agreement with FNS;
- (2) Ensure compliance with all requirements relating to food safety and food recalls;
- (3) Establish the duration of the agreement. The duration of the agreement may be established as permanent, but may be amended at the initiation of distributing agencies;
- (4) Permit termination of the agreement by the distributing agency for failure of the recipient agency (or subdistributing agency, as applicable) to comply with its provisions or applicable requirements, upon written notification to the applicable party; and
- (5) Permit termination of the agreement by either party, upon written notification to the other party, at least 60 days prior to the effective date of termination.

(d) *Procurement of services of commercial enterprises.* The distributing agency, or a recipient agency, must ensure compliance with procurement requirements in 2 CFR part 200, subpart D, and USDA implementing regulations at 2 CFR parts 400 and 416, as applicable, to obtain the services of a commercial enterprise to conduct activities relating to donated foods. The distributing agency, or a recipient agency, must also ensure compliance with other applicable Departmental regulations in such procurements—for example, a school food authority must ensure compliance with requirements in §§210.16 and 210.21 of this chapter, and in subpart D of this part, in procuring the services of a food service management company.

## **§250.5 Civil rights.**

Distributing agencies, subdistributing agencies and recipient agencies must comply with the Department's nondiscrimination regulations (7 CFR parts 15, 15a, and 15b) and the FNS civil rights instructions to ensure that in the operation of the program no person is discriminated against on protected bases as such bases apply to each program.

## **Subpart B—Delivery, Distribution, and Control of Donated Foods**

SOURCE: 81 FR 23104, Apr. 19, 2016, unless otherwise noted.

### **§250.10 Availability and ordering of donated foods.**

(a) *Ordering donated foods.* The distributing agency must utilize a request-driven ordering system in submitting orders for donated foods to FNS. As part of such system, the distributing agency must provide recipient agencies with the opportunity to submit input, on at least an annual basis, in determining the donated foods from the full list that are made available to them for ordering. Based on the input received, the distributing agency must ensure that the types and forms of donated foods that recipient agencies may best utilize are made available to them for ordering. The distributing agency must also ensure that donated foods are ordered and distributed only in amounts that may be utilized efficiently and without waste.

(b) *Provision of information on donated foods.* The distributing agency must provide recipient agencies, at their request, information that will assist them in ordering or utilization of donated foods, including information provided by USDA. Information provided to recipient agencies must include:

- (1) The types and quantities of donated foods that they may order;
- (2) Donated food specifications and nutritional value; and
- (3) Procedures for the disposition of donated foods that are out-of-condition or that are subject to a food recall.

(c) *Normal food expenditures.* Section 416 donated foods must not be distributed to any recipient agencies or recipients whose normal food expenditures are reduced because of the receipt of donated foods.

### **§250.11 Delivery and receipt of donated food shipments.**

(a) *Delivery.* The Department arranges for delivery of donated foods from the vendor or Federal storage facility to the distributing agency's storage facility, or to a processor with which the distributing agency has entered into a contract or agreement. The Department may also deliver donated foods directly to a recipient agency, or to a storage facility or processor with which the recipient agency has entered into a contract or agreement, with the approval of the distributing agency. The Department will make every reasonable effort to arrange deliveries of donated foods based on information obtained from distributing agencies, to the extent feasible. In accordance with §250.2, an entity that receives a shipment of donated foods directly from a USDA vendor or a Federal storage facility is referred to as the consignee. Consignees must provide a delivery

address, and other information as required by FNS, as well as update this information as necessary, to ensure foods are delivered to the correct location.

(b) *Receipt of shipments.* The distributing or recipient agency, or other consignee, must comply with all applicable Federal requirements in receiving shipments of donated foods, including procedures for the disposition of any donated foods in a shipment that are out-of-condition (as this term is defined in §250.2), or are not in accordance with ordered amounts. The distributing or recipient agency, or other consignee, must provide notification of the receipt of donated food shipments to FNS, through electronic means, and must maintain an electronic record of receipt of all donated food shipments.

(c) *Replacement of donated foods.* The vendor is responsible for the replacement of donated foods that are delivered out-of-condition. Such responsibility extends until expiration of the vendor warranty period included in the vendor contract with USDA. In all cases, responsibility for replacement is contingent on the determination that the foods were out-of-condition at the time of delivery. Replacement must be in-kind, unless FNS approves similar replacement (the terms in-kind and similar replacement are defined in §250.2). If FNS determines that physical replacement of donated foods is not cost-effective or efficient, FNS may:

(1) Approve payment by the vendor to the distributing or recipient agency, as appropriate, for the value of the donated foods at time of delivery (or at another value determined by FNS); or

(2) Credit the distributing agency's entitlement, as feasible.

(d) *Payment of costs relating to shipments.* The Department is responsible for payment of processing, transportation, handling, or other costs incurred up to the time of delivery of donated foods to a distributing or recipient agency, or other consignee, as the Department deems in its best interest. However, the distributing or recipient agency, or other consignee, is responsible for payment of any delivery charges that accrue as a result of such consignee's failure to comply with procedures in FNS instructions—*e.g.*, failure to provide for the unloading of a shipment of donated foods within a designated time period.

(e) *Transfer of title.* Title to donated foods transfers to the distributing or recipient agency, as appropriate, upon acceptance of the donated foods at the time and place of delivery. Notwithstanding transfer of title, distributing and recipient agencies must ensure compliance with the requirements of this part in the distribution, control, and use of donated foods.

## **§250.12 Storage and inventory management at the distributing agency level.**

(a) *Safe storage and control.* The distributing agency or subdistributing agency (which may include commercial storage facilities under contract with either the distributing agency or subdistributing agency, as applicable), must provide facilities for the storage and control of donated foods that protect against theft, spoilage, damage, or other loss. Accordingly, such storage facilities must maintain donated foods in sanitary conditions, at the proper temperature

and humidity, and with adequate air circulation. The distributing agency must ensure that storage facilities comply with all Federal, State, or local requirements relative to food safety and health and procedures for responding to a food recall, as applicable, and obtain all required health inspections.

(b) *Inventory management.* The distributing agency must ensure that donated foods at all storage facilities used by the distributing agency (or by a subdistributing agency) are stored in a manner that permits them to be distinguished from other foods, and must ensure that a separate inventory record of donated foods is maintained. The distributing agency's system of inventory management must ensure that donated foods are distributed in a timely manner and in optimal condition. On an annual basis, the distributing agency must conduct a physical review of donated food inventories at all storage facilities used by the distributing agency (or by a subdistributing agency), and must reconcile physical and book inventories of donated foods. The distributing agency must report donated food losses to FNS, and ensure that restitution is made for such losses.

(c) *Inventory limitations.* The distributing agency is subject to the following limitations in the amount of donated food inventories on-hand, unless FNS approval is obtained to maintain larger inventories:

(1) For TEFAP, NSLP and other child nutrition programs, inventories of each category of donated food may not exceed an amount needed for a six-month period, based on an average amount of donated foods utilized in that period; and

(2) For CSFP and FDPIR, inventories of each category of donated food in the food package may not exceed an amount needed for a three-month period, based on an average amount of donated food that the distributing agency can reasonably utilize in that period to meet CSFP caseload or FDPIR average participation.

(d) *Inventory protection.* The distributing agency must obtain insurance to protect the value of donated foods at its storage facilities. The amount of such insurance must be at least equal to the average monthly value of donated food inventories at such facilities in the previous fiscal year. The distributing agency must also ensure that the following entities obtain insurance to protect the value of their donated food inventories, in the same amount required of the distributing agency in this paragraph (d):

(1) Subdistributing agencies;

(2) Recipient agencies in household programs that have an agreement with the distributing agency or subdistributing agency to store and distribute foods (except those recipient agencies which maintain inventories with a value of donated foods that do not exceed a defined threshold, as determined in FNS policy); and

(3) Commercial storage facilities under contract with the distributing agency or with an agency identified in paragraph (d)(1) or (2) of this section.

(e) *Transfer of donated foods.* The distributing agency may transfer donated foods from its inventories to another distributing agency, or to another program, in order to ensure that such foods may be utilized in a timely manner and in optimal condition, in accordance with this part. However, the distributing agency must request FNS approval. FNS may also require a distributing agency to transfer donated foods at the distributing agency's storage facilities or at a processor's facility, if inventories of donated foods are excessive or may not be efficiently utilized. If there is a question of food safety, or if directed by FNS, the distributing agency must obtain an inspection of donated foods by State or local health authorities, as necessary, to ensure that the donated foods are still safe and not out-of-condition before transferring them. The distributing agency is responsible for meeting any transportation or inspection costs incurred, unless it is determined by FNS that the transfer is not the result of negligence or improper action on the part of the distributing agency. The distributing agency must maintain a record of all transfers from its inventories, and of any inspections related to such transfers.

(f) *Commercial storage facilities or carriers.* The distributing agency may obtain the services of a commercial storage facility to store and distribute donated foods, or a carrier to transport donated foods, but must do so in compliance with procurement requirements in 2 CFR part 200, subpart D, and USDA implementing regulations at 2 CFR parts 400 and 416. The distributing agency must enter into a written contract with a commercial storage facility or carrier, which may not exceed five years in duration, including any extensions or renewals. The contract must include applicable provisions required by Federal statutes and executive orders listed in 2 CFR part 200, appendix II, Contract Provisions for Non-Federal Entity Contracts Under Federal Awards, and USDA implementing regulations at 2 CFR parts 400 and 416. The contract must also include, as applicable to a storage facility or carrier, provisions that:

- (1) Assure storage, management, and transportation of donated foods in a manner that properly safeguards them against theft, spoilage, damage, or other loss, in accordance with the requirements in this part;
- (2) Assure compliance with all Federal, State, or local requirements relative to food safety and health, including required health inspections, and procedures for responding to a food recall;
- (3) Assure storage of donated foods in a manner that distinguishes them from other foods, and assure separate inventory recordkeeping of donated foods;
- (4) Assure distribution of donated foods to eligible recipient agencies in a timely manner, in optimal condition, and in amounts for which such recipient agencies are eligible;
- (5) Include the amount of insurance coverage obtained to protect the value of donated foods;
- (6) Permit the performance of on-site reviews of the storage facility by the distributing agency, the Comptroller General, the Department of Agriculture, or any of its duly authorized representatives, in order to determine compliance with requirements in this part;
- (7) Establish the duration of the contract, and provide for extension or renewal of the contract only upon fulfillment of all contract provisions;

(8) Provide for expeditious termination of the contract by the distributing agency for noncompliance with its provisions; and

(9) Provide for termination of the contract by either party for other cause, after written notification of such intent at least 60 days prior to the effective date of such action.

## **§250.13 Efficient and cost-effective distribution of donated foods.**

(a) *Direct shipments.* The distributing agency must ensure that the distribution of donated foods is conducted in the most efficient and cost-effective manner, and, to the extent practical, in accordance with the specific needs and preferences of recipient agencies. In meeting this requirement, the distributing agency must, to the extent practical, provide for:

(1) Shipments of donated foods directly from USDA vendors to recipient agencies, including two or more recipient agencies acting as a collective unit (such as a school co-op), or to the commercial storage facilities of such agencies;

(2) Shipments of donated foods directly from USDA vendors to processors for processing of donated foods and sale of end products to recipient agencies, in accordance with subpart C of this part; and

(3) The use of split shipments, as defined in §250.2, in arranging for delivery of donated foods to recipient agencies that cannot accept a full truckload.

(b) *Distributing agency storage and distribution charge.* (1) If a distributing agency determines that direct shipments of donated foods, as described in paragraph (a) of this section, are impractical, it must provide for the storage of donated foods at the distributing agency level, and subsequent distribution to recipient agencies, in the most efficient and cost-effective manner possible. The distributing agency must use a commercial storage facility, in accordance with §250.12(f), if the use of such system is determined to be more efficient and cost-effective than other available methods.

(2) The distributing agency must utilize State Administrative Expense (SAE) funds in child nutrition programs, as available, to meet the costs of storing and distributing donated foods for school food authorities or other recipient agencies in child nutrition programs, and administrative costs related to such activities, in accordance with 7 CFR part 235. If SAE funds, or any other Federal or State funds received for such purpose, are insufficient to fully meet the distributing agency's costs of storing and distributing donated foods, and related administrative costs (*e.g.*, salaries of employees engaged in such activities), the distributing agency may require school food authorities or other recipient agencies in child nutrition programs to pay a distribution charge, as defined in §250.2, to help meet such costs. The distribution charge may cover only allowable costs, in accordance with 2 CFR part 200, subpart E, and USDA implementing regulations at 2 CFR part 400. The distributing agency must maintain a record of costs incurred

in storing and distributing donated foods and related administrative costs, and the source of funds used to pay such costs.

(c) *FNS approval of amount of State distributing agency distribution charge to school food authorities and other recipient agencies in child nutrition programs.* In determining the amount of a new distribution charge, or in increasing the amount (except for normal inflationary adjustments) or reducing the level of service provided once a distribution charge is established, the distributing agency must request FNS approval prior to implementation. Such requirement also applies to the distribution charge imposed by a commercial storage facility under contract with the distributing agency. The request for approval must be submitted to FNS at least 90 days in advance of its projected implementation, and must include justification of the newly established amount, or any increased charge or reduction in the level of service provided under an established distribution charge, and the specific costs covered under the distribution charge (e.g., storage, delivery, or administrative costs).

(d) *FNS review authority.* FNS may reject the distributing agency's proposed new, or changes to an existing, distribution charge for school food authorities and other recipient agencies in child nutrition programs if FNS determines that the charge would not provide for distribution of donated foods in the most efficient and cost-effective manner, or may otherwise impact recipient agencies negatively. In such case, the distributing agency would be required to adjust the proposed amount or the level of service provided in its distribution charge, or consider other distribution options. FNS may also require the distributing agency to submit documentation to justify the efficiency and cost-effectiveness of its storage and distribution system at other times, and may require the distributing agency to re-evaluate such system in order to ensure compliance with the requirements in this part.

## **§250.14 Storage and inventory management at the recipient agency level.**

(a) *Safe storage and control.* Recipient agencies must provide facilities for the storage and control of donated foods that protect against theft, spoilage, damage, or other loss. Accordingly, such storage facilities must maintain donated foods in sanitary conditions, at the proper temperature and humidity, and with adequate air circulation. Recipient agencies must ensure that storage facilities comply with all Federal, State, or local requirements relative to food safety and health and procedures for responding to a food recall, as applicable, and obtain all required health inspections.

(b) *Inventory management—household programs.* Recipient agencies in household programs must store donated foods in a manner that permits them to be distinguished from other foods in storage, and must maintain a separate inventory record of donated foods. Such recipient agencies' system of inventory management must ensure that donated foods are distributed to recipients in a timely manner that permits use of such foods while still in optimal condition. Such recipient agencies must notify the distributing agency of donated food losses and take further actions with respect to such food losses, as directed by the distributing agency.

(c) *Inventory management—child nutrition programs and charitable institutions.* Recipient agencies in child nutrition programs, and those receiving donated foods as charitable institutions, in accordance with §250.67, are not required to store donated foods in a manner that distinguishes them from purchased foods or other foods, or to maintain a separate inventory record of donated foods—*i.e.*, they may utilize single inventory management, as defined in §250.2. For such recipient agencies, donated foods are subject to the same safeguards and effective management practices as other foods. Accordingly, recipient agencies in child nutrition programs and those receiving donated foods as charitable institutions (regardless of the inventory management system utilized), are not required to separately monitor and report donated food use, distribution, or loss to the distributing agency, unless there is evidence indicating that donated food loss has occurred as a result of theft or fraud.

(d) *Transfer of donated foods to another recipient agency.* A recipient agency operating a household program must request approval from the distributing agency to transfer donated foods at its storage facilities to another recipient agency. The distributing agency may approve such transfer to another recipient agency in the same household program (*e.g.*, the transfer of TEFAP foods from one food pantry to another) without FNS approval. However, the distributing agency must receive FNS approval to permit a recipient agency in a household program to transfer donated foods to a recipient agency in a different program (*e.g.*, the transfer of TEFAP foods from a food pantry to a CSFP local agency), even if the same recipient agency administers both programs. A recipient agency operating a child nutrition program, or receiving donated foods as a charitable institution, in accordance with §250.67, may transfer donated foods to another recipient agency or charitable organization without approval from the distributing agency or FNS. However, the recipient agency must still maintain records of donated food inventories.

(e) *Commercial storage facilities.* Recipient agencies may obtain the services of commercial storage facilities to store and distribute donated foods, but must do so in compliance with procurement requirements in 2 CFR part 200, subpart D, and USDA implementing regulations at 2 CFR parts 400 and 416, as applicable. Recipient agencies must ensure that commercial storage facilities comply with all of the applicable requirements in this section regarding the storage and inventory management of donated foods.

## **§250.15 Out-of-condition donated foods, food recalls, and complaints.**

(a) *Out-of-condition donated foods at the distributing agency level.* The distributing agency must ensure that donated foods that are out-of-condition, as defined in §250.2, at any of its storage facilities are removed, destroyed, or otherwise disposed of, in accordance with FNS instruction and State or local requirements pertaining to food safety and health. The distributing agency must obtain an inspection of donated foods by State or local health authorities to determine their safety and condition, as necessary, or as directed by FNS. Out-of-condition donated foods may be sold (*e.g.*, to a salvage company), if permitted by FNS and State or local laws or regulations.

(b) *Out-of-condition donated foods at the recipient agency level.* Recipient agencies in household programs must report out-of-condition donated foods at their storage facilities to the distributing

agency, in accordance with §250.14(b), and must ensure that such donated foods are removed, destroyed, or otherwise disposed of, in accordance with FNS instruction and State or local requirements pertaining to food safety and health. The distributing agency must ensure that such recipient agencies obtain an inspection of donated foods by State or local health authorities to determine their safety and condition, as necessary, or as directed by FNS. For charitable institutions, in accordance with §250.67, and recipient agencies in child nutrition programs, donated foods must be treated as other foods when safety is in question. Consequently, such recipient agencies must comply with State or local requirements in determining the safety of foods (including donated foods), and in their destruction or other disposition. However, they are not required to report such actions to the distributing agency.

(c) *Food recalls.* The distributing or recipient agency, as appropriate, must follow all applicable Federal, State or local requirements for donated foods subject to a food recall, as this term is defined in §250.2. Further, in the event of a recall, Departmental guidance is provided, including procedures or instructions for all parties in responding to a food recall, replacement of recalled donated foods, and reimbursement of specific costs incurred as a result of such actions.

(d) *Complaints relating to donated foods.* The distributing agency must inform recipient agencies of the preferred method of receiving complaints regarding donated foods. Complaints received from recipients, recipient agencies, or other entities relating to donated foods must be resolved in an expeditious manner, and in accordance with applicable requirements in this part. However, the distributing agency may not dispose of any donated food that is the subject of a complaint prior to guidance and authorization from FNS. Any complaints regarding product quality or specifications, or suggested product improvements, must be submitted to FNS through the established FNS donated foods complaint system for tracking purposes. If complaints may not be resolved at the State level, the distributing agency must provide information regarding the complaint to FNS. The distributing agency must maintain a record of its investigations and other actions with respect to complaints relating to donated foods.

## **§250.16 Claims and restitution for donated food losses.**

(a) *Distributing agency responsibilities.* The distributing agency must ensure that restitution is made for the loss of donated foods, or for the loss or improper use of funds provided for, or obtained as an incident of, the distribution of donated foods. The distributing agency must identify, and seek restitution from, parties responsible for the loss, and implement corrective actions to prevent future losses.

(b) *FNS claim actions.* FNS may initiate and pursue claims against the distributing agency or other entities for the loss of donated foods, or for the loss or improper use of funds provided for, or obtained as an incident of, the distribution of donated foods. FNS may also initiate and pursue claims against the distributing agency for failure to take required claim actions against other parties. FNS may, on behalf of the Department, compromise, forgive, suspend, or waive a claim. FNS may, at its option, require assignment to it of any claim arising from the distribution of donated foods.

## **§250.17 Use of funds obtained incidental to donated food distribution.**

(a) *Distribution charge.* The distributing agency must use funds obtained from the distribution charge imposed on recipient agencies in child nutrition programs, in accordance with §250.13(b), to meet the costs of storing and distributing donated foods or related administrative costs, consistent with the limitations on the use of funds provided under a Federal grant in 2 CFR part 200, subparts D and E, and USDA implementing regulations at 2 CFR parts 400 and 416. The distributing agency must maintain such funds in an operating account, separate from other funds obtained incidental to donated food distribution. The amount of funds maintained at any time in the operating account may not exceed the distributing agency's highest expenditure from that account over any three-month period in the previous school or fiscal year, unless the distributing agency receives FNS approval to maintain a larger amount of funds in such account. Unless such approval is granted, funds in excess of the established limit must be used to reduce the distribution charge imposed on recipient agencies, or to provide appropriate reimbursement to such agencies. The distributing agency may not use funds obtained from the distribution charge to purchase foods to replace donated food losses or to pay claims to make restitution for donated food losses.

(b) *Processing and food service management company contracts.* School food authorities must use funds obtained from processors in processing of donated foods into end products (*e.g.*, through rebates for the value of such donated foods), or from food service management companies in crediting for the value of donated foods received, in support of the nonprofit school food service, in accordance with §210.14 of this chapter. Other recipient agencies must use such funds in accordance with the requirements in paragraph (c) of this section.

(c) *Claims and other sources.* The distributing agency must ensure that funds collected in payment of claims for donated food losses are used only for the payment of expenses of the food distribution program. The first priority for the use of funds collected in a claim for the loss of donated foods is the purchase of replacement foods for use in the program in which the loss occurred. If the purchase of replacement foods is not feasible, funds collected in a claim for the loss of donated foods must be used to pay allowable administrative costs incurred in the storage and distribution of donated foods. The distributing agency, or recipient agency, must use funds obtained from sources incidental to donated food distribution (except as otherwise indicated in this section) to pay administrative costs incurred in the storage and distribution of donated foods, consistent with the limitations on the use of funds provided under a Federal grant in 2 CFR part 200, subparts D and E, and USDA implementing regulations at 2 CFR parts 400 and 416. The distributing agency must maintain funds obtained from claims and other sources included in this paragraph (c) in a donated food account (separate from the operating account maintained in accordance with paragraph (a) of this section), and must obtain FNS prior approval for any single deposit into, or expenditure from, such account in excess of \$25,000. Distributing and recipient agencies must maintain records of funds obtained and expended in accordance with this paragraph (c). Examples of funds applicable to the provisions in this paragraph (c) include funds accrued from:

(1) The salvage of out-of-condition donated foods.

(2) The sale of donated food containers, pallets, or packing materials.

(3) Payments by processors for failure to meet processing yields or other cause.

(d) *Prohibitions.* The distributing agency may not use funds obtained incidental to donated food distribution to meet State matching requirements for Federal administrative funds provided in household programs, or in place of State Administrative Expense (SAE) funds provided in accordance with 7 CFR part 235.

(e) *Buy American.* When funds obtained in accordance with this section are used to purchase foods in the commercial market, a distributing or recipient agency in the continental United States, and in Hawaii, must, to the maximum extent practical, purchase only domestic foods or food products. Such requirement is also applicable to food purchases made with the cash-in-lieu-of-donated foods provided in NSLP and CACFP, in accordance with §§250.56(e) and 250.61(c). For the purposes of this section, domestic foods or food products are:

(1) Agricultural commodities that are produced in the United States; or

(2) Food products that are processed in the United States substantially using agricultural commodities that are produced in the United States.

## **§250.18 Reporting requirements.**

(a) *Inventory and distribution of donated foods.* The distributing agency must submit to FNS reports relating to the inventory and distribution of donated foods in this paragraph (a) or in other regulations applicable to specific programs. Such reports must be submitted in accordance with the timeframes established for each respective form. For donated foods received in FDPIR, the distributing agency must submit form FNS-152, *Monthly Distribution of Donated Foods to Family Units*. For donated foods received in TEFAP, NSLP, or other child nutrition programs, the distributing agency must submit form FNS-155, the *Inventory Management Register*.

(b) *Processor performance reports.* Processors must submit monthly performance reports to the distributing agency, in accordance with §250.30(m). Such reports must include the information listed in §250.30(m).

(c) *Disasters and situations of distress.* The distributing agency must submit to FNS a report of the types and amounts of donated foods used from distributing or recipient agency storage facilities in disasters and situations of distress, and a request for replacement of such foods, using electronic form FNS-292A, *Report of Commodity Distribution for Disaster Relief*, in accordance with §§250.69 and 250.70. The report must be submitted within 45 days of the termination of such assistance.

(d) *Other information.* The distributing agency must submit other information, as requested by FNS, in order to ensure compliance with requirements in this part. For example, FNS may require the distributing agency to submit information with respect to its assessment of the distribution charge, or to justify the efficiency and cost-effectiveness of its distribution system, in accordance with §250.13(c) and (d).

## **§250.19 Recordkeeping requirements.**

(a) *Required records.* Distributing agencies, recipient agencies, and other entities must maintain records of agreements and contracts, reports, audits, and claim actions, funds obtained as an incident of donated food distribution, and other records specifically required in this part or in other Departmental regulations, as applicable. In addition, distributing agencies must keep a record of the value of donated foods each of its school food authorities receives, in accordance with §250.58(e), and records to demonstrate compliance with the professional standards for distributing agency directors established in §235.11(g). Processors must also maintain records documenting the sale of end products to recipient agencies, including the sale of such end products by distributors, and must submit monthly performance reports, in accordance with §250.30(m). Specific recordkeeping requirements relating to the use of donated foods in contracts with food service management companies are included in §250.54. Failure of the distributing agency, recipient agency, processor, or other entity to comply with recordkeeping requirements must be considered prima facie evidence of improper distribution or loss of donated foods and may result in a claim against such party for the loss or misuse of donated foods, in accordance with §250.16, or in other sanctions or corrective actions.

(b) *Retention of records.* Records relating to requirements for donated foods must be retained for a period of three years from the close of the fiscal or school year to which they pertain. However, records pertaining to claims or audits that remain unresolved in this period of time must be retained until such actions have been resolved.

## **§250.20 Audit requirements.**

(a) *Requirements for distributing and recipient agencies.* Audit requirements for State or local government agencies and nonprofit organizations that receive Federal awards or grants (including distributing and recipient agencies under this part) are included in 2 CFR part 200, subpart F and appendix XI, Compliance Supplement, and USDA implementing regulations at 2 CFR part 400. In accordance with such regulations, the value of Federal grants or awards expended in a fiscal year determine if the distributing or recipient agency is required to obtain an audit in that year. The value of donated foods must be considered as part of the Federal grants or awards in determining if an audit is required. FNS provides guidance for distributing and recipient agencies in valuing donated foods for audit purposes, and in determining whether an audit must be obtained.

(b) *Requirements for processors.* In-State processors must obtain an independent certified public accountant (CPA) audit in the first year that they receive donated foods for processing, while multi-State processors must obtain such an audit in each of the first two years that they receive

donated foods for processing. After this initial requirement period, in-State and multi-State processors must obtain an independent CPA audit at a frequency determined by the average value of donated foods received for processing per year, as indicated in this paragraph (b). The value of donated foods used in determining if an audit is required must be the contract value of the donated foods, as defined in §250.2. The audit must determine that the processor's performance is in compliance with the requirements in this part, and must be conducted in accordance with procedures in the FNS Audit Guide for Processors. All processors must pay for audits required in this paragraph (b). An in-State or multi-State processor must obtain an audit:

(1) Annually, if it receives, on average, more than \$5,000,000 in donated foods for processing per year;

(2) Every two years, if it receives, on average, between \$1,000,000 and \$5,000,000 in donated foods for processing per year; or

(3) Every three years, if it receives, on average, less than \$1,000,000 in donated foods for processing per year.

(c) *Post-audit actions required of processors.* In-State processors must submit a copy of the audit to the distributing agency for review by December 31st of each year in which an audit is required. The distributing agency must ensure that in-State processors provide a corrective action plan with timelines for correcting deficiencies identified in the audit, and must ensure that such deficiencies are corrected. Multi-State processors must submit a copy of the audit, and a corrective action plan with timelines for correcting deficiencies identified in the audit, as appropriate, to FNS for review by December 31st of each year in which an audit is required. FNS may conduct an audit or investigation of a processor to ensure correction of deficiencies, in accordance with §250.3(b).

(d) *Failure to meet audit requirements.* If a distributing agency or recipient agency fails to obtain the required audit, or fails to correct deficiencies identified in the audit, FNS may withhold, suspend, or terminate the Federal award. If an in-State processor fails to obtain the required audit, or fails to correct deficiencies identified in the audit, a distributing or recipient agency may terminate the processing agreement, and may not extend or renew such an agreement. Additionally, FNS may prohibit the further distribution of donated foods to such processor. If a multi-State processor fails to obtain a required audit, or fails to correct deficiencies identified in the audit, FNS may terminate the processing agreement. Additionally, FNS may prohibit the further distribution of donated foods to such processor.

## **§250.21 Distributing agency reviews.**

(a) *Scope of review requirements.* The distributing agency must ensure that subdistributing agencies, recipient agencies, and other entities comply with applicable requirements in this part, and in other Federal regulations, through the on-site reviews required in paragraph (b) of this section, and the review of required reports or audits. However, the distributing agency is not responsible for the review of school food authorities and other recipient agencies in child

nutrition programs. The State administering agency is responsible for the review of such recipient agencies, in accordance with review requirements of part 210 of this chapter.

(b) *On-site reviews.* The distributing agency must conduct an on-site review of:

(1) Charitable institutions, whenever the distributing agency identifies actual or probable deficiencies in the use of donated foods by such institutions, through audits, investigations, complaints, or any other information;

(2) Storage facilities at the distributing agency level (including commercial storage facilities under contract with the distributing or subdistributing agency), on an annual basis; and

(3) Subdistributing and recipient agencies in CSFP, TEFAP, and FDPIR, in accordance with 7 CFR parts 247, 251, and 253, respectively.

(c) *Identification and correction of deficiencies.* The distributing agency must inform each subdistributing agency, recipient agency, or other entity of any deficiencies identified in its reviews, and recommend specific actions to correct such deficiencies. The distributing agency must ensure that such agencies or entities implement corrective actions to correct deficiencies in a timely manner.

## **§250.22 Distributing agency performance standards.**

(a) *Performance standards.* The distributing agency must meet the basic performance standards included in this paragraph (a) in the ordering, distribution, processing, if applicable, and control of donated foods. Some of the performance standards apply only to distributing agencies that distribute donated foods in NSLP or other child nutrition programs, as indicated. However, the identification of specific performance standards does not diminish the responsibility of the distributing agency to meet other requirements in this part. In meeting basic performance standards, the distributing agency must:

(1) Provide recipient agencies with information on donated food availability, assistance levels, values, product specifications, and processing options, as requested;

(2) Implement a request-driven ordering system, in accordance with §250.10(a), and, for child nutrition programs, §250.58(a);

(3) Offer school food authorities in NSLP, at a minimum, the commodity offer value of donated foods, in accordance with §250.58;

(4) Provide for the storage, distribution, and control of donated foods in accordance with all Federal, State, or local requirements relating to food safety and health;

(5) Provide for the distribution of donated foods in the most efficient and cost-effective manner, including, to the extent practical, direct shipments from vendors to recipient agencies or processors, and the use of split shipments;

(6) Use SAE funds, or other Federal or State funds, as available, in paying State storage and distribution costs for child nutrition programs, and impose a distribution charge on recipient agencies in child nutrition programs only to the extent that such funds are insufficient to meet applicable costs;

(7) Provide for the processing of donated foods, at the request of school food authorities, in accordance with subpart C of this part, including the testing of end products with school food authorities, and the solicitation of acceptability input, when procuring end products on behalf of school food authorities or otherwise limiting the procurement of end products; and

(8) Provide recipient agencies information regarding the preferred method for submission of donated foods complaints to the distributing agency and act expeditiously to resolve submitted complaints.

(b) *Corrective action plan.* The distributing agency must submit a corrective action plan to FNS whenever it is found to be substantially out of compliance with the performance standards in paragraph (a) of this section, or with other requirements in this part. The plan must identify the corrective actions to be taken, and the timeframe for completion of such actions. The plan must be submitted to FNS within 60 days after the distributing agency receives notification from FNS of a deficiency.

(c) *Termination or suspension.* FNS may terminate or suspend all, or part, of the distributing agency's participation in the distribution of donated foods, or in a food distribution program, for failure to comply with requirements in this part, with other applicable Federal regulations, or with its written agreement with FNS. FNS may also take other actions, as appropriate, including prosecution under applicable Federal statutes.

## **Subpart C—Processing and Labeling of Donated Foods**

### **§250.30 State processing of donated foods.**

(a) *General.* This section sets forth the terms and conditions under which distributing agencies, subdistributing agencies, or recipient agencies may enter into contracts for the processing of donated foods and prescribes the minimum requirements to be included in such contracts.

(b) *Permissible contractual arrangements.* (1) A distributing agency, subdistributing agency, or recipient agency may contract for processing, pay the processing fee, and deliver the end products to eligible recipient agencies through its own distribution system. Distributing agencies shall assure that the acceptability of processed end products is tested with recipient agencies eligible to receive them prior to entering into a processing contract and shall develop a system for monitoring product acceptability. Distributing agencies may exempt end products from testing if they have been used previously, have been determined by the distributing agency to be acceptable by recipient agencies, and have had no changes in specifications.

(2) A distributing agency or subdistributing agency may contract for processing on behalf of one or more recipient agencies. All recipient agencies eligible to receive the donated foods to be processed may receive end products made from those foods and produced under such processing contracts by virtue of the distributing agency—recipient agency agreement required by §250.4(c). Under this arrangement and subject to the approval of the distributing agency:

(i) Processors shall utilize either a discount or a refund system in accordance with paragraph (d) of this section when they sell end products directly to recipient agencies, or

(ii) When selling end products through a distributor, such sales shall be in accordance with paragraph (e) of this section.

(3) Distributing agencies shall permit subdistributing agencies and recipient agencies to enter into processing contracts with a processor under arrangements similar to those described in paragraph (b) (1) or (2) of this section.

(c) *Requirements for processing contracts.* (1) Contracts with processors shall be in a standard written form and shall be reviewed by the appropriate FNS Regional Office. Processing contracts shall terminate on June 30 of each year. However, processing contracts may give contracting agencies the option of extending contracts for two 1-year periods, provided that any changed information must be updated before any contract extension is granted, including the information in paragraphs (c)(4), (c)(5)(ii), and (c)(5)(viii)(B) of this section. The processor must have performed to the satisfaction of the contracting agency during the previous contract year, submitted all required reports and any corrections to such reports up to the time that contract extension occurs, and submitted its certified public accountant report as required under paragraph (c)(5)(xi) of this section before the contract may be extended. Distributing agencies shall develop criteria for use in evaluating and selecting processing contracts. The selection criteria shall be used in selecting or rejecting processors in a manner that ensures equitable treatment of processors. The selection criteria shall, at a minimum, include:

(i) The nutritional contribution which the end product will provide;

(ii) The marketability of the end product;

(iii) The distribution method which the processor intends to utilize;

(iv) Price and yield schedule data;

(v) Any applicable labeling requirements; and

(vi) The ability of the processor to meet the terms and conditions set forth in the regulations.

(2) These criteria will be reviewed by the appropriate FNS Regional Office during the management evaluation review of the distributing agency. Distributing agencies and subdistributing agencies which enter into contracts on behalf of recipient agencies but which do not limit the types of end products which can be sold or the number of processors which can sell

end products within the State are not required to follow the selection criteria. In addition to utilizing these selection criteria, when a contracting agency enters into a contract both for the processing of donated food and the purchase of the end products produced from the donated food, the procurement standards set forth in 2 CFR part 200, subpart D and Appendix II, Contract Provisions for Non-Federal Entity Contracts Under Federal Awards and USDA implementing regulations at 2 CFR part 400 and part 416 must be followed. Recipient agencies which purchase end products produced under Statewide agreements are also required to comply with 2 CFR part 200, subpart D and USDA implementing regulations at 2 CFR part 400 and part 416. Contracting agencies shall not enter into contracts with processors which cannot demonstrate the ability to meet the terms and conditions of the regulations and the distributing agency agreements; furnish prior to the delivery of any donated foods for processing, a performance bond, an irrevocable letter of credit or an escrow account in an amount sufficient to protect the contract value of donated food on hand and on order; demonstrate the ability to distribute end products to eligible recipient agencies; provide a satisfactory record of integrity, business ethics and performance and provide adequate storage.

(3) Standard form contracts shall be prepared or reviewed by the appropriate State legal staff to assure conformity with the requirements of these regulations and of applicable Federal, State and local laws.

(4) The contract shall be signed for the processor by the owner, a partner, or a corporate officer duly authorized to sign the contract, as follows:

- (i) In a sole proprietorship, the owner shall sign the contract;
- (ii) In a partnership, a partner shall sign the contract;
- (iii) In a corporation, a duly authorized corporate officer shall sign the contract.

(5) At a minimum, each processing contract shall include:

- (i) The names and telephone numbers of the contracting agency and processor;
- (ii) A description of each end product, the quantity of each donated food and the identification of any other ingredient which is needed to yield a specific number of units of each end product (except that the contracting agency may permit the processor to specify the total quantity of any flavorings or seasonings which may be used without identifying the ingredients which are, or may be, components of flavorings or seasonings), the total weight of all ingredients in the batch formula, the yield factor for each donated food, and any pricing information provided by the processor in addition to that required in paragraph (c)(5)(iii) of this section as requested by the contracting agency and a thorough explanation of what this additional pricing information represents. The yield factor is the percentage of the donated food which must be returned in the end product to be distributed to eligible recipient agencies. For substitutable donated foods, at least 100 percent of the donated food provided to the processor must be physically contained in the end products with no allowable tolerance;

(iii) The contract value of each donated food to be processed and, where processing is to be performed only on a fee-for-service basis as defined in §250.2, the fee-for-service;

(iv) A provision for:

(A) Termination of the contract upon thirty days written notice by the contracting agency or the processor and

(B) Immediate termination of the contract when there has been noncompliance with its terms and conditions by the contracting agency or the processor;

(v) In the event of contract termination, a provision for disposition of donated foods and end products in the processor's inventories or payment of funds in accordance with paragraph (j) of this section;

(vi) A provision for inspection and certification during processing, where applicable, by the appropriate acceptance service in accordance with paragraphs (g) and (h) of this section;

(vii) A provision that end products containing donated foods that are not substitutable under paragraph (f) of this section shall be delivered only to eligible recipient agencies and that end products containing both substitutable and non-substitutable donated foods may be delivered and sold in accordance with the requirements of paragraph (d) and (e) of this section;

(viii) Provisions that the processor shall:

(A) Fully account for all donated foods delivered into its possession by production and delivery to the contracting agency or eligible recipient agencies of an appropriate number of units of end products meeting the contract specifications, and where end products are sold through a distributor, that the processor remains full accountable for the donated foods until refunds or any other credits equal to their contracted value have been made to eligible recipient agencies in accordance with paragraph (k) of this section or to distributing agencies in accordance with paragraph (n)(2) of this section;

(B) Furnish to the contracting agency prior to the delivery of any donated foods for processing documentation that a performance supply and surety bond from a surety company listed in the most recent U.S. Department of Treasury Circular 570, an irrevocable letter of credit or an escrow account has been obtained in an amount that is sufficient to protect the contract value of all donated foods. Since the distributing agency is held liable by FNS for any donated foods provided to a processor the distributing agency shall determine the dollar value of the performance supply and surety bond, irrevocable letter of credit or the escrow account taking into consideration the

(1) Value of donated foods on hand;

(2) Value of donated foods on order and

- (3) Anticipated usage rate during the contract period;
- (C) Use or dispose of the containers in which donated foods are received from the Department in accordance with the instructions of the contracting agency;
- (D) Apply as credit against the processing fee or return to the contracting agency and identify:
- (1) Any funds received from the sale of containers, and
- (2) The market value or the price received from the sale of any by-products of donated foods or commercial foods which have been substituted for donated foods;
- (E) Substitute donated foods with commercially purchased foods only in accordance with paragraph (f) of this section;
- (F) Meet the requirements of paragraph (i) of this section for labeling end products;
- (G) Meet the requirements of §250.19 in maintaining records pertaining to the receipt, distribution, and control of donated foods, and the sale of end products;
- (H) Submit processing performance reports in accordance with paragraph (m) of this section; and
- (I) Submit annual reconciliation reports and make payments to distributing agencies for any inventory remaining at the termination of the contract in accordance with paragraph (n)(3) of this section.
- (ix) A provision that approval of the contract by distributing agency shall not obligate that agency or the Department to deliver donated foods for processing;
- (x) A description of the processor's quality control system and assurance that an effective quality control system will be maintained for the duration of the contract;
- (xi) Meet the requirements in §250.20(b) and (c) in obtaining an independent certified public accountant audit, and in performing post-audit actions;
- (xii) A requirement that inventory drawdowns shall be limited to the actual amount of donated foods contained in the end product. Additional commodity required to account for production loss shall be obtained from non-donated foods;
- (xiii) A provision that the fee-for-service or value pass-through system to be used for the sale of end products to recipient agencies shall be described and be consistent with paragraphs (d) and (e) of this section.
- (xiv) A provision that the contracting agency shall give the processor a list of all recipient agencies eligible to purchase end products under the contract and provide updates for any changes which occur during the contract period.

(xv) A provision that the processor shall not assign the processing contract or delegate any aspect of processing under a subcontract or other arrangement without the written consent of the contracting agency and the distributing agency.

(xvi) A provision that the processor shall provide pricing information summaries and updated pricing information summaries as required in paragraphs (d)(3) and (e)(2) of this section.

(xvii) A provision that the processor shall maintain documentation which demonstrates that the level of the processor's commercial production has not been reduced, as required in paragraph (f)(1)(iii) of this section.

(d) *End products sold by processors.* (1) When recipient agencies pay the processor for end products, such sales shall be under:

(i) A refund system in which the processor provides a payment to the recipient agency in the amount of the contract value of the donated food contained in the end product;

(ii) A discount system which provides the price of each unit of end product purchased by eligible recipient agencies to be discounted by the stated contract value of the donated foods contained therein; or

(iii) An alternative value pass-through system under which the value of the donated food contained in each unit of end product shall be passed to the recipient agency and which has been approved by FNS at the request of the distributing agency. FNS may consider the paperwork and resource burden associated with alternative value pass-through systems when considering approval and reserves the right to deny the approval of systems which are labor-intensive and provide no greater accountability than those systems permitted under paragraphs (d) and (e) of this section.

(2) When a processor delivers end products produced under a fee-for-service contract, the processor shall separately identify on the bill for the recipient agency the agreed-upon fee-for-service and any delivery costs.

(3) Processors shall provide pricing information summaries to contracting agencies and contracting agencies shall provide this information to recipient agencies as soon as possible after contract approval. If this pricing information changes during the contract period, processors shall provide updated pricing information to the contracting agency 30 days prior to the effective date of the change, which, in turn, shall provide this updated information to eligible recipient agencies.

(e) *End products sold by distributors.* (1) When a processor transfers end products to a distributor for delivery and sale to recipient agencies, such sales shall be under:

(i) A refund system in which the processor provides a payment to the recipient agency in the amount of the contract value of the donated food contained in the end product;

(ii) A hybrid system which provides a refund for the contract value of the donated food shall be provided to the distributor in accordance with paragraph (k) of this section and the price of each unit of end product purchased by eligible recipient agencies through a distributor shall be discounted by the contract value of the donated foods contained therein; or

(iii) An alternative value pass-through system under which the contract value of the donated food contained in each unit of end product shall be passed on to the recipient agency and which has been approved by FNS in accordance with paragraph (d)(1)(iii) of this section; or

(iv) When a processor arranges for delivery of processed end products produced under fee-for-service contracts by distributors, the products shall be delivered and invoiced using one of the following procedures:

(A) The recipient agency is billed by the processor for the fee-for-service and the distributor bills the recipient agency for the storage and delivery of the end products; or

(B) The processor arranges for the delivery of end products through a distributor on behalf of the recipient agency. In this system, the processor's invoice must include both the fee-for-service and the distributor's charges as separate, clearly identifiable charges.

(2) Processors shall provide pricing information summaries to contracting agencies and contracting agencies shall provide this information to recipient agencies as soon as possible after contract approval. If this pricing information changes during the contract period, the processor shall provide updated pricing information to the contracting agency, which, in turn, shall provide this information to the eligible recipient agencies.

(f) *Substitution of donated foods with commercial foods.* (1) The processing contract may provide for substitution of donated foods as defined in §250.2 except that donated beef and donated pork shall not be substitutable. Any substitution of commercial product for commodities other than beef, pork, or poultry is subject to a 100-percent yield requirement. Under the 100-percent yield requirement, the processor is responsible for any manufacturing losses.

(i) All components of commercial foods substituted for any donated food must be of U.S. origin and identical or superior in every particular of the donated food specification. Records must be maintained to allow independent verification that the substituted food meets the above condition.

(ii) Poultry shall be eligible for limited substitution. Any processors that wish to substitute poultry must have a plan approved by both FNS and AMS. Only bulk pack chicken, chicken parts, and bulk pack turkey delivered by USDA vendors to the processor are eligible for substitution. No backhauled poultry product may be substituted. (Backhauled product is typically cut-up frozen poultry parts delivered to schools that may be turned over to processors for further processing at a later time.) Should a processor want to amend its approved plan, it shall submit any amendments to USDA for approval prior to implementing such amendments.

(A) Substitution of commercial poultry may occur in advance of the actual receipt of the donated poultry by the processor. Should a processor choose to use the substitution option prior to the

commodity being purchased by the USDA, the processor shall assume all risks. Any donated poultry not used in end products because of substitution shall only be used by the processor at one of its facilities in other commercially processed products and cannot be sold as an intact unit. However, in lieu of processing the donated poultry, the processor may use the commodity product to fulfill other USDA contracts awarded for delivery to another processor provided all terms of the other contract are met. Any variation between the amount of commercial poultry substituted and the amount of donated poultry received by the processor shall be adjusted according to guidelines furnished by USDA.

(B) The substitution plan shall contain a step-by-step description of how production will be monitored; a complete description of the records that will be maintained for the commercial poultry substituted for the donated poultry and the disposition of the donated poultry delivered; and how the substitution will be tracked for the purpose of monthly reporting to the State distributing agencies. Poultry substitution shall not be subject to the 100-percent yield requirement; however, the AMS Grading Service must verify processing yields. Should a processor choose to have all production of a specific end product, identified by name and product code, produced under AMS grading, then the label "Contains Commodities Donated by the United States Department of Agriculture. This Product Shall Only Be Sold to Eligible Recipient Agencies" shall not be required. Finished poultry end products that have not been produced under AMS grading supervision may not be substituted for finished commodity end products.

(iii) Processors shall maintain documentation that they have not reduced their level of commercial production because of participation in the State processing program.

(2) Documentation must be maintained by both parties in accordance with §250.19. Where commercial food is authorized to be substituted for any donated food, the processor shall maintain records to substantiate that it continues to acquire on the commercial market sufficient purchases of substitutable food for commercial production and any amounts necessary to meet the 100 percent yield requirement. When there is substitution, the donated foods shall be used by the processor and shall not otherwise be sold or disposed of in bulk form. The applicable Federal acceptance service shall, upon request by the Department, the contracting agency or the distributing agency determine if the quality analysis meets the requirements set forth in the original USDA procurement specification and, in the case of concentrated skim milk replacing donated nonfat dry milk, determine if the concentrated skim milk contains the amount of milk solids as specified in the contract. When donated foods are nonsubstitutable, the applicable Federal acceptance service shall ensure against unauthorized substitutions, and verify that quantities of donated foods used are as specified in the contract.

(3) When concentrated skim milk is used to replace donated nonfat dry milk, the contract shall also specify (in addition to the requirements in paragraph (c) of this section):

(i) The percent of milk solids that, at a minimum, must be contained in the concentrated skim milk;

(ii) The weight ratio of concentrated skim milk to donated nonfat dry milk;

(A) The weight ratio is the weight of concentrated skim milk which equals one pound of donated nonfat dry milk, based on milk solids;

(B) In calculating this weight, nonfat dry milk shall be considered as containing 96.5 percent milk solids;

(C) If more than one concentration of concentrated skim milk is to be used, a separate weight ratio must be specified for each concentration;

(iii) The processor's method of verifying that the milk solids content of the concentrated skim milk is as stated in the contract;

(iv) A requirement that inventory drawdowns of donated nonfat dry milk shall be limited to an amount equal to the amount of concentrated skim milk, based on the weight ratio, used to produce the end product;

(v) A requirement that the contract value of donated food for a given amount of concentrated skim milk used to produce an end product is the value of the equivalent amount of nonfat dry milk, based on the weight ratio of the two foods;

(vi) A requirement that the concentrated skim milk shall be produced in a USDA approved plant or in a plant approved by the appropriate regulatory authority for the processing of Grade A milk products; and

(vii) A requirement that documentation sufficient to substantiate compliance with the contract provisions shall be maintained in accordance with §250.19(a).

(4) Title to the substituted food shall transfer to the contracting agency upon the initiation of the processing of the end product containing the substituted food. Title to the equivalent amount of donated food shall transfer to the processor at the same time (except when the substitution is necessary to meet the 100 percent yield requirement or to otherwise replace missing or out-of-condition donated food). As with the processing of donated poultry into end products, AMS graders must monitor the processing of any substituted commercial poultry to ensure that program integrity is maintained. Once title has transferred, the processor shall use the substituted food in accordance with the terms and conditions of this part.

(g) *Meat and poultry inspection programs.* When donated meat or poultry products are processed or when any commercial meat or poultry products are incorporated into an end product containing one or more donated foods, all of the processing shall be performed in plants under continuous Federal meat or poultry inspection, or continuous State meat or poultry inspection in States certified to have programs at least equal to the Federal inspection programs. In addition to FSIS inspection, all donated meat and poultry processing shall be performed under AMS acceptance service grading. The cost of this service shall be borne by the processor. In the event the processor can demonstrate that grading is impractical, exemptions in the use of acceptance services shall be approved by the distributing agency prior to processing each order. Exemptions

in the use of acceptance service graders will be authorized on the basis of each order to be processed provided the processor can demonstrate:

- (1) That even with ample notification time, the processor cannot secure the services of a grader,
- (2) That the cost for a grader would be unduly excessive relative to the value of foods being processed and that production runs cannot be combined or scheduled to enable prorating of the costs of services among the purchasers of end products, or
- (3) The documented urgency of the recipient agency's need for the end product precludes the use of acceptance services.

Prior to approving a processor's request to waive the acceptance service requirement the distributing agency shall ensure, based on the processor's past performance, that the quality of the end product produced will in no way be adversely affected as a result of waiving the requirement.

(h) *Certification by acceptance service.* (1) All processing activities of donated foods shall be subject to review and audit by the Department, including the applicable Federal acceptance service. The contracting agency may also require acceptance and certification by such acceptance service in addition to the requirements set forth in paragraph (g) of this section.

(2) In the case of substitutable donated foods, in deciding whether to require acceptance and certification, the contracting agency should consider the dollar value of the donated foods delivered to the processor.

(3) When contracting agencies require certification in accordance with paragraph (h) (1) or (2) of this section, the degree of acceptance and certification necessary under the processing contract shall be determined by the appropriate Federal acceptance service after consultation with the distributing agency concerning the type and volume of the donated foods and anticipated value of end products to be processed. The cost of this service shall also be borne by the processor.

(i) *Labeling end products.* (1) Except when end products contain donated foods that are substituted under paragraph (f) of this section, the exterior shipping containers of end products and, where practicable, the individual wrappings or containers of end products, shall be clearly labeled "Contains Commodities Donated by the United States Department of Agriculture. This Product Shall Be Sold Only to Eligible Recipient Agencies."

(2) Labels on all end products shall meet applicable Federal labeling requirements.

(3) When a processor makes any claim with regard to an end product's contribution toward meal requirements of any child nutrition program, the processor shall follow procedures established by FNS, the Food Safety and Inspection Service of the Department, the National Marine Fisheries Service of the U.S. Department of Commerce or other applicable Federal agencies for approval of such labels.

(j) *Termination of processing contracts.* (1) When contracts are terminated or completed and the processor has commodities remaining in inventory, the processor shall be directed, at the option of the distributing agency and the FNS Regional Office, to do the following:

(i) With respect to nonsubstitutable commodities, the processor shall:

(A) Return the commodities to the contracting agency;

(B) Pay the contracting agency for the commodities based on the Department's replacement costs, determined by using the most recent data provided by the Department; or

(C) Pay the contracting agency for the commodities based on the contract value stated in the processor's contract;

(D) Pay the contracting agency the CCC unrestricted sales price;

(ii) With respect to substitutable commodities, the processor shall:

(A) With the concurrence of any affected contracting agencies, transfer the donated foods to the accounts of other contracting agencies with which the processor has contracts;

(B) Return the foods donated to the contracting agency;

(C) Replace the commodities with the same foods of equal or better quality as certified in accordance with paragraph (f)(2) of this section and deliver such foods to the contracting agency;

(D) Pay the contracting agency for the commodities based on the Department's replacement costs, determined by using the most recent data provided by the Department; or

(E) Pay the contracting agency for the commodities based on the contract value stated in the processor's contract.

(F) Pay the contracting agency the CCC unrestricted sales price.

(2) When a processor's contract is terminated at the processor's request or due to noncompliance or negligence on the part of the processor and commodities remaining in the processor's inventory are transported pursuant to paragraph (j)(1)(i)(A), (j)(1)(ii)(B) or (j)(1)(ii)(C) of this section, the processor shall pay the transportation costs.

(3) Funds received by distributing agencies upon termination of contracts shall be used in accordance with §250.17(c).

(k) *Refund payments.* (1) When end products are sold to recipient agencies in accordance with the refund provisions of paragraph (d) or (e) of this section, each recipient agency shall submit refund applications to the processor within 30 days from the close of the month in which the sales were made, except that recipient agencies may submit refund applications to a single

processor on a Federal fiscal quarterly basis if the total anticipated refund due for all purchases of product from that processor during the quarter is 25 dollars or less.

(2) In instances when refunds are to be provided to distributors which have sold end products to recipient agencies at a discount, distributors shall submit refund applications to processors within 30 days from the close of the month in which the sales were made of the date of sale to recipient agencies in order to receive benefits.

(3) Not later than 30 days after receipt of the application by the processor, the processor shall make a payment to the recipient agency or distributor equal to the stated contract value of the donated foods contained in the purchased end products covered by the refund application, except that processors may group together refund applications for a single recipient agency on a Federal fiscal quarterly basis if the total anticipated refund due that recipient agency during the quarter is 25 dollars or less.

(l) *Contract approvals.* Distributing agencies shall review and approve processing contracts entered into or renewed by subdistributing and recipient agencies prior to the delivery of commodities for processing under such contracts. The distributing agency which enters into or approves a processing contract shall provide a copy of the contract and of these regulations to the processors, forward a copy of the contract to the appropriate FNS Regional Office, and retain a copy for its files.

(m) *Performance reports.* (1) Processors shall be required to submit to distributing agencies monthly reports of performance under each processing contract with year-to-date totals. Processors contracting with agencies other than a distributing agency shall submit such reports to the distributing agency having authority over that particular contracting agency. Performance reports shall be postmarked no later than the final day of the month following the reporting period; however, the final performance report for the contract period shall be postmarked no later than 60 postmarked days from the close of the contract year. The report shall include:

(i) A list of all recipient agencies purchasing end products under the contract;

(ii) Donated-food inventory at the beginning of the reporting period;

(iii) Amount of donated foods received during the reporting period;

(iv) Amount of donated foods transferred to and/or from existing inventory;

(v) Number of units approved end products delivered to each eligible recipient agency during the reporting period and the number of pounds of each donated food represented by these delivered end products;

(vi) Donated food inventory at the end of the reporting period;

(vii) A certification statement that sufficient donated foods are in inventory or on order to account for the quantities needed for production of end products for State processing contracts

and that the processor has on hand or on order adequate quantities of foods purchased commercially to meet the processor's production requirements for commercial sales.

(2) In addition to reporting the information identified in paragraph (m)(1) of this section, processors which substitute concentrated skim milk for donated nonfat dry milk shall also report the following information for the reporting period:

(i) The number of pounds of nonfat dry milk used in commercial products sold to outlets which are not recipient agencies; and

(ii) The number of pounds of concentrated skim milk, and the percent of milk solids contained therein, used in end products sold to recipient agencies.

(3) Distributing agencies shall review and analyze reports submitted by processors to ensure that performance under each contract is in accordance with the provisions set forth in this section.

(n) *Inventory controls.* (1) Distributing agencies shall monitor processor inventories to ensure that the quantity of donated foods for which a processor is accountable is the lowest cost-efficient level but in no event more than a six-month supply based on the processor's average monthly usage, unless a higher level has been specifically approved by the distributing agency on the basis of a written justification submitted by the processor. Under no circumstances should the amount of donated foods ordered by the contracting agency for processing purposes be in excess of anticipated usage or beyond the processor's ability to accept and store the donated foods at any one time. Distributing agencies shall make no further distribution to processors whose inventories exceed these limits until such inventories have been reduced.

(2) For processors substituting concentrated skim milk for donated nonfat dry milk, distributing agencies shall review the processors' monthly performance reports to ensure that:

(i) Donated nonfat dry milk inventory is being drawn down based on the amount of milk solids contained in the concentrated skim milk which was used in end products sold to eligible recipient agencies;

(ii) An amount of milk solids equivalent to the amount in the donated nonfat dry milk is contained in end products sold to eligible recipient agencies; and

(iii) Donated nonfat dry milk is not being sold in bulk form.

(3) The last monthly performance report for the contract period, as required in paragraph (m)(1) of this section, shall serve as the annual reconciliation report. As a part of the annual reconciliation, the distributing agency must ensure that a processor with excessive inventories of donated foods reduces such inventories. However, if this action is not practical, the distributing agency must require the processor to pay for the donated foods held in excess of allowed levels, at the replacement value of the donated foods. A processor whose contract has been completed or terminated shall return or pay for commodities as required by subsection (j).

(4) Distributing agencies shall not submit food requisitions for processors reporting no sales activity during the prior year's contract period unless documentation is submitted by the processor which outlines specific plans for product promotion or sales expansion.

(o) *Cooperation with administering agencies for child nutrition programs.* If the distributing agency which enters into or approves contracts for end products to be used in a child nutrition program does not also administer such program, it shall collaborate with the administering agency by;

(1) Giving that agency an opportunity to review all such contracts to determine whether end products to be provided contribute to required nutritional standards for reimbursement under the applicable regulations for such program (7 CFR parts 210, 225, and 226) or are otherwise suitable for use in such program;

(2) Consulting with the agency with regard to the labeling requirements for the end products; and

(3) Otherwise requesting technical assistance as needed from that agency.

(p) *Processing activity guidance.* Distributing agencies shall develop and provide a processing manual or similar procedural material for guidance to contracting agencies, recipient agencies, and processors. Distributing agencies must revise these materials as necessary to reflect policy and regulatory changes. This guidance material shall be provided to contracting agencies, recipient agencies and processors at the time of the approval of the initial agreement by the distributing agency, when there have been regulatory or policy changes which necessitate changes in the guidance materials, and upon request. The manual shall include, at a minimum, statements of the distributing agency's policies and procedures on

(1) Contract approval,

(2) Monitoring and review of processing activities,

(3) Recordkeeping and reporting requirements,

(4) inventory controls, and (5) refund applications.

(q) *Waiver authority.* The Food and Nutrition Service may waive any of the requirements contained in this part for the purpose of conducting demonstration projects to test program changes designed to improve the State processing of donated foods.

(Approved by the Office of Management and Budget under control number 0584-0007)

[53 FR 20226, June 3, 1988, as amended at 53 FR 20598, June 6, 1988; 53 FR 27476, July 21, 1988; 53 FR 46080, Nov. 16, 1988; 54 FR 7525, Feb. 22, 1989; 54 FR 25564, June 16, 1989; 58 FR 39122, July 22, 1993; 59 FR 62984, Dec. 7, 1994; 61 FR 5272, Feb. 12, 1996; 67 FR 65015, Oct. 23, 2002; 81 FR 23110, Apr. 19, 2016; 81 FR 39869, June 20, 2016; 81 FR 75683, Nov. 1, 2016]

EDITORIAL NOTE: At 81 FR 23110, Apr. 19, 2016, §250.30 was amended by revising paragraph (c)(1)(vi). At 81 FR 39869, June 20, 2016, the regulatory text set out at 81 FR 23110 for (c)(1)(vi) was removed though the regulatory instruction remained; therefore, the revision of (c)(1)(vi) could not be incorporated.

## **Subpart D—Donated Foods in Contracts With Food Service Management Companies**

SOURCE: 73 FR 46185, Aug. 8, 2008, unless otherwise noted.

### **§250.50 Contract requirements and procurement.**

(a) *Contract requirements.* Prior to donated foods being made available to a food service management company, the recipient agency must enter into a contract with the food service management company. The contract must ensure that all donated foods received for use by the recipient agency in the school or fiscal year, as applicable, are used in the recipient agency's food service, or that commercially purchased foods are used in place of such donated foods only in accordance with the requirements in §250.51(d). Contracts between recipient agencies in child nutrition programs and food service management companies must also ensure compliance with other requirements in this subpart relating to donated foods, as well as other Federal requirements in 7 CFR parts 210, 220, 225, or 226, as applicable. Contracts between other recipient agencies—i.e., charitable institutions and recipient agencies utilizing TEFAP foods—and food service management companies are not subject to the other requirements in this subpart.

(b) *Types of contracts.* Recipient agencies may enter into a fixed-price or a cost-reimbursable contract with a food service management company, except that recipient agencies in CACFP are prohibited from entering into cost-reimbursable contracts, in accordance with 7 CFR part 226. Under a fixed-price contract, the recipient agency pays a fixed cost per meal provided or a fixed cost for a certain time period. Under a cost-reimbursable contract, the food service management company charges the recipient agency for food service operating costs, and also charges fixed fees for management or services.

(c) *Procurement requirements.* The recipient agency must meet Departmental procurement requirements in 7 2 CFR part 200, subpart D, and USDA implementing regulations at 2 CFR parts 400 and 416, as applicable, in obtaining the services of a food service management company, as well as applicable requirements in 7 CFR parts 210, 220, 225, or 226. The recipient agency must ensure that procurement documents, as well as contract provisions, include any donated food activities that a food service management company is to perform, such as those activities listed in paragraph (d) of this section. The procurement and contract must also specify the method used to determine the donated food values to be used in crediting, or the actual values assigned, in accordance with §250.51. The method used to determine the donated food values may not be established through a post-award negotiation, or by any other method that may directly or indirectly alter the terms and conditions of the procurement or contract.

(d) *Activities relating to donated foods.* A food service management company may perform specific activities relating to donated foods, such as those listed in this paragraph (d), in accordance with procurement documents and its contract with the recipient agency. Such activities may also include the procurement of processed end products on behalf of the recipient agency. Such procurement must ensure compliance with the requirements in subpart C of this part and with the provisions of the distributing or recipient agency's processing agreements, and must ensure crediting of the recipient agency for the value of donated foods contained in such end products at the processing agreement value. Although the food service management company may procure processed end products on behalf of the recipient agency, it may not itself enter into the processing agreement with the processor required in subpart C of this part. Other donated food activities that the food service management company may perform include:

- (1) Preparing and serving meals;
- (2) Ordering or selection of donated foods, in coordination with the recipient agency, and in accordance with §250.58(a);
- (3) Storage and inventory management of donated foods, in accordance with §250.52; and
- (4) Payment of processing fees or submittal of refund requests to a processor on behalf of the recipient agency, or remittance of refunds for the value of donated foods in processed end products to the recipient agency, in accordance with the requirements in subpart C of this part.

[73 FR 46185, Aug. 8, 2008, as amended at 81 FR 23111, Apr. 19, 2016]

## **§250.51 Crediting for, and use of, donated foods.**

(a) *Crediting for donated foods.* In both fixed-price and cost-reimbursable contracts, the food service management company must credit the recipient agency for the value of all donated foods received for use in the recipient agency's meal service in a school year or fiscal year (including both entitlement and bonus foods). Such requirement includes crediting for the value of donated foods contained in processed end products if the food service management company's contract requires it to:

- (1) Procure processed end products on behalf of the recipient agency; or
- (2) Act as an intermediary in passing the donated food value in processed end products on to the recipient agency.

(b) *Method and frequency of crediting.* The recipient agency may permit crediting for the value of donated foods through invoice reductions, refunds, discounts, or other means. However, all forms of crediting must provide clear documentation of the value received from the donated foods—e.g., by separate line item entries on invoices. If provided for in a fixed-price contract, the recipient agency may permit a food service management company to pre-credit for donated foods. In pre-crediting, a deduction for the value of donated foods is included in the established fixed price per meal. However, the recipient agency must ensure that the food service

management company provides an additional credit for any donated foods not accounted for in the fixed price per meal—e.g., for donated foods that are not made available until later in the year. In cost-reimbursable contracts, crediting may be performed by disclosure; i.e., the food service management company credits the recipient agency for the value of donated foods by disclosing, in its billing for food costs submitted to the recipient agency, the savings resulting from the receipt of donated foods for the billing period. In all cases, the recipient agency must require crediting to be performed not less frequently than annually, and must ensure that the specified method of valuation of donated foods permits crediting to be achieved in the required time period. A school food authority must also ensure that the method, and timing, of crediting does not cause its cash resources to exceed the limits established in 7 CFR 210.9(b)(2).

(c) *Donated food values required in crediting.* The recipient agency must ensure that, in crediting it for the value of donated foods, the food service management company uses the donated food values determined by the distributing agency, in accordance with §250.58(e), or, if approved by the distributing agency, donated food values determined by an alternate means of the recipient agency's choosing. For example, the recipient agency may, with the approval of the distributing agency, specify that the value will be the average price per pound for a food, or for a group or category of foods (e.g., all frozen foods or cereal products), as listed in market journals over a specified period of time. However, the method of determining the donated food values to be used in crediting must be included in procurement documents and in the contract, and must result in the determination of actual values; e.g., the average USDA purchase price for the period of the contract with the food vendor, or the average price per pound listed in market journals over a specified period of time. Negotiation of such values is not permitted. Additionally, the method of valuation must ensure that crediting may be achieved in accordance with paragraph (b) of this section, and at the specific frequency established in procurement documents and in the contract.

(d) *Use of donated foods.* The food service management company must use all donated beef, pork, and all processed end products, in the recipient agency's food service, and must use all other donated foods, or commercially purchased foods of the same generic identity, of U.S. origin, and of equal or better quality than the donated foods, in the recipient agency's food service (unless the contract specifically stipulates that the donated foods, and not such commercial substitutes, be used).

[73 FR 46185, Aug. 8, 2008, as amended at 81 FR 23111, Apr. 19, 2016]

## **§250.52 Storage and inventory management of donated foods.**

(a) *General requirements.* The food service management company must meet the requirements for the safe storage and control of donated foods in §250.14(a).

(b) *Storage and inventory with commercially purchased foods.* The food service management company may store and inventory donated foods together with foods it has purchased commercially for the school food authority's use (unless specifically prohibited in the contract). It may store and inventory such foods together with other commercially purchased foods only to

the extent that such a system ensures compliance with the requirements for the use of donated foods in §250.51(d)—*i.e.*, use all donated beef and pork, and all end products in the food service, and use all other donated foods or commercially purchased foods of the same generic identity, of U.S. origin, and of equal or better quality than the donated foods, in the food service.

Additionally, under cost-reimbursable contracts, the food service management company must ensure that its system of inventory management does not result in the recipient agency being charged for donated foods.

*(c) Disposition of donated foods and credit reconciliation upon termination of the contract.*

When a contract terminates, and is not extended or renewed, the food service management company must return all unused donated beef, pork, and processed end products, and must, at the recipient agency's discretion, return other unused donated foods. The recipient agency must ensure that the food service management company has credited it for the value of all donated foods received for use in the recipient agency's meal service in a school year or fiscal year, as applicable.

[81 FR 23111, Apr. 19, 2016]

## **§250.53 Contract provisions.**

*(a) Required contract provisions in fixed-price contracts.* The following provisions relating to the use of donated foods must be included, as applicable, in a recipient agency's fixed-price contract with a food service management company. Such provisions must also be included in procurement documents. The required provisions are:

(1) A statement that the food service management company must credit the recipient agency for the value of all donated foods received for use in the recipient agency's meal service in the school year or fiscal year (including both entitlement and bonus foods), and including the value of donated foods contained in processed end products, in accordance with the contingencies in §250.51(a);

(2) The method and frequency by which crediting will occur, and the means of documentation to be utilized to verify that the value of all donated foods has been credited;

(3) The method of determining the donated food values to be used in crediting, in accordance with §250.51(c), or the actual donated food values;

(4) Any activities relating to donated foods that the food service management company will be responsible for, in accordance with §250.50(d), and assurance that such activities will be performed in accordance with the applicable requirements in 7 CFR part 250;

(5) A statement that the food service management company will use all donated beef and pork products, and all processed end products, in the recipient agency's food service;

(6) A statement that the food service management company will use all other donated foods, or will use commercially purchased foods of the same generic identity, of U.S. origin, and of equal or better quality than the donated foods, in the recipient agency's food service;

(7) Assurance that the procurement of processed end products on behalf of the recipient agency, as applicable, will ensure compliance with the requirements in subpart C of 7 CFR part 250 and with the provisions of distributing or recipient agency processing agreements, and will ensure crediting of the recipient agency for the value of donated foods contained in such end products at the processing agreement value;

(8) Assurance that the food service management company will not itself enter into the processing agreement with the processor required in subpart C of 7 CFR part 250;

(9) Assurance that the food service management company will comply with the storage and inventory requirements for donated foods;

(10) A statement that the distributing agency, subdistributing agency, or recipient agency, the Comptroller General, the Department of Agriculture, or their duly authorized representatives, may perform onsite reviews of the food service management company's food service operation, including the review of records, to ensure compliance with requirements for the management and use of donated foods;

(11) A statement that the food service management company will maintain records to document its compliance with requirements relating to donated foods, in accordance with §250.54(b); and

(12) A statement that extensions or renewals of the contract, if applicable, are contingent upon the fulfillment of all contract provisions relating to donated foods.

(b) *Required contract provisions in cost-reimbursable contracts.* A cost-reimbursable contract must include the same provisions as those required for a fixed-price contract in paragraph (a) of this section. Such provisions must also be included in procurement documents. However, a cost-reimbursable contract must also contain a statement that the food service management company will ensure that its system of inventory management will not result in the recipient agency being charged for donated foods.

[73 FR 46185, Aug. 8, 2008, as amended at 81 FR 23111, Apr. 19, 2016]

## **§250.54 Recordkeeping and reviews.**

(a) *Recordkeeping requirements for the recipient agency.* The recipient agency must maintain the following records relating to the use of donated foods in its contract with the food service management company:

(1) The donated foods and processed end products received and provided to the food service management company for use in the recipient agency's food service;

(2) Documentation that the food service management company has credited it for the value of all donated foods received for use in the recipient agency's food service in the school or fiscal year, including, in accordance with the requirements in §250.51(a), the value of donated foods contained in processed end products; and

(3) The actual donated food values used in crediting.

(b) *Recordkeeping requirements for the food service management company.* The food service management company must maintain the following records relating to the use of donated foods in its contract with the recipient agency:

(1) The donated foods and processed end products received from, or on behalf of, the recipient agency, for use in the recipient agency's food service;

(2) Documentation that it has credited the recipient agency for the value of all donated foods received for use in the recipient agency's food service in the school or fiscal year, including, in accordance with the requirements in §250.51(a), the value of donated foods contained in processed end products; and

(3) Documentation of its procurement of processed end products on behalf of the recipient agency, as applicable.

(c) *Review requirements for the recipient agency.* The recipient agency must ensure that the food service management company is in compliance with the requirements of this part through its monitoring of the food service operation, as required in 7 CFR parts 210, 225, or 226, as applicable. The recipient agency must also conduct a reconciliation at least annually (and upon termination of the contract) to ensure that the food service management company has credited it for the value of all donated foods received for use in the recipient agency's food service in the school or fiscal year, including, in accordance with the requirements in §250.51(a), the value of donated foods contained in processed end products.

(d) *Departmental reviews of food service management companies.* The Department may conduct reviews of food service management company operations, as necessary, to ensure compliance with the requirements of this part with respect to the use and management of donated foods.

## **Subpart E—National School Lunch Program (NSLP) and Other Child Nutrition Programs**

SOURCE: 73 FR 46185, Aug. 8, 2008, unless otherwise noted.

### **§250.56 Provision of donated foods in NSLP.**

(a) *Distribution of donated foods in NSLP.* The Department provides donated foods in NSLP to distributing agencies. Distributing agencies provide donated foods to school food authorities that participate in NSLP for use in serving nutritious lunches or other meals to schoolchildren in their

nonprofit school food service. The distributing agency must confirm the participation of school food authorities in NSLP with the State administering agency (if different from the distributing agency). In addition to requirements in this part relating to donated foods, distributing agencies and school food authorities in NSLP must adhere to Federal regulations in 7 CFR part 210, as applicable.

(b) *Types of donated foods distributed.* The Department purchases a wide variety of foods for distribution in NSLP each school year. A list of available foods is posted on the FNS Web site, for access by distributing agencies and school food authorities. In addition to Section 6 foods (42 U.S.C. 1755) as described in paragraph (c) of this section, the distributing agency may also receive Section 14 donated foods (42 U.S.C. 1762(a)), and donated foods under Section 32 (7 U.S.C. 612c), Section 416 (7 U.S.C. 1431), or Section 709 (7 U.S.C. 1446a-1), as available.

(c) *National per-meal value of donated foods.* For each school year, the distributing agency receives, at a minimum, the national per-meal value of donated foods, as established by Section 6(c) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1755(c)), multiplied by the number of reimbursable lunches served in the State in the previous school year. The donated foods provided in this manner are referred to as Section 6 foods, or entitlement foods. The national per-meal value is adjusted each year to reflect changes in the Bureau of Labor Statistic's Producer Price Index for Foods Used in Schools and Institutions, in accordance with the Richard B. Russell National School Lunch Act. The adjusted value is published in a notice in the FEDERAL REGISTER in July of each year. Reimbursable lunches are those that meet the nutritional standards established in 7 CFR part 210, and that are reported to FNS, in accordance with the requirements in that part.

(d) *Donated food values used to credit distributing agency entitlement levels.* FNS uses the average price (cost per pound) for USDA purchases of donated food made in a contract period to credit distributing agency entitlement levels.

(e) *Cash in lieu of donated foods.* States that phased out their food distribution facilities prior to July 1, 1974, are permitted to choose to receive cash in lieu of the donated foods to which they would be entitled in NSLP, in accordance with the Richard B. Russell National School Lunch Act (42 U.S.C. 1765) and with 7 CFR part 240.

## **§250.57 Commodity schools.**

(a) *Categorization of commodity schools.* Commodity schools are schools that operate a nonprofit school food service in accordance with 7 CFR part 210, but receive additional donated food assistance rather than the general cash payment available to them under Section 4 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1753). In addition to requirements in this part relating to donated foods, commodity schools must adhere to Federal regulations in 7 CFR part 210, as applicable.

(b) *Value of donated foods for commodity schools.* For participating commodity schools, the distributing agency receives donated foods valued at the sum of the national per-meal value and the value of the general cash payment available to it under Section 4 of the Richard B. Russell

National School Lunch Act (42 U.S.C. 1753), multiplied by the number of reimbursable lunches served by commodity schools in the previous school year. From the total value of donated food assistance for which it is eligible, a commodity school may elect to receive up to 5 cents per meal in cash to cover processing and handling expenses related to the use of donated foods. In addition to Section 6 and Section 14 foods under the Richard B. Russell National School Lunch Act (42 U.S.C. 1755 and 1762(a)), the distributing agency may also receive donated foods under Section 32 (7 U.S.C. 612c), Section 416 (7 U.S.C. 1431), or Section 709 (7 U.S.C. 1446a-1), as available, for commodity schools.

## **§250.58 Ordering donated foods and their provision to school food authorities.**

(a) *Ordering and distribution of donated foods.* The distributing agency must ensure that school food authorities are able to submit donated food orders through the FNS electronic donated foods ordering system, or through a comparable electronic food ordering system. The distributing agency must ensure that all school food authorities have the opportunity to provide input at least annually in determining the donated foods from the full list that are made available to them for ordering in the FNS electronic donated foods ordering system or other comparable electronic ordering system. The distributing agency must ensure distribution to school food authorities of all such ordered donated foods that may be distributed to them in a cost-effective manner (including the use of split shipments, as necessary), and that they may utilize efficiently and without waste.

(b) *Value of donated foods offered to school food authorities.* In accordance with Section 6(c) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1755(c)), the distributing agency must offer the school food authority, at a minimum, the national per-meal value of donated food assistance multiplied by the number of reimbursable lunches served by the school food authority in the previous school year. This is referred to as the commodity offer value. For a commodity school, the distributing agency must offer the sum of the national per-meal value of donated foods and the value of the general cash payment available to it under Section 4 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1753), multiplied by the number of reimbursable lunches served by the school in the previous school year. The school food authority may also receive bonus foods, as available, in addition to the Section 6 foods.

(c) *Receipt of less donated foods than the commodity offer value.* In certain cases, the school food authority may receive less donated foods than the commodity offer value in a school year. This “adjusted” value of donated foods is referred to as the adjusted assistance level. For example, the school food authority may receive an adjusted assistance level if:

- (1) The distributing agency, in consultation with the school food authority, determines that the school food authority cannot efficiently utilize the commodity offer value of donated foods; or
- (2) The school food authority does not order, or select, donated foods equal to the commodity offer value that can be cost-effectively distributed to it.

(d) *Receipt of more donated foods than the commodity offer value.* The school food authority may receive more donated foods than the commodity offer value if the distributing agency, in consultation with the school food authority, determines that the school food authority may efficiently utilize more donated foods than the commodity offer value, and more donated foods are available for distribution. This may occur, for example, if other school food authorities receive less than the commodity offer value of donated foods for one of the reasons described in paragraph (c) of this section.

(e) *Donated food value in crediting.* In meeting the commodity offer value of donated foods for the school food authority, the distributing agency must use the cost-per-pound donated food prices posted annually by USDA, the most recently published cost-per-pound price in the USDA donated foods catalog, and/or a rolling average of the USDA prices (average cost per pound). The distributing agency must credit the school food authority using the USDA purchase price (cost-per-pound), and update the price at least semi-annually to reflect the most recent USDA purchase price.

[73 FR 46185, Aug. 8, 2008, as amended at 81 FR 23111, Apr. 19, 2016]

## **§250.59 Storage, control, and use of donated foods.**

(a) *Storage and inventory management.* The distributing agency must ensure compliance with requirements in §§250.12 and 250.13 in order to ensure the safe and effective storage and inventory management of donated foods, and their efficient and cost-effective distribution to school food authorities. The school food authority must ensure compliance with requirements in §210.13 of this chapter and §§250.13 and 250.14 to ensure the safe and sanitary storage, inventory management, and use of donated foods and purchased foods. In accordance with §250.14(c), the school food authority may commingle donated foods and purchased foods in storage and maintain a single inventory record of such commingled foods, in a single inventory management system.

(b) *Use of donated foods in the nonprofit school food service.* The school food authority must use donated foods, as much as is practical, in the lunches served to schoolchildren, for which they receive an established per-meal value of donated food assistance each school year. However, the school food authority may also use donated foods in other activities of the nonprofit school food service. Revenues received from such activities must accrue to the school food authority's nonprofit school food service account, in accordance with §210.14 of this chapter. Some examples of such activities in which donated foods may be used include:

(1) School breakfasts or other meals served in child nutrition programs;

(2) A la carte foods sold to schoolchildren;

(3) Meals served to adults directly involved in the operation and administration of the nonprofit school food service, and to other school staff; and

(4) Training in nutrition, health, food service, or general home economics instruction for students.

(c) *Use of donated foods outside of the nonprofit school food service.* The school food authority should not use donated foods in meals or other activities that do not benefit primarily schoolchildren, such as banquets or catered events. However, as their use in such activities may not always be avoided (*e.g.*, if donated foods are commingled with purchased foods in a single inventory management system), the school food authority must ensure reimbursement to the nonprofit school food service for the value of donated foods used in such activities. When such reimbursement may not be based on actual usage of donated foods (*e.g.*, in a single inventory management system), the school food authority must establish an alternate method of reimbursement—*e.g.*, by including the current per-meal value of donated food assistance in the price charged for the meal or other activity.

(d) *Use of donated foods in a contract with a food service management company.* When the school food authority contracts with a food service management company to conduct the food service, in accordance with §210.16 of this chapter, it must ensure compliance with requirements in subpart D of this part, which address the treatment of donated foods under such contract. The school food authority must also ensure compliance with the use of donated foods in paragraphs (b) and (c) of this section under its contract with a food service management company.

(e) *School food authorities acting as a collective unit.* Two or more school food authorities may conduct activities of the nonprofit school food service as a collective unit (*e.g.*, in a school co-op or consortium), including activities relating to donated foods. Such activities must be conducted in accordance with a written agreement or contract between the parties. The school food authority collective unit is subject to the same requirements as a single school food authority in conducting such activities. For example, the school food authority collective unit may use a single inventory management system in its storage and control of purchased and donated foods.

[81 FR 23111, Apr. 19, 2016]

## **§250.60 Child and Adult Care Food Program (CACFP).**

(a) *Distribution of donated foods in CACFP.* The Department provides donated foods in CACFP to distributing agencies, which provide them to child care and adult care institutions participating in CACFP for use in serving nutritious lunches and suppers to eligible recipients. Distributing agencies and child care and adult care institutions must also adhere to Federal regulations in 7 CFR part 226, as applicable.

(b) *Types and quantities of donated foods distributed.* For each school year, the distributing agency receives, at a minimum, the national per-meal value of donated food assistance (or cash in lieu of donated foods) multiplied by the number of reimbursable lunches and suppers served in the State in the previous school year, as established in Section 6(c) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1755(c)). The national per-meal value is adjusted each year to reflect changes in the Bureau of Labor Statistic's Producer Price Index for Foods Used in Schools and Institutions. The adjusted per-meal value is published in a notice in the FEDERAL

REGISTER in July of each year. Reimbursable lunches and suppers are those meeting the nutritional standards established in 7 CFR part 226. The number of reimbursable lunches and suppers may be adjusted during, or at the end of the school year, in accordance with 7 CFR part 226. In addition to Section 6 entitlement foods (42 U.S.C. 1755(c)), the distributing agency may also receive Section 14 donated foods (42 U.S.C. 1762(a)), and donated foods under Section 32 (7 U.S.C. 612c), Section 416 (7 U.S.C. 1431), or Section 709 (7 U.S.C. 1446a-1), as available, for distribution to child care and adult care institutions participating in CACFP.

(c) *Cash in lieu of donated foods.* In accordance with the Richard B. Russell National School Lunch Act, and with 7 CFR part 226, the State administering agency must determine whether child care and adult care institutions participating in CACFP wish to receive donated foods or cash in lieu of donated foods, and ensure that they receive the preferred form of assistance. The State administering agency must inform the distributing agency (if a different agency) which institutions wish to receive donated foods and must ensure that such foods are provided to them. However, if the State administering agency, in consultation with the distributing agency, determines that distribution of such foods would not be cost-effective, it may, with the concurrence of FNS, provide cash payments to the applicable institutions instead.

(d) *Use of donated foods in a contract with a food service management company.* A child care or adult care institution may use donated foods in a contract with a food service management company to conduct its food service. The contract must meet the requirements in subpart D of this part with respect to donated foods, and must also meet requirements in 7 CFR part 226, 2 CFR part 200, subpart D and appendix II, Contract Provisions for Non-Federal Entity Contracts Under Federal Awards, and USDA implementing regulations at 2 CFR parts 400 and 416, as applicable, with respect to the formation of such contracts.

(e) *Applicability of other requirements in this subpart to CACFP.* The requirements in this subpart relating to the ordering, storage and inventory management, and use of donated foods in NSLP, also apply to CACFP. However, in accordance with 7 CFR part 226, a child care or adult care institution that uses donated foods to prepare and provide meals to other such institutions is considered a food service management company.

[73 FR 46185, Aug. 8, 2008. Redesignated and amended at 81 FR 23112, Apr. 19, 2016]

## **§250.61 Summer Food Service Program (SFSP).**

(a) *Distribution of donated foods in SFSP.* The Department provides donated foods in SFSP to distributing agencies, which provide them to eligible service institutions participating in SFSP for use in serving nutritious meals to needy children primarily in the summer months, in their nonprofit food service programs. Distributing agencies and service institutions in SFSP must also adhere to Federal regulations in 7 CFR part 225, as applicable.

(b) *Types and quantities of donated foods distributed.* The distributing agency receives donated foods available under Section 6 and Section 14 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1755 and 1762), and may also receive donated foods under Section 32 (7 U.S.C. 612c), Section 416 (7 U.S.C. 1431), or Section 709 (7 U.S.C. 1446a-1), as available, for

distribution to eligible service institutions participating in SFSP. Section 6 donated foods are provided to distributing agencies in accordance with the number of meals served in the State in the previous school year that are eligible for donated food support, in accordance with 7 CFR part 225.

(c) *Distribution of donated foods to service institutions in SFSP.* The distributing agency provides donated food assistance to eligible service institutions participating in SFSP based on the number of meals served that are eligible for donated food support, in accordance with 7 CFR part 225.

(d) *Use of donated foods in a contract with a food service management company.* A service institution may use donated foods in a contract with a food service management company to conduct the food service. The contract must meet the requirements in subpart D of this part with respect to donated foods, and must also meet requirements in 7 CFR part 225, 2 CFR part 200, subpart D and appendix II, Contract Provisions for Non-Federal Entity Contracts Under Federal Awards, and USDA implementing regulations at 2 CFR parts 400 and 416, as applicable, with respect to the formation of such contracts.

(e) *Applicability of other requirements in this subpart to SFSP.* The requirements in this subpart relating to the ordering, storage and inventory management, and use of donated foods in NSLP, also apply to SFSP.

[73 FR 46185, Aug. 8, 2008. Redesignated and amended at 81 FR 23112, Apr. 19, 2016]

## **Subpart F—Household Programs**

SOURCE: 81 FR 23112, Apr. 19, 2016, unless otherwise noted.

### **§250.63 Commodity Supplemental Food Program (CSFP).**

(a) *Distribution of donated foods in CSFP.* The Department provides donated foods in CSFP to the distributing agency (*i.e.*, the State agency, in accordance with 7 CFR part 247) for further distribution in the State, in accordance with 7 CFR part 247. State agencies and recipient agencies (*i.e.*, local agencies in 7 CFR part 247) must comply with the requirements of this part in the distribution, control, and use of donated foods in CSFP, to the extent that such requirements are not inconsistent with the requirements in 7 CFR part 247.

(b) *Types of donated foods distributed.* Donated foods distributed in CSFP include Section 4(a) foods, and donated foods provided under Section 32, Section 416, or Section 709, as available.

### **§250.64 The Emergency Food Assistance Program (TEFAP).**

(a) *Distribution of donated foods in TEFAP.* The Department provides donated foods in TEFAP to the distributing agency (*i.e.*, the State agency, in accordance with 7 CFR part 251) for further distribution in the State, in accordance with 7 CFR part 251. State agencies and recipient agencies must comply with the requirements of this part in the distribution, control, and use of donated foods, to the extent that such requirements are not inconsistent with the requirements in 7 CFR part 251.

(b) *Types of donated foods distributed.* Donated foods distributed in TEFAP include Section 27 foods, and donated foods provided under Section 32, Section 416, or Section 709, as available.

## **§250.65 Food Distribution Program on Indian Reservations (FDPIR).**

(a) *Distribution of donated foods in FDPIR.* The Department provides donated foods in FDPIR to the distributing agency (*i.e.*, the State agency, in accordance with 7 CFR parts 253 and 254, which may be an Indian Tribal Organization) for further distribution, in accordance with 7 CFR parts 253 and 254. The State agency must comply with the requirements of this part in the distribution, control, and use of donated foods, to the extent that such requirements are not inconsistent with the requirements in 7 CFR parts 253 and 254.

(b) *Types of donated foods distributed.* Donated foods distributed in FDPIR include Section 4(a) foods, and donated foods provided under Section 32, Section 416, or Section 709, as available.

## **§250.66 [Reserved]**

## **Subpart G—Additional Provisions**

### **§250.67 Charitable institutions.**

(a) *Distribution to charitable institutions.* The Department provides donated foods to distributing agencies for distribution to charitable institutions, as defined in this part. A charitable institution must have a signed agreement with the distributing agency in order to receive donated foods, in accordance with §250.12(b). However, the following organizations may not receive donated foods as charitable institutions:

- (1) Schools, summer camps, service institutions, and child and adult care institutions that participate in child nutrition programs or as commodity schools; and
- (2) Adult correctional institutions that do not conduct rehabilitation programs for a majority of inmates.

(b) *Types of charitable institutions.* Some types of charitable institutions that may receive donated foods, if they meet the requirements of this section, include:

- (1) Hospitals or retirement homes;
- (2) Emergency shelters, soup kitchens, or emergency kitchens;
- (3) Elderly nutrition projects or adult day care centers;
- (4) Schools, summer camps, service institutions, and child care institutions that do not participate in child nutrition programs; and
- (5) Adult correctional institutions that conduct rehabilitation programs for a majority of inmates.

(c) *Determining service to predominantly needy persons.* To determine if a charitable institution serves predominantly needy persons, the distributing agency must use:

- (1) Socioeconomic data of the area in which the organization is located, or of the clientele served by the organization;
- (2) Data from other public or private social service agencies, or from State advisory boards, such as those established in accordance with 7 CFR 251.4(h)(4); or
- (3) Other similar data.

(d) *Types and quantities of donated foods distributed.* A charitable institution may receive donated foods under Section 4(a), Section 32, Section 416, or Section 709, as available. The distributing agency must distribute donated foods to charitable institutions based on the quantities that each may effectively utilize without waste, and the total quantities available for distribution to such institutions.

(e) *Contracts with food service management companies.* A charitable institution may use donated foods in a contract with a food service management company. The contract must ensure that all donated foods received for use by the charitable institution in a fiscal year are used in the charitable institution's food service. However, the charitable institution is not subject to the other requirements in subpart D of this part relating to the use of donated foods under such contracts.

[73 FR 46184, Aug. 8, 2008]

## **§250.68 Nutrition Services Incentive Program (NSIP).**

(a) *Distribution of donated foods in NSIP.* The Department provides donated foods in NSIP to State Units on Aging and their selected elderly nutrition projects for use in providing meals to elderly persons. NSIP is administered at the Federal level by DHHS' Administration for Community Living (ACL), which provides an NSIP grant each year to State Units on Aging. The State agencies may choose to receive all, or part, of the grant as donated foods, on behalf of its elderly nutrition projects. The Department is responsible for the purchase of the donated foods and their delivery to State Units on Aging. ACL is responsible for transferring funds to the Department for the cost of donated food purchases and for expenses related to such purchases.

(b) *Types and quantities of donated foods distributed.* Each State Unit on Aging, and its elderly nutrition projects, may receive any types of donated foods available in food distribution or child nutrition programs, to the extent that such foods may be distributed cost-effectively. Each State Unit on Aging may receive donated foods with a value equal to its NSIP grant. Each State Unit on Aging and elderly nutrition project may also receive donated foods under Section 32, Section 416, and Section 709, as available, and under Section 14 (42 U.S.C. 1762(a)).

(c) *Role of distributing agency.* The Department delivers NSIP donated foods to distributing agencies, which distribute them to elderly nutrition projects selected by each State Unit on Aging. The distributing agency may only distribute donated foods to elderly nutrition projects with which they have signed agreements. The agreements must contain provisions that describe the roles of each party in ensuring that the desired donated foods are ordered, stored, and distributed in an effective manner.

(d) *Donated food values used in crediting a State Unit on Aging's NSIP grant.* FNS uses the average price (cost per pound) for USDA purchases of a donated food made in a contract period in crediting a State Unit on Aging's NSIP grant.

(e) *Coordination between FNS and ACL.* FNS and ACL coordinate their respective roles in NSIP through the execution of annual agreements. The agreement ensures that ACL transfers funds to FNS sufficient to purchase the donated foods requested by State Units on Aging, and to meet expenses related to such purchases. The agreement also authorizes FNS to carry over any such funds that are not used in the current fiscal year to make purchases of donated foods for the appropriate State Units on Aging in the following fiscal year.

[81 FR 23113, Apr. 19, 2016]

## **§250.69 Disasters.**

(a) *Use of donated foods to provide congregate meals.* The distributing agency may provide donated foods from current inventories, either at the distributing or recipient agency level, to a disaster organization (as defined in §250.2), for use in providing congregate meals to persons in need of food assistance as a result of a Presidentially declared disaster or emergency (hereinafter referred to collectively as a “disaster”). FNS approval is not required for such use. However, the distributing agency must notify FNS that such assistance is to be provided, and the period of time that it is expected to be needed. The distributing agency may extend such period of assistance as needs dictate, but must notify FNS of such extension.

(b) *Use of donated foods for distribution to households.* Subject to FNS approval, the distributing agency may provide donated foods from current inventories, either at the distributing or recipient agency level, to a disaster organization, for distribution to households in need of food assistance because of a disaster. Such distribution may continue for the period that FNS has determined to be necessary to meet the needs of such households. However, households receiving disaster SNAP (D-SNAP) benefits are not eligible to receive such donated food assistance.

(c) *Approval of disaster organization.* Before distribution of donated foods to a disaster organization, the distributing agency must review and approve such organization's application in accordance with applicable FNS guidance, which must be submitted to the distributing agency either electronically or in written form. The distributing agency must also submit such application to FNS for review and approval before permitting distribution of donated foods to households.

(1) The disaster organization's application must, to the extent possible, include the following information:

(i) A description of the disaster situation;

(ii) The number of people requiring assistance;

(iii) The period of time for which donated foods are requested;

(iv) The quantity and types of food needed; and

(v) The number and location of sites where donated foods are to be used, to the extent that such information is known.

(2) In addition to the information required in paragraph (c)(1) of this section, disaster organizations applying to distribute donated foods to households must include the following information in their application:

(i) An explanation as to why such distribution is needed;

(ii) The method(s) of distribution available; and

(iii) A statement assuring that D-SNAP benefits and donated food assistance will not be provided simultaneously to individual households, and a description of the system that will be implemented to prevent such dual participation.

(d) *Information from households.* If the issuance of D-SNAP benefits has been approved, the distributing agency must ensure that the disaster organization obtains the following information from households receiving donated foods, and reports such information to the distributing agency:

(1) The name and address of the household members applying for assistance;

(2) The number of household members; and

(3) A statement from the head of the household certifying that the household is in need of food assistance, is not receiving D-SNAP benefits, and understands that the sale or exchange of donated foods is prohibited.

(e) *Eligibility of emergency relief workers for congregate meals.* The disaster organization may use donated foods to provide meals to any emergency relief workers at the congregate feeding site who are directly engaged in providing relief assistance.

(f) *Reporting and recordkeeping requirements.* The distributing agency must report to FNS the number and location of sites where donated foods are used in congregate meals or household distribution as these sites are established. The distributing agency must also report the types and amounts of donated foods from distributing or recipient agency storage facilities used in disaster assistance, utilizing form FNS-292A, *Report of Commodity Distribution for Disaster Relief*, which must be submitted electronically, within 45 days from the termination of disaster assistance. This form must also be used to request replacement of donated foods, in accordance with paragraph (g) of this section. The distributing agency must maintain records of reports and other information relating to disasters.

(g) *Replacement of donated foods.* In order to ensure replacement of donated foods used in disasters, the distributing agency must submit to FNS a request for such replacement, utilizing form FNS-292A, *Report of Commodity Distribution for Disaster Relief*, within 45 days following the termination of disaster assistance. The distributing agency may request replacement of foods used from inventories in which donated foods are commingled with other foods (*i.e.*, at storage facilities of recipient agencies utilizing single inventory management), if the recipient agency received donated foods of the same type as the foods used during the year preceding the onset of the disaster assistance. FNS will replace such foods in the amounts used, or in the amount of like donated foods received during the preceding year, whichever is less.

(h) *Reimbursement of transportation costs.* In order to receive reimbursement for any costs incurred in transporting donated foods within the State, or from one State to another, for use in disasters, the distributing agency must submit a public voucher to FNS with documentation of such costs. FNS will review the request and reimburse the distributing agency.

[81 FR 23113, Apr. 19, 2016]

## **§250.70 Situations of distress.**

(a) *Use of donated foods to provide congregate meals.* The distributing agency may provide donated foods from current inventories, either at the distributing or recipient agency level, to a disaster organization, for use in providing congregate meals to persons in need of food assistance because of a situation of distress, as this term is defined in §250.2. If the situation of distress results from a natural event (*e.g.*, a hurricane, flood, or snowstorm), such donated food assistance may be provided for a period not to exceed 30 days, without the need for FNS approval. However, the distributing agency must notify FNS that such assistance is to be provided. FNS approval must be obtained to permit such donated food assistance for a period exceeding 30 days. If the situation of distress results from other than a natural event (*e.g.*, an explosion), FNS approval is required to permit donated food assistance for use in providing congregate meals for any period of time.

(b) *Use of donated foods for distribution to households.* The distributing agency must receive FNS approval to provide donated foods from current inventories, either at the distributing or recipient agency level, to a disaster organization for distribution to households in need of food assistance because of a situation of distress. Such distribution may continue for the period of time that FNS determines necessary to meet the needs of such households. However, households receiving D-SNAP benefits are not eligible to receive such donated food assistance.

(c) *Approval of disaster organizations.* Before distribution of donated foods to a disaster organization, the distributing agency must review and approve such organization's application in accordance with applicable FNS guidance, which must be submitted to the distributing agency either electronically or in written form. The distributing agency must also submit such application to FNS for review and approval before permitting distribution of donated foods in a situation of distress that is not the result of a natural event, or for any distribution of donated foods to households. The disaster organization's application must, to the extent possible, include the information required in §250.69(c).

(d) *Information from households.* If the issuance of D-SNAP benefits has been approved, the distributing agency must ensure that the disaster organization obtains the information in §250.69(d) from households receiving donated foods, and reports such information to the distributing agency.

(e) *Eligibility of emergency relief workers for congregate meals.* The disaster organization may use donated foods to provide meals to any emergency relief workers at the congregate feeding site that are directly engaged in providing relief assistance.

(f) *Reporting and recordkeeping requirements.* The distributing agency must report to FNS the number and location of sites where donated foods are used in congregate meals or household distribution as these sites are established. The distributing agency must also report the types and amounts of donated foods from distributing or recipient agency storage facilities used in the situation of distress, utilizing form FNS-292A, *Report of Commodity Distribution for Disaster Relief*, which must be submitted electronically, within 45 days from the termination of assistance. This form must also be used to request replacement of donated foods, in accordance with paragraph (g) of this section. The distributing agency must maintain records of reports and other information relating to situations of distress.

(g) *Replacement of donated foods.* FNS will replace donated foods used in a situation of distress only to the extent that funds to provide for such replacement are available. The distributing agency must submit to FNS a request for replacement of such foods, utilizing form FNS-292A, *Report of Commodity Distribution for Disaster Relief*, which must be submitted electronically, within 45 days from the termination of assistance. The distributing agency may request replacement of foods used from inventories in which donated foods are commingled with other foods (*i.e.*, at storage facilities of recipient agencies utilizing single inventory management), if the recipient agency received donated foods of the same type as the foods used during the year preceding the onset of the situation of distress. Subject to the availability of funds, FNS will replace such foods in the amounts used, or in the amount of like donated foods received during the preceding year, whichever is less.

(h) *Reimbursement of transportation costs.* In order to receive reimbursement for any costs incurred in transporting donated foods within the State, or from one State to another, for use in a situation of distress, the distributing agency must submit a public voucher to FNS with documentation of such costs. FNS will review the request and reimburse the distributing agency to the extent that funds are available.

[81 FR 23113, Apr. 19, 2016]

## **§250.71 OMB control numbers.**

Unless as otherwise specified in the table in this section, the information collection reporting and recordkeeping requirements in 7 CFR part 250 are accounted for in OMB control number 0584-0293.

<b>CFR Cite</b>	<b>OMB Control No.</b>
§250.4(a)	0584-0067
§250.19(a)	0584-0067, 0584-0293
§§250.69(f) and (g) and 250.70(f) and (g)	0584-0067, 0584-0293

[81 FR 23114, Apr. 19, 2016]