## Rules and Regulations

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### DEPARTMENT OF AGRICULTURE

#### Food and Nutrition Service

7 CFR Part 210 and 250

Donation of Foods for Use in the United States, Its Territories and Possessions and Areas Under Its Jurisdiction

**AGENCY:** Food and Nutrition Service, USDA.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** This interim rule amends the Food Distribution Program Regulations (7 CFR Part 250) and the National School Lunch Program Regulations (7 CFR Part 210). This amendment will implement those provisions of Pub. L. 100-237 that relate to: (1) Dissemination of summaries of product specifications to recipient agencies; (2) semiannual collection of commodity acceptability information from recipient agencies (including a change in the submission dates for State Food Distribution Advisory Council Reports); (3) purchase of domestically-produced products; (4) testing and monitoring of processed end products; (5) allocation procedures; (6) establishing commodity values; and (7) offering the per meal value of commodities to school food authorities. These changes will improve the manner in which commodities are distributed.

**DATES:** The provisions contained in this rule are effective in accordance with the following chart. Comments must be received on or before October 19, 1988.

**ADDRESS:** Comments should be sent to: Susan Proden, Chief, Program Administration Branch, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, Alexandria, Virginia 22302.

**FOR FURTHER INFORMATION CONTACT:** Susan Proden, Chief, Program Administration Branch, at (703) 758-3060.

**SUPPLEMENTARY INFORMATION:**

### Classification

This action has been reviewed under Executive Order 12291 and has not been classified major because it does not meet any of the three identified under the Executive Order. Compliance with the provisions in this rule will neither have an annual effect on the economy of more than $100 million or more nor will it cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions. This action will not have significant adverse effects on (1) competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

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This rule implements a number of provisions contained in Pub. L. 100-237. The law requires that those provisions relative to the purchase of domestically-produced products, the establishment and use of commodity value information and offering the national per meal commodity value take effect upon the date of enactment of the Act. Thus, these provisions are being made effective without prior public comment retroactive to January 8, 1988.

The statute also requires that the Secretary implement those provisions relative to the collection of commodity acceptability information and the dissemination of summaries of product specifications within 120 days of enactment of the Act. Thus, in order to implement these provisions within the timeframes established in the law, those provisions of the rule are being made effective without prior public comment retroactive to May 7, 1988.

Pub. L. 100-237 requires the Secretary to establish Departmental allocation procedures in the regulations within 270 days of enactment. The regulatory provision regarding the allocation of commodities to States reflects current standard Departmental operations. Since this provision merely codifies existing procedures which would remain in effect during any period of public comment, it is being made effective upon publication with a request for public comment.

With regard to those provisions that relate to the testing and monitoring of processed end products, the Department is implementing these provisions by restating the requirements exactly as set forth in the law. Thus, they are being adopted without prior public comment.

The provision regarding the submission of the State Food Distribution Advisory Council Report is to extend the current submission dates. Since this amendment will provide additional time to submit the report it is being implemented without prior public comment upon publication of this interim rule.

For the reasons stated above, Anna Kondratas, Administrator of the Food and Nutrition Service (FNS) has found, in accordance with 5 U.S.C. 553(b), that prior notice and comment is impracticable, unnecessary and contrary to public interest, good cause exists for publishing this rule without prior public notice and comment. For these same
reasons, the Administrator has found, in accordance with 5 U.S.C. 553(d), that good cause exists for making the noted provisions of this rule effective less than 30 days after publication. However, since the Department believes that an opportunity for public comment could result in improved and simplified administration of the rule, it is being published as an interim rule with a 90-day comment period. This action has been reviewed with regard to the Regulatory Flexibility Act (5 U.S.C. 601-612). Anna Kondratas, Administrator of FNS, has certified that this action will not have a significant economic impact on a substantial number of small entities.

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 through 3520), additional recordkeeping and reporting requirements contained in §§ 250.13(k) and 250.17(d) of this interim rule are subject to review and approval by the Office of Management and Budget (OMB). Current reporting and recordkeeping requirements for Part 250 were approved by OMB under Control Number 0584-0007.

This program is listed in the Catalog of Federal Domestic Assistance under 10.558 and is subject to the provisions of Executive Order 12147 which requires intergovernmental consultation with State and local officials (7 CFR Part 3520), additional recordkeeping and reporting requirements contained in §§ 250.13(k) and 250.17(d) of this interim rule are subject to review and approval by the Office of Management and Budget (OMB). Current reporting and recordkeeping requirements for Part 250 were approved by OMB under Control Number 0584-0007.

Background

The regulations governing the Food Distribution Program (7 CFR Part 250) outline the responsibilities of FNS and distributing agencies with regard to the distribution and use of federally-donated foods. The current regulations provide for the distribution of donated foods to a variety of domestic outlets, including entities participating in the Child Nutrition Programs, Nutrition Programs for the Elderly and Charitable Institutions.

On January 8, 1988, President Reagan signed the Commodity Distribution Reform Act and WIC Amendments of 1987 (Pub. L. 100-237). The purpose of the law is to improve the operation of the food distribution program for recipients of Federal Assistance under the Temporary Emergency Food Assistance Program (TEFAP). Since § 251.4(a) of the TEFAP regulations provides that TEFAP commodities are made available in programs operated by recipient agencies, the new law requires that the Secretary establish procedures to ensure that information is received from recipient agencies, at least semiannually, about the types and forms of commodities that are most useful to persons participating in programs operated by recipient agencies.

Section 250.13(k) of this interim rule establishes minimum information collection requirements necessary to meet these needs. Therefore, the reports submitted to FNS shall reflect, at a minimum, the following (1) the types and forms of commodities that are most useful to persons participating in programs operated by recipient agencies, (2) commodity specification recommendations and (3) requests for options regarding package sizes and forms of commodities.

Section 250.13(k) of this interim rule requires that distributing agencies obtain this information from a sample of at least 10 percent or 100, whichever is less, of recipient agencies from each distinct program category. Individual program categories must be established for schools, the Child Care Food Program, the Summer Food Service Program, the Nutrition Program for the Elderly, the Commodity Supplemental Food Program, charitable institutions, summer camps, the Food Distribution Program on Indian Reservations, and the Temporary Emergency Food Assistance Program (TEFAP). Since § 251.4(a) of the TEFAP regulations provides that TEFAP commodities are made available in accordance with the terms and conditions of Part 250, to the extent that they are inconsistent with the TEFAP regulations, the TEFAP State agency will be responsible for the collection of the TEFAP information. Distributing agencies must obtain this commodity information at least semiannually except for summer camps and the Summer Food Service Program. Since summer camps and the Summer Food Service Program are only in operation for a few months each year, it is not feasible for commodity acceptability information to be obtained semiannually. Thus, distributing agencies are required to obtain the information from recipient agencies.
participating in these programs annually. In selecting the sample, distributing agencies must also consider the size and geographic location of the recipient agencies to ensure that each sample is representative of all agencies participating in a particular program. In addition, the regulations require distributing agencies to alternate among recipient agencies so that over the course of several years each recipient agency is provided an opportunity to express its views. Distributing agencies may use information which has been obtained from the State Food Distribution Advisory Council, under Part 213; and from the Food Distribution Program on Indian Reservations program’s food preference reports, under Part 253, to represent one of the required acceptability reports for the respective program categories.

The procedures contained in this section provide for the collection of information in a manner which ensures representation of recipient agencies’ needs by program. At the same time, the information is collected on a sample basis, rather than from each recipient agency twice a year. This relieves State and local agencies of an unnecessarily burdensome paperwork requirement. These procedures are being implemented under this interim rule because the law requires that the Secretary establish procedures for the collection of commodity acceptability information within 120 days of enactment of the law. Section 250.13(k) and 250.17(d) require distributing agencies to submit commodity acceptability information from recipient agencies, with the exception of summer camps and the Summer Food Service Program, to the appropriate FNSRO by April 30 and November 30 of each year. Distributing agencies must submit the information for summer camps and the Summer Food Service Program to the appropriate FNSRO by November 30 of each year. Information received beyond the required dates will not be considered.

The April 30 submission date results in collecting data from recipient agencies near the end of the school year which will allow the Department to receive feedback on the types and forms of commodities distributed throughout that reporting year. This date also coincides with the revised requirement for submitting the State Food Distribution Advisory Council report in § 210.27 which is being amended by this interim rule. The Department selected the second submission date of November 30 taking the school year calendar into consideration. Clearly, data collection and reporting between May and September would not be appropriate given school food authorities’ schedules and workload.

The second data collection should include, but is not limited to, follow-up information to confirm trends previously noted by the State and to provide responses to USDA requests for specific information. The time between each submission of this information will provide the Department with ample time to review this information, to request follow-up information and to make changes to commodity specifications as warranted for the upcoming school or fiscal year. The Department is, however, specifically soliciting comments on the feasibility of collecting commodity acceptability information within these timeframes.

Food Distribution Program on Indian Reservations

Paragraph (a) of § 250.47 of this interim rule is being revised to require that distributing agencies that operate food distribution program on Indian reservations also comply with the commodity acceptability reporting requirement contained in paragraph (d) of § 250.17.

Buy American

Section 3(h) of the new law requires that recipient agencies purchase, whenever possible, only food products that are produced in the United States (U.S.). Recipient agencies in Alaska, Hawaii, Guam, American Samoa, Puerto Rico, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands are exempt from this requirement. The law also permits the Secretary to grant waivers for: (1) Those recipient agencies that have unusual or ethnic preferences in food products; or (2) such other circumstances as the Secretary considers appropriate. In order to incorporate these provisions into the regulations, § 250.23 has been added under this interim rule to require that, when ever possible, recipient agencies, with the exception of those in Alaska, Hawaii, Guam, American Samoa, Puerto Rico, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands, purchase only food products that are produced in the U.S. as defined in § 250.3.

However, the interim regulations limit the applicability of the “Buy American” provision to purchases of food products with Federal funds. The Department believes that absent any clear statement to the contrary, the “Buy American” provision should be interpreted so as to avoid intrusion by the Federal Government into local purchasing decisions. This interpretation is further supported by a statement made by Congressman Ford, author of the “Buy American” provision, before the House of Representatives on December 17, 1987 (133 Cong. Rec. H1654 (daily ed., Dec. 17, 1987). In that statement, Congressman Ford states that the provision applies only to food purchases made from Federal funds and not those from State or local sources. However, while the requirements of § 250.23 are limited to purchases made with Federal funds, the Department continues to encourage schools and other outlets to purchase food of domestic origin regardless of the funding source.

Several options were considered in defining what foods would be classified as “food products produced in the United States.” The definition is clearest for unmanufactured products—these must be of U.S. origin. For manufactured products, defining what a “food product produced in the U.S.” is more difficult. The Department considered requiring that manufactured products primarily contain ingredients of U.S. origin and be manufactured by a company located in the U.S. However, many manufactured products that are labeled and canned in the U.S. may have some or all foreign ingredients. It would be extremely difficult and costly to determine which ingredients were exclusively or primarily of U.S. origin. Further, recipient agencies would not have a means to verify that the ingredients in the manufactured products they are buying came from U.S. markets. Therefore, § 250.3 of the interim rule defines “food products produced in the U.S.” as an unmanufactured food product produced in the U.S. or a food product manufactured in the U.S. Defining food products produced in the U.S. in this manner eliminates the need for recipient agencies to determine if the ingredients in a product were produced in the U.S. In addition, purchases of processed food products can be monitored to ensure compliance since section 304 of the Tariff Act of 1930 (19 U.S.C. 1304) requires imported articles to be marked with the country of origin.

The law also permits the Secretary to grant waivers of the “Buy American” requirement for those recipient agencies that have unusual or ethnic preferences in food products or such other circumstances as the Secretary considers appropriate. In accordance with the legislation, § 250.23 permits recipient agencies to purchase food products which are not produced in the U.S. when recipient agencies have...
unusual or ethnic food preferences which can only be met through purchases of food products not produced in the U.S. The Department has identified two other situations which warrant a waiver. First, a foreign product may be purchased if the product is not produced or manufactured in the U.S. in sufficient and reasonably available quantities of a satisfactory quality. Second, if competitive bids reveal the cost of a U.S. product is unreasonable compared to a foreign product, the foreign product may be purchased. These objective criteria will allow recipient agencies to continue purchases of items like bananas and to buy foreign goods when the price compared to U.S. goods varies widely. Recipient agencies must keep records of how they implement this provision to demonstrate that U.S. products have been purchased whenever possible.

As required by section 14 of the law, the "Buy American" requirement took effect upon enactment (January 8, 1988) and therefore, the provisions contained in § 250.23 are effective retroactive to January 8, 1988.

Allocation Procedures

Section 3(f)(1)(C) of Pub. L. 100–237 requires the Secretary to provide for, by regulation, procedures for allocating commodities among States. Presently, when a commodity is available in limited quantities, the Department uses allocation percentages, based on program participation data, to ensure States are allocated their pro rata share of such commodity. Allocation percentages are based on the most recent participation data available, by program designated to receive the commodity, at the time the commodity is offered to States. The Department is revising § 250.13(a)(4) (as recently amended by the interim rule published on June 16, 1988, (53 FR 22466)) to codify the Department's current method of allocating commodities among States.

Commodity Value

Section (3)(b)(7) of Pub. L. 100–237 requires the Secretary to establish a value for all donated commodities (i.e., cost per pound) to be used by distributing agencies when allocating or charging commodities to recipient agencies. The established commodity values are also to be used by States in determining the value of commodities offered to recipient agencies to meet commodity assistance levels. Currently, when a commodity is offered or made available to States to order but is not yet actually purchased, FNS provides distributing agencies with an estimated cost per pound. Once a product is purchased, an actual cost per pound (which includes the USDA cost of acquisition, transportation and other related purchase costs) is established and used to charge a State's entitlement. The cost per pound charged to a State's entitlement appears on the Entitlement Food Order Report (FNS Report No. 98) which is routinely provided to distributing agencies. An entitlement is the per meal value of donated foods the Department must provide to States for specific food assistance programs as established by law. Further explanation of entitlements follows in the section regarding offering the per meal value to school food authorities.

Current regulations do not require States to consistently value commodities when offering a commodity to recipient agencies or when determining the level of commodity assistance provided to recipient agencies. In accordance with the law, § 250.13(a)(5) of this interim rule has been revised to require that States use either the estimated cost per pound data or actual cost per pound data provided by USDA to value commodities offered to recipient agencies and to credit recipient agencies' planned assistance levels.

When States offer and charge commodities to recipient agencies, the distributing agency may use either the estimated or actual cost data provided by FNS, as long as the data chosen is used consistently throughout the State to value the commodities. Estimated cost data for grain, dairy, peanut and oil products (i.e. Group B commodities) shall be defined as the April 10 and October 10 costs listed in the USDA commodity file which are provided by the FNS regional offices to the distributing agencies. Estimated cost data for meat, fish, poultry, fruit and vegetable products (i.e. Group A commodities) shall be defined as the cost provided by USDA on commodity survey memorandum offering commodities to distributing agencies. Distribution agencies should advise recipient agencies of the value of individual commodities at the time an offer is made. In instances where cost data used to allocate or credit commodity assistance levels differs from the cost data used to offer a commodity, distributing agencies shall advise recipient agencies of the cost used to allocate or credit a commodity.

Use of these criteria to value commodities will ensure that distributing agencies value commodities on the same basis for all recipient agencies throughout the State. The requirement that distributing agencies provide commodity values to recipient agencies conforms with the voluntary performance standards developed by FNS last year in consultation with the American School Food Service Association (ASFSA) and the National Association of State Agencies for Food Distribution (NASAFD). This standard recognized that dissemination of commodity values to recipient agencies is necessary for informed participation in the Food Distribution Program.

In § 250.13, paragraph (a) has been revised and restructured to include the provisions regarding allocation procedures and commodity value. As required by section 14 of the Act, the statutory provisions regarding commodity value took effect upon enactment (January 8, 1988) and therefore, the new provisions contained in § 250.13(a)(5) are effective retroactive to January 8, 1983.

Commodity Specifications

Commodity specifications precisely identify the product characteristics required in end products purchased by USDA. Lenghly and highly technical commodity specification documents are provided to vendors to ensure that end products meet USDA standards. Depending on the food product, components of a specification may include: (1) the name of the product; (2) quality or official grade; (3) kind, style, and/or variety; (4) product composition; (5) special instructions; (6) conditions that affect acceptability after the product has been inspected; (7) the size of the product; and (8) information about how the product is to be packaged.

Because of the length and technical nature of commodity specifications, it is difficult for those without a food technology background to understand or effectively use complete specifications. However, specifications do contain essential information about the commodities that is of value to recipient agencies. Therefore, the Department has developed summaries of commodity specifications which contain the most relevant information on the composition of commodities. The main requirements and standards listed in a commodity specification are contained in each summary, thus making it easier for meal service providers to find the information they need to accept, store and use commodities.

The FNS Instruction 716–1 contains the summaries of commodity specifications. In October 1987, the Department distributed this FNS Instruction to distributing agencies for further distribution to all school food authorities. Additional copies will be provided to all distributing agencies so
that they can be made available to other recipient agencies upon request. Section 3(d)(3)(D) of Pub. L. 100-237 requires the dissemination of the summaries of commodity specifications by distributing agencies to recipient agencies upon request. The law requires implementation of this provision within 120 days of enactment of the bill. In accordance with Pub. L. 100-237, § 250.13 of this interim rule requires distributing agencies to make summaries of commodity specifications available to recipient agencies upon request.

Testing and Monitoring Processed End Products

Section 3(d)(3) of the law requires each distributing agency that enters into a processing contract for recipient agencies to test the product to determine the acceptability of the product prior to entering into a contract. The law also requires distributing agencies to develop a system to monitor product acceptability. Under current regulations, distributing agencies may enter into processing contracts on behalf of recipient agencies. In addition, in an effort to ensure that recipient agencies are benefiting from the use of processed end products to the fullest extent possible, the Department revised the regulations in July 1986 to require that distributing agencies permit recipient agencies to enter into processing contracts. The Department believes that the current regulatory provisions, coupled with this requirement to test and monitor the acceptability of processed end products, will result in recipient agencies receiving the most desirable end products. Section 250.30(b)(1) of this interim rule requires each distributing agency to test products with the recipient agencies eligible to receive them prior to entering into a processing contract and to develop a system to monitor product acceptability. However, the Department is not, at this time, establishing specific, detailed procedures for distributing agencies to use in testing and monitoring the acceptability of products. The Department is, however, soliciting comments from all interested parties about establishing specific procedures for testing and monitoring processed end products. Comments should include a description of any proposed system to be used for testing products and a description of the system to be used for monitoring product acceptability. Although this provision is not effective until October 7, 1988, the Department encourages distributing agencies to begin testing and monitoring end products as soon as possible. Based on the comments, the Department will be developing further guidance.

Offering the Per Meal Value of Donated Foods

Section (6)(e) of the National School Lunch Act requires that the Department provide commodity assistance to States for use by schools participating in the School Lunch Program. The level of assistance to be provided is determined by multiplying the appropriate national average value established under that section (i.e. per meal value) by the number of meals served in the current school year. Section (3)(j) of Pub. L. 100-237 amends section (6)(e) to require States to offer school food authorities the per meal value which is not less than the national average value of donated foods. The law also requires that offers include the full range of such commodities and products that are made available by the Secretary to the extent that quantities requested are sufficient to allow efficient delivery to and within the State.

Congress directed USDA to establish a consistent value for offering school food authorities commodity assistance so that school food authorities can claim their fair share of commodities. This provision is intended to prevent discriminatory distribution practices which may occur within a State. There is no evidence, however, of any intent to cause States to operate distribution systems inefficiently or to increase USDA’s expenditures for commodities. Current regulations do not define the value of commodities which States must offer individual school food authorities. Department policy and voluntary performance standards, however, set forth that States should establish planned assistance levels for school food authorities and allocate commodities equally among school food authorities based on participation data. Section 250.48(c) of this interim rule is being revised to establish how States must determine the total value of commodities to offer school food authorities, to require an annual update of the commodity offer value and to specify the variety of commodities to offer and the type of commodities which count towards the per meal value that must be offered.

Commodity Offer Value. Section 250.48(c)(1) of this interim rule requires distributing agencies to offer school food authorities no less than the national average per meal value of donated foods established on July 1 of each school year by the Department in accordance with section (6)(e) of the National School Lunch Act. The total value of donated foods which must be offered to school food authorities shall be calculated by multiplying the per meal value of donated foods times the standard number of eligible meals to be served by the school food authorities during the school year. This method was selected so that the States’ determined value of commodities offered to school food authorities is consistent with the Department’s determined value of commodities offered to States. States shall be required to maintain records of the value of commodities offered and refused in the event that these amounts must be substantiated in the future.

Section 250.48(c)(1) of this interim rule is also being revised to specify that distributing agencies shall be responsible for establishing the estimated number of meals to be served. This number shall be based on eligible meal count data submitted by school food authorities to the State education agency.

Update Requirement. Section 250.48(c)(2) requires, at a minimum, that the total value of commodities which must be offered to school food authorities shall be adjusted once annually to reflect significant changes in meals served. This rule is consistent with the voluntary distributing agency performance standards developed last year. During the development of these standards, State distributing agencies, recipient agencies and the Department agreed that significant changes in average daily participation must be recognized to ensure an equitable commodity offering, ordering and allocation system.

As required by §250.48(c)(2), distributing agencies shall establish and communicate to school food authorities and FNS regional offices the following: (1) The method to be used for establishing the number of meals to be served; (2) procedures for updating the commodity offer value; and (3) timeframes for updating the commodity offer value information. As noted earlier regarding per meal value, the requirement to communicate information about commodity offers to school food authorities is consistent with the voluntary performance standard objective that school food authorities should have all information necessary for informed participation in the Food Distribution Program.

The Department considered specifying which meal count data (i.e. previous year’s or actual to date) must be used to determine the commodity offer value and the timeframes for updating these data. However, a review of existing State commodity offering procedures revealed that many States use a variety...
of equitable and accurate methods, based on various types of meal count data, to ensure that school food authorities have the opportunity to claim their fair share of commodities. Most methods allowed for updates, either monthly, quarterly or yearly, and take significant changes in participation into account. Several States have developed sophisticated computer systems to calculate and to monitor commodity offerings to ensure an equitable offering of the full range of available commodities to school food authorities. The Department has determined, however, that the States do not have any system in place for consistently offering a full range of commodities to school food authorities. Therefore, the Department has decided to set general guidelines for establishing the commodity offer value and minimum update requirements. Thus, those States without such a system will be required to establish one and those States with existing systems may continue to use them without disruption.

Commodity Variety Offered Section 250.48(c)(3) of this interim rule requires distributing agencies to offer each school food authorities the full range of commodities to the extent that quantities requested or made available are sufficient to make statewide distribution and to allow for efficient delivery to and within the State. This regulation is to ensure that school food authorities have an opportunity to receive a wide variety of commodities in the various forms made available by the Department.

As recognized in the law, consideration must be given to the practical considerations necessary for the cost effective distribution of commodities. For cost effective purchasing, USDA requires distributing agencies to order commodities in full truck load quantities (approximately 40,000 pounds). Further, for cost effective shipping there is a limit to the number of destinations (i.e. stop-offs) to which this amount can be delivered. School food authorities should be aware of these constraints and work with each other and their distributing agency in order to receive as wide of a variety of commodities as possible.

The requirement that distributing agencies offer each school food authority the full range of commodities would also mean that distributing agencies must equally and consistently offer commodities from the Group A and Group B category of entitlement commodities. An explanation of these two categories follows. States are provided an overall entitlement value which is then separated into a Group A and a Group B category. The Group A category includes meat, fish, poultry, fruit and vegetable products which are designated as surplus-removal type commodities. These commodities are purchased by the Agricultural Marketing Service and are offered to States on a pro rate basis. Group B entitlement commodities may include grain, dairy, peanut and oil products which are acquired by the Agricultural Stabilization and Conservation Service under price-support authority or through direct purchases. Group B entitlement commodities are not allocated to States, but are made available to States in accordance with the procedures which follow.

For the past few years, States have been provided with the option of receiving from 15 to 20 percent of their overall entitlement in Group B foods. The percentage range of Group B foods offered to States depends on which commodities are designated for the Group B entitlement category. Therefore, a State's Group A and B portion of entitlement may vary from year to year depending on the percentage of Group B commodities that the distributing agency may elect to receive. Each year States notify the Department of the percentage of Group B entitlement selected for the upcoming school year. Within the established limits available to the State for Group B foods, distributing agencies have discretion over the kinds and quantities of commodities to order. The Department provides States with a list of available Group B foods and ordering options. Distributing agencies determine the types, package size, quantities and shipping periods in which to order this category of commodities.

A review of existing State systems for offering commodities revealed that some school food authorities were not provided with an opportunity to accept or reject their share of either category of commodities. The Department intends for distributing agencies to fairly offer both categories of commodities. Further, within each category, States should pass on ordering options and make as wide a variety of commodities available as possible to all school food authorities. The provisions of this paragraph are not, however, intended to require school food authorities to accept the full range of commodities offered. Further, these requirements are not intended to prevent school food authorities from receiving additional quantities that have been rejected by other school food authorities.

In the event that the amount of any commodity received from the Department is not sufficient to equitably distribute to all school food authorities, this section requires distributing agencies to develop and disseminate annually to school food authorities procedures for the allocation of such commodities. The procedures should result in the equitable distribution of commodities in limited supply.

Bonus Commodities. Section 250.48(c)(4) of this interim rule specifies that the value of bonus commodities offered shall not be included as a part of the per meal value of donated foods which must be offered to school food authorities and that States shall equitably distribute bonus commodities among school food authorities. Bonus commodities are donated by the Department to States and are not charged against a State's entitlement. A review of various State systems revealed that some States do not clearly distinguish between bonus and entitlement commodities distributed. Therefore, bonus commodities must be identified and should not be counted as a part of the value which States offer to school food authorities. Discrepancies from State to State in the per meal value provided to school food authorities in the past may be partially attributed to the fact that some States identify and credit bonus commodities differently.

As required by section 14 of the Act the offering of the per meal value requirement took effect upon enactment (January 8, 1988) and therefore, the provisions in § 250.48(c) are effective retroactive to January 8, 1988.

List of subjects 7 CFR Part 210
Food assistance programs, National School Lunch Programs, Commodity School Program, Grant programs—Social programs, Nutrition, Children, Reporting and record keeping requirements, Surplus agricultural commodities.

7 CFR Part 250
Aged, agricultural commodities, Business and Industry, Food assistance programs, Food donations, Food processing, Grant programs—social programs, Infants and children, Price support programs, Reporting and record keeping requirements, School breakfast and lunch programs, Surplus agricultural commodities.

Accordingly, 7 CFR Parts 210 and 250 are amended to read as follows:
PART 210—NATIONAL SCHOOL LUNCH PROGRAM

1. The authority citation for Part 210 continues to read as follows:

Authority: Sec. 2-12, 60 Stat. 230, as amended; Sec. 10, 80 Stat. 688, as amended; 84 Stat. 270; 42 U.S.C. 1751-1760, 1779.

2. In § 210.27, paragraph (c) is revised to read as follows:

§ 210.27 State Food Distribution Advisory Council

(c) Council timeframe. The council shall meet at least once a year and shall report to the State educational agency and State distributing agency, if it is a different entity, no later than March 30 of each year, recommendations concerning the manner of selection and distribution of commodity assistance for the next school year. The State educational agency shall inform FNS of the Council’s recommendations no later than April 30, of each year.

PART 250—DONATIONS OF FOOD FOR USE IN THE UNITED STATES, ITS TERRITORIES AND POSSESSIONS AND AREAS UNDER ITS JURISDICTION

1. The authority citation for Part 250 is revised to read as follows:


2. In § 250.12, paragraph (c) is revised to read as follows:

§ 250.12 Distribution and Control of Donated Foods

(c) Availability and use of donated foods. (1) Availability and use. Donated foods shall be donated only in such quantities as will protect the low cost carried freight rate, except as deemed in the best interest of the program as determined by the Department.

(2) Allocations. As foods become available for donation, FNS shall notify distributing agencies regarding the donated foods, the class or classes of recipient agencies or recipients eligible to receive them, and any special terms and conditions of donation and distribution which attach to a particular donated food in addition to the general terms and conditions set forth herein. When a commodity is available in limited quantities the Department shall allocate such commodities among the States using allocation percentages which are based on the most recent participation data available for the program designated to receive the commodity.

(3) Commodity Value. To value a commodity offered to a recipient agency and to credit a commodity towards a recipient agency’s commodity assistance level, distributing agencies shall use either actual cost per pound data used to charge a State’s program entitlement or estimated cost per pound data provided by the Department, as long as the data chosen is used consistently throughout the State to value commodities. Actual cost data shall be defined as the cost per pound for an individual commodity charged to a State’s entitlement on the Entitlement Food Order Report, which is based on the USDA purchase cost. Estimated cost data for grain, dairy, peanut and oil products (i.e. Group B commodities) shall be defined as the April 10 and October 10 costs listed in the USDA commodity file. Estimated cost data for meat, fish, poultry, fruit and vegetable products (i.e. Group A commodities) shall be defined as the cost provided by USDA on commodity survey memoranda. Distributing agencies shall notify recipient agencies of the cost per pound used to value commodities at the time a commodity is offered to recipient agencies. If the cost used to credit a commodity differs from the cost used to offer a commodity, distributing agencies shall advise recipient agencies of the cost used to credit a commodity.

(4) Delivery of commodities. The Department shall, to the extent practicable, make every effort to arrange deliveries based on information obtained from distributing agencies. However, the Department shall not be held financially responsible for any delay in

similar restrictions on recipient agencies.


2. In § 250.12, paragraph (c) is revised to read as follows:

§ 250.12 Distribution and Control of Donated Foods

(a) Availability and use of donated foods.—(1) Availability and use. Donated foods shall be available only for distribution and use in accordance with the provisions of this Part and, with respect to distribution to households on or for any reason shall not be sold, exchanged or otherwise disposed of without the approval of the Department. Donated foods which are provided as part of an approved food package or authorized program level of assistance may be transferred between like recipient agencies with only prior authorization of the distributing agency. Donated foods which are provided in addition to the State’s authorized program level of assistance may be transferred between recipient agencies which are eligible to receive such foods with the prior authorization of the distributing agency. However, the transfer of donated foods between unlike recipient agencies (schools to charitable institutions), which have been provided as part of an approved food package or authorized program level of assistance, must be approved by the appropriate FNSRO. Food donated under section 32 of Pub. L. 74-320 (7 U.S.C. 612c) may also be transferred by recipient agencies to emergency feeding organizations which are distributing donated foods under 7 CFR Part 251. A transfer between recipient agencies and emergency feeding organizations may be made only with the prior approval of the distributing agency and the State agency responsible for administering TEFAP. All transfers of donated foods shall be documented. Such documentation shall be maintained in accordance with the recordkeeping requirements in §§ 250.16 and 251.10(a).

(2) Quantities. (i) The quantity of donated foods to be made available for donation under this Part shall be determined in accordance with the pertinent legislation and the program obligations of the Department, and shall be such as can be effectively distributed to further the objectives of the pertinent legislation. (ii) Donated foods shall be requested and distributed only in quantities which can be consumed without waste in providing food assistance for persons eligible under this Part. Distributing agencies shall impose

similar restrictions on recipient agencies.

(3) Minimum donations. Foods shall be donated only in such quantities as will protect the low cost carried freight rate, except as deemed in the best interest of the program as determined by the Department.
delivering or for nondelivery of donated foods due to any cause. To avoid unduly deliveries to recipient agencies, distributing agencies shall notify recipient agencies of: (i) Anticipated Department purchases and estimated shipping periods as such information becomes available; (ii) anticipated State delivery schedules at least quarterly; and (iii) changes in delivery schedules as they become known. In addition, distributing agencies shall maintain distribution schedules which are equitable and reliable, recognize hours of operation, holidays and vacations and other special needs of recipient agencies, and make donated foods available at least monthly.

(2) Demonstrations and tests. Notwithstanding any other provision of this part, a quantity of any food donated for use by any recipient agency or recipient may be transferred by the distributing agency or by the recipient agency to bona fide experimental or testing agencies, or for use in workshops, or for demonstrations or tests relating to the utilization of such donated food by the recipient agency or recipient. No such transfer by any recipient agency shall be made without the approval of the appropriate distributing agency.

(i) Commodity specifications. Distributing agencies shall make summaries of commodity specifications available to recipient agencies upon request.

(a) Commodity acceptability information. (1) Information collection. Distributing agencies shall obtain information from recipient agencies which reflects: (i) The types and forms of donated foods that are most useful to program participants; (ii) commodity specification recommendations; and (iii) requests for options regarding package sizes and forms of commodities.

(2) Samples and Representation shall be selected from each distinct program category, i.e. schools, the Child Care Food Program, the Summer Food Service Program, the Nutrition Program for the Elderly, the Commodity Supplemental Food Program, charitable institutions, summer camps, and the Food Distribution Program on Indian Reservations. and the Temporary Emergency Food Assistance Program. At a minimum, distributing agencies shall obtain this information from a sample of at least 10 percent or 100 recipient agencies, whichever is less. To ensure that the sample is representative of all recipient agencies, distributing agencies shall consider the size and geographic location of all recipient agencies within the State and alternate among them so that over time each recipient agency is provided an opportunity to express its views. Distributing agencies may use information which already has been obtained from the State Food Distribution Advisory Council in accordance with Part 210 and the Indian tribes in accordance with Part 253 to represent one of the required commodity acceptability reports for the respective program categories.

(3) Timeframes for submission. Distributing agencies shall obtain commodity acceptability information from each program category at least semiannually except for summer camps and the Summer Food Service Program.

(b) Permissible contractual arrangements. (1) * * * * * 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.

7. In § 250.47, paragraph (a) is revised to read as follows:

§ 250.47 Food Distribution Program on Indian Reservations.

(a) Distribution. Distributing agencies which operate a food distribution program on Indian reservations shall comply with the provisions set forth in §§ 250.1, 250.2, 250.3, 250.10, 250.11, 250.12, 250.13 (with the exception of paragraphs (d)(2), § 250.14, §§ 250.15 and 250.17) to the extent that these provisions are not inconsistent with the regulations cited in paragraph (b) of this section.
value of donated foods which must be offered to school food authorities shall be calculated by multiplying the per meal value of donated foods times the number of estimated meals to be served by the school food authority during the school year. This value shall be referred to as the commodity offer value. Distributing agencies shall be responsible for establishing the number of estimated meals to be served.

(2) Update requirement. Meal count data used to determine the commodity offer value shall be updated at a minimum annually. Distributing agencies shall communicate to school food authorities and FNS regional offices the method for establishing estimated meals to be served, procedures for updating the commodity offer value and timeframes for updates. Commodity offer values shall be adjusted to reflect significant changes in meal data.

(3) Commodity variety offered. Distributing agencies shall offer each school food authority the full range of all commodities equitably and consistently to the extent that quantities requested or made available are sufficient to make a statewide distribution and allow for efficient delivery to and within the State. Distributing agencies shall develop and disseminate to school food authorities at least annually a procedure for the allocation of commodities when the amount received from the Department is not sufficient to make a statewide distribution to all school food authorities.

(4) Bonus commodities. Bonus commodities offered shall be distinguished from entitlement commodities and shall not be included as a part of the per meal value of donated foods which must be offered to school food authorities.

* * *

Date: July 15, 1988.
Anna Kondratas,
Administrator.
[FR Doc. 16449 Filed 7-20-88; 8:45 am]
BILLING CODE 3410-30-M

Agricultural Marketing Service
7 CFR Part 1230
[No. LS-88-014]
Pork Promotion and Research
AGENCY: Agricultural Marketing Service, USDA.
ACTION: Final rule.
SUMMARY: Pursuant to the Pork Promotion, Research, and Consumer Information Act of 1985 and the Order issued thereunder, this final rule increases the amount of the assessment per pound due on imported pork and pork products to reflect an increase in the 1987 seven market average price for domestic barrows and gilts and to bring the equivalent market value of the live animals from which such imported pork and pork products were derived in line with the market values of domestic porcine animals.

ADDRESS: Ralph L. Tapp, Chief; Marketing Programs and Procurement Branch; Livestock and Seed Division; Agricultural Marketing Service, USDA, Room 2610–S, P.O. Box 96436, Washington, DC 20090-6456.

FOR FURTHER INFORMATION CONTACT: Ralph Tapp, Chief, Marketing Programs and Procurement Branch (202) 447-2650.
SUPPLEMENTARY INFORMATION: This action was reviewed under USDA procedures established to implement Executive Order 12291 and Departmental Regulation 1512.1-1 and is hereby classified as a nonmajor rule under the criteria contained therein.

This action also was reviewed under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.). The effect of the Order upon small entities was discussed in the September 5, 1986, issue of the Federal Register (51 FR 31898), and it was determined that the Order would not have a significant effect upon a substantial number of small entities. Many importers may be classified as small entities. This final rule increases the assessments per pound on 2 of the 13 imported pork and pork products subject to assessment by an amount of one-hundredths of a cent per pound. Adjusting the base of assessments on imported pork and pork products will result in an estimated $30,000 more in assessments over a 12-month period. While the final rule will result in an increase in assessments, any additional costs will be outweighed by the benefits derived from the operations of the pork promotion, research, and consumer information program. Accordingly, the Administrator of the Agricultural Marketing Service (AMS) has determined that this action will not have a significant economic impact on a substantial number of small entities.

The Pork Promotion, Research, and Consumer Information Act of 1985 (7 U.S.C. 4601-4619) approved December 23, 1985, authorized the establishment of a national pork promotion, research, and consumer information program. The program is funded by an assessment rate of 0.25 percent of the market value of all porcine animals marketed in the United States and an equivalent amount of assessment on imported porcine animals, pork, and pork products. The final Order establishing a pork promotion, research, and consumer information program was published in the September 5, 1986, issue of the Federal Register [51 FR 31898; as corrected at 51 FR 36383] and assessments began on November 1, 1986. The Order requires importers of porcine animals to pay the U.S. Customs Service (USCS), upon importation, the assessment of 0.25 percent of the animal's declared value and importers of pork and pork products to pay to the USCS, upon importation, the assessment of 0.25 percent of the market value of the live porcine animals from which such pork and pork products were produced. As a matter of practicality, the assessment on imported pork and pork products is expressed in dollars per pound for each type of such products.

This rule increases the per-pound assessments on specified imported pork and pork products. This increase is consistent with increases in the annual average price of domestic barrows and gilts at the seven markets for calendar year 1987 as reported by the USDA, AMS, Livestock and Grain Market News Branch (LGMN). This increase in cents-per-pound assessments will make the equivalent market value of the live porcine animal from which the imported pork and pork products were derived reflect the recent increase in the market value of domestic porcine animals, thereby promoting comparability between importer and domestic assessments. This final rule will not change the current assessment rate of 0.25 percent of the market value.

The methodology for determining the per-pound amounts for imported pork and pork products was described in the supplementary information accompanying the Order and published in the September 5, 1986, Federal Register at 51 FR 31901. The weight of imported pork and pork products is converted to a carcass weight equivalent by utilizing conversion factors which are published in the USDA Statistical Bulletin No. 610 "Conversion Factors and Weights and Measures." These conversion factors take into account the removal of bone, weight lost in cooking or other processing, and the nonmeat components of pork products. Secondly, the carcass weight equivalent is converted to a live animal equivalent weight by dividing the carcass weight equivalent by 70 percent, which is the average dressing percentage of porcine animals in the United States. Thirdly,
the equivalent value of the live porcine animal is determined by multiplying the live animal equivalent weight by an annual average seven market price for barrows and gilts as reported by the USDA, AMS, LGMN Branch. This average price is published on a yearly basis during the month of January in the LGMN Branch’s publication “Livestock, Meat, and Wool Weekly Summary and Statistics.” Finally, the equivalent value is multiplied by the applicable assessment amount due on imported pork or pork products. The end result is expressed in an amount per pound for each type of pork or pork product.

The formula in the preamble for the order at 51 FR 31901 contemplated that it would be necessary to recalculate the equivalent live animal value of imported pork and pork products to reflect changes in the annual average price of domestic barrows and gilts to maintain equity of assessments between domestic porcine animals and imported pork and pork products.

In 1987, the average annual seven market price rose to $51.04, an increase of about 1 percent over the 1986 per hundredweight price, which results in an increase in assessments for two TSUS categories 107.3525, in an amount equal to one-hundredth of a cent per pound. These two TSUS categories are for cooked, canned, boneless hams and shoulders. Based upon the conversion formula described above and the average seven market price of $51.04, the remaining 11 TSUS categories would not require an increase in assessments.

Based on Department of Commerce, Bureau of Census data on the volume of imported pork and pork products for 1987, the increase in the per-pound assessments would result in an estimated $30,000 in additional assessments over a 12-month period.

On May 3, 1988, AMS published in the Federal Register [53 FR 15700] a proposed rule which would increase the per-pound assessments on imported pork and pork products consistent with increases in the 1987 average price of domestic barrows and gilts to provide comparability between importer and domestic assessments. The proposed rule was published with a request for comments by June 2, 1988. Thirteen comments were received—one from the National Pork Board; one from a national pork producer organization; one from a State farm organization, and 10 from State pork producer associations. All comments were in favor of the proposed increase in the assessments on imported pork and pork products. Most commentors expressed the opinion that the increase would promote comparability between assessments on domestic hogs and imported pork and pork products and that it was fair and equitable. Accordingly, this final rule establishes the per-pound assessment on imported pork and pork products as proposed.

List of Subjects in 7 CFR Part 1230

Administrative practice and procedure, Advertising, Agricultural research, Marketing agreement, Meat and meat products, Pork and pork products.

For the reasons set forth in the preamble, 7 CFR Part 1230 is amended as set forth below:

PART 1230—PORK PROMOTION, RESEARCH, AND CONSUMER INFORMATION

1. The authority citation for 7 CFR Part 1230 continues to read as follows:


2. Amend Subpart B—Rules and Regulations by revising § 1230.110 to read as follows:

§ 1230.110 Assessments on imported pork and pork products.

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<th>Pork and pork products (U.S. Tariff Schedule No.)</th>
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Done at Washington, DC, on: July 18, 1988.

J. Patrick Boyle, Administrator.

For the reasons set forth in the preamble, 7 CFR Part 1230 is amended as set forth below:

§ 1230.110 Assessments on imported pork and pork products.

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J. Patrick Boyle, Administrator.

The applicable service bulletins may be obtained from Bell Helicopter Textron, Inc., P.O. Box 482, Fort Worth, Texas 76101, Attention: Commercial Publications Distribution, or may be examined in the Regional Rules Docket, Office of the Regional Counsel, FAA, Southwest Region, 4400 Blue Mound Road, Fort Worth, Texas.

For Further Information Contact:
Mr. Tyrone D. Millard, Helicopter Certification Branch, ASW–170, Federal Aviation Administration, Fort Worth, Texas 76190–0170, telephone (817) 624–5111.

Supplementary Information:
On May 19, 1987, Priority Letter AD No. 87–10–11 was issued and made effective immediately as to all known U.S. owners and operators of Bell Helicopter Textron, Inc., Models 206A, 206B, 206L, 206L–1 and 206L–3 helicopters. The AD requires the removal and replacement of certain main rotor masts, which may be metallurgically defective, in order to prevent failures of the main rotor mast which could result in loss of the helicopter.

Effective Date: August 8, 1988, as to all persons except those persons to whom it was made immediately effective by Priority Letter AD No. 87–10–11, issued May 19, 1987, which contained this amendment.

Compliance: As indicated in the body of the AD.

Addresses:
The applicable service bulletins may be obtained from Bell Helicopter Textron, Inc., P.O. Box 482, Fort Worth, Texas 76101, Attention: Commercial Publications Distribution, or may be examined in the Regional Rules Docket, Office of the Regional Counsel, FAA, Southwest Region, 4400 Blue Mound Road, Fort Worth, Texas.