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**DEPARTMENT OF AGRICULTURE**

**Food and Nutrition Service**

**7 CFR Parts 250 and 251**

**[FNS-2014-0040]**

**RIN 0584-AE29**

**Requirements for the Distribution and Control of Donated Foods -&-  
The Emergency Food Assistance Program: Implementation of the Agricultural Act  
of 2014**

**AGENCY:** Food and Nutrition Service (FNS), USDA.

**ACTION:** Final rule.

**SUMMARY:** This rule revises and clarifies requirements to ensure that USDA donated foods are distributed, stored, and managed in the safest, most efficient, and cost-effective manner, at State and recipient agency levels. The rule also reduces administrative and reporting requirements for State distributing agencies, revises or clarifies regulatory provisions relating to accountability for donated foods, and rewrites much of the regulations in a more user-friendly, “plain language,” format. Lastly, the rule revises and clarifies specific requirements to conform more closely to related requirements in corresponding regulations and current law.

**DATES:** This rule is effective [insert date that is 60 days from date of publication in the Federal Register].

**FOR FURTHER INFORMATION CONTACT:** Dana Rasmussen, Chief, Policy Branch, Food Distribution Division, Food and Nutrition Service, 3101 Park Center Drive, Room 506, Alexandria, Virginia 22302, or by telephone (703) 305-2680.

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**I. Background and Description of Comments Received**

A. Requirements for the Distribution and Control of Donated Foods

In a proposed rule published in the Federal Register on October 22, 2014 (79 FR 63224), the Department proposed to amend Food Distribution regulations at 7 CFR part 250 and 7 CFR part 251 to revise and clarify requirements to ensure that USDA donated foods are distributed, stored, and managed in the safest, most efficient, and cost-effective manner, at State and recipient agency levels. The rule proposed to further amend regulations to reduce administrative and reporting requirements for State distributing agencies, revise or clarify regulatory provisions relating to accountability for donated

foods, and rewrite much of the regulations in a more user-friendly, “plain language,” format. Lastly, FNS proposed to revise and clarify specific requirements to conform more closely to related requirements elsewhere in the Code of Federal Regulations.

FNS solicited comments through January 20, 2015 on the provisions of the proposed rulemaking. These comments are discussed below and are available for review at [www.regulations.gov](http://www.regulations.gov). To view the comments received, enter “FNS-2014-0040” in the search field on the main page of [www.regulations.gov](http://www.regulations.gov). Then click on “Search.” Under “Document Type”, select “Public Submission”.

The Department received 19 written comments regarding the proposed provisions from four associations and advocacy groups, five State agencies, four recipient agencies, one consulting firm, and four individuals who did not identify with an organization.

Two comments were supportive of the rule as proposed, in its entirety. The majority of the comments were supportive, but recommended changes to add clarity and consistency to the language in the regulations. Some commenters requested leaving the regulations as they currently stand in certain sections without the proposed revisions. There was only one comment in opposition of the proposed rule as a whole.

Commenters in support of the proposed rule indicated they were in favor of the clarifying changes and the consolidation of requirements for all food distribution programs. They also supported measures in the proposed rule to reduce administrative and reporting burdens on State distributing agencies and to lower costs for school food authorities (SFAs) receiving donated foods.

Most commenters requested further clarification and guidance on the proposed rule and the provisions that are changing. Specifically, commenters requested clarification on:

- Whether certain sections of the proposed rule applied to USDA donated foods in child nutrition programs, household programs, or both;
  - Food safety inspection requirements and responsibilities at the State distributing, subdistributing, and recipient agency levels;
  - Substitution of donated foods with commercially available foods in child nutrition programs and how and when to determine the value of donated foods at processors;
  - The roles and responsibilities of State distributing agencies versus subdistributing agencies, including which duties may be delegated to a subdistributing agency on behalf of the State distributing agency; and
  - Requirements for recipient agencies which may not have agreements with a State distributing agency or subdistributing agency, and enforcement of such requirements as they relate to storage and inventory management and insurance.
- Commenters provided that select, proposed requirements, such as keeping inventories of donated foods separate from other foods and purchasing insurance, are financially and/or administratively burdensome for some recipient agencies and difficult for State distributing agencies to enforce when hundreds of recipient agencies distribute food for a program.

Commenters also requested that USDA:

- Hold greater responsibility for conforming to scheduled delivery periods and specifying a timeline for the resolution of donated foods complaints and the replacement of out-of-condition foods; and
- Require all in-state processors to sign national processing agreements (NPAs) to lessen the administrative and/or financial burden on States and processors. For example, as proposed, in-state processors would be required to obtain an independent certified public accountant (CPA) audit, which could be cost-prohibitive, according to commenters.

There was only one comment in opposition to the new rule as a whole which stated in generic terms that reformatting and revising rules is unnecessary.

#### B. Nondiscretionary Requirements under the Agricultural Act of 2014, Section 4027

FNS is also amending program regulations at 7 CFR part 251 to implement nondiscretionary provisions of the Agricultural Act of 2014 (P.L. 113-79, the 2014 Farm Bill) with regard to The Emergency Food Assistance Program (TEFAP) through this rulemaking. Current program regulations at 7 CFR part 251 provide for the provision of donated foods to State distributing agencies for distribution to needy individuals through TEFAP.

Prior to enactment of the 2014 Farm Bill on February 7, 2014, section 214 of the Emergency Food Assistance Act of 1983 (Public Law 98-8; 7 U.S.C. 612c note), permitted USDA to use funds authorized for the purchase of TEFAP food only in the fiscal year (FY) in which the funds were appropriated. Section 4027 of the 2014 Farm Bill amended Section 27(a) of the Food and Nutrition Act of 2008 (7 U.S.C. 2036(a)) to

make food funds used by the Department to purchase TEFAP foods available for two FYs, and to allow State distributing agencies to carry over unexpended balances of food funding allocations for use in the immediately following FY.

State distributing agencies administering TEFAP routinely obligate over 95 percent of their available TEFAP food funding allocation in the FY in which it was appropriated. While FNS and TEFAP State distributing agencies work hard to ensure that states use all of their allocation of TEFAP foods each FY, order cancellations, price fluctuations, and other logistical challenges may result in a state having a small portion of its food funding allocation remaining at the end of the FY. These funds, which are lost to the program, often would be sufficient to purchase additional foods for program participants.

The 2014 Farm Bill amendments provide State distributing agencies administering TEFAP with the flexibility to access food fund balances allocated to them for use in TEFAP for two FYs in the event they are not able to fully use such food funds in the year they are allocated.

FY 2015 appropriations legislation included language allowing for carryover, thus permitting this provision to take effect in FY 2015. FNS issued a memorandum on August 14, 2014, implementing the amendment made by section 4027; the memorandum is available on the FNS website at [http://www.fns.usda.gov/sites/default/files/fdd/TEFAP\\_Farm\\_Bill\\_2014\\_Implementation\\_Memo\\_1.pdf](http://www.fns.usda.gov/sites/default/files/fdd/TEFAP_Farm_Bill_2014_Implementation_Memo_1.pdf). Beginning with FY 2015-appropriated TEFAP food funds, State distributing agencies will be able to keep any remaining TEFAP food funding allocation at the end of a FY and place orders against it during the subsequent FY. However, TEFAP food funds remaining at the end of the FY immediately following the FY for

which they were initially appropriated will no longer be available to USDA for TEFAP purposes. As a result, the TEFAP food funds will be unavailable for State distributing agencies to use in placing orders. For example, any State distributing agency's balance of its FY 2015 TEFAP food funds allocation will be available during FY 2015 and FY 2016. Those funds will expire at the end of FY 2016 and will not carry over into FY 2017. Thus, FNS advises State distributing agencies to continue to make every effort to use their TEFAP food allocations in the year they are provided by USDA.

## **II. Analysis of Comments Received and Regulatory Revisions, 7 CFR 250 and 251**

This final rulemaking amends the regulations at 7 CFR parts 250 and 251 as follows:

### **7 CFR part 250**

#### **A. Subpart A – General Purpose and Administration**

The Department proposed to completely revise current subpart A of 7 CFR part 250 to more clearly present the general purpose and use of donated foods, the definitions applicable to 7 CFR part 250, the responsible administrative agencies in the distribution and control of donated foods at Federal and State levels, and civil rights requirements. Comments received on this subpart are outlined below.

##### **1. Purpose and Use of Donated Foods, § 250.1**

In § 250.1, we proposed to describe the purpose of donated foods, the general requirements for their use, and the legislative sanctions that apply in the event they are improperly used. The Department received one comment which supported the proposed changes in § 250.1(b) regarding the use of donated foods for demonstration purposes. No

other comments were received. Therefore, the proposed provisions at § 250.1 are retained without change in this final rule.

## 2. Definitions, § 250.2

In § 250.2, we proposed to include the definitions applicable to 7 CFR part 250, which are included in current § 250.3. We proposed to remove and replace definitions that were outdated. We also proposed to add new definitions applicable to our programs, and to streamline and clarify current definitions.

The proposed revision of the definition of “Distributing agency” would clarify the current definition by indicating that it is a State agency selected by the appropriate authorities in the State to distribute donated foods in the State, in accordance with 7 CFR part 250 and other Federal regulations, as applicable. One commenter requested a revision to the proposed definition because we infer the commenter believed the proposed language would allow State distributing agencies to single source one recipient or “local” agency to operate The Emergency Food Assistance Program (TEFAP) in the entire state, in every locale. Federal regulations at 7 CFR part 251 set forth TEFAP-specific requirements, including those requirements specific to the State selection of recipient agencies. State distributing agencies are responsible for the administration of TEFAP at the state level, and have the discretion to select eligible recipient agencies that can meet program requirements. Thus, FNS is not revising the definition in this regard; however, we are clarifying in § 250.2 of this final rule that the distributing agency may also be referred to as the State distributing agency.

The Department proposed to revise the definition of “Recipient agencies” to clarify their function in providing assistance directly to needy persons. Two commenters expressed concern about this definition, as child nutrition programs, for example, provide nutrition to all eligible children. Thus, in this final rule, the Department is revising the term “needy” to “eligible” wherever it appears, and replacing the definition of “Needy persons” with “Eligible persons.”

We proposed to define “Distribution charge” as 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. One commenter requested a revision to this definition to include the word “state” to distinguish state distribution charges from commercial ones. In the final rule revised definition of “Distributing agency,” we clarify that State distributing agencies are agencies of the State. No additional modification or clarification of the definition of “Distribution charge” is needed as a result. The proposed provision is retained without change in this final rule.

One commenter expressed concern about the definition of “Distributor” in current § 250.2, adding that commercial distributors responsible for distributing direct delivery USDA foods neither sell nor bill for the product other than charging handling fees subject to the contract. To clarify in this final rule, the definition of “Distributor” is amended to state that 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.

Another commenter requested clarification on the “Sections” referenced throughout the proposed rule. Proposed § 250.2 contains definitions of each of the referenced “Sections” and the laws with which they are associated. These proposed definitions are being retained without change in this final rule.

One commenter requested clarification on the definition of “Subdistributing agencies.” The commenter argued that in some cases, private cooperative-led SFAs and Commodity Supplemental Food Program (CSFP) agencies perform what may be considered activities of the State distributing agency and should therefore be considered subdistributors. Proposed § 250.2, Definitions, proposed to define a subdistributing agency as 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. In some cases, the private cooperative’s duties most closely resemble those of recipient agencies or SFAs, as they are performing duties on behalf of SFAs and not the State. In CSFP, larger recipient or “local” agencies may manage similar duties for smaller, sub-contracted entities and would not be considered subdistributing agencies. Thus, the proposed provision is retained without change in this final rule.

Additionally, we are removing the definitions of “7 CFR part 3016” and “7 CFR part 3019”, and the proposed definition of “7 CFR part 3052”. The Office of Management and Budget (OMB) issued new guidance at 2 CFR part 200 titled Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance). OMB’s Uniform Guidance replaces 7 CFR parts 3015, 3016, 3019, 3052, and

cost principles addressed in 2 CFR parts 220 (A-21), 225 (A-87), and 230 (A-122). The USDA regulations implementing OMB’s Uniform Guidance are located at 2 CFR parts 400, 415, 416, and 418. Resultantly, we are adding definitions of “2 CFR part 200” and “USDA implementing regulations” in this final rule.

We are also revising the definitions of “Disaster” and “National per-meal value” to include the complete statutory references to which these definitions apply. We are revising the definition of “Disaster” to include reference to Section 412 or 413 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5179-5180) (the Act). The proposed definition only referenced the Act generally, rather than the specific sections of the Act to which this definition applies. In addition, we are revising the definition of “National per-meal value” to include the statutory references for both the National School Lunch Program (NSLP) and the Child and Adult Care Food Program (CACFP). 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)) establish the national per-meal value for each reimbursable meal served in NSLP and CACFP. These complete statutory references are reflected in this final rulemaking.

In this final rule, we are updating terminology used in reference to the Nutrition Services Incentive Program (NSIP). We are removing the definition of “AoA” and replacing it with “ACL” in the new definition and wherever the term appears. ACL, or the Administration for Community Living, is now the Department of Health and Human Services’ (DHHS) administering agency for NSIP. We are also replacing the definition of “State Agency on Aging” with “State Unit on Aging”, as this is the updated terminology used by DHHS, and replacing this term wherever it appears. Additionally,

we are updating the definition of “Elderly nutrition project” to state that it is a recipient agency selected by the State Unit on Aging to receive assistance in NSIP, which may include donated food assistance. Lastly, the definition of “Section 311” is also being updated to include use of the term “State Unit on Aging”, rather than “State Agency on Aging.”

Based on general comments received requesting further clarity, we are also revising the definitions of “Contract value of the donated foods” and “Substitution” to clarify current requirements. The revision to “Contract value of the donated foods” streamlines and clarifies the current definition, and removes references which are no longer applicable. The current definition of “Substitution” uses the term “commodity,” which we are replacing with “donated foods” for consistency with revised terminology in this final rule. Also, the current definition of “Substitution” references cheddar cheese and nonfat dry milk, which are outdated. The Commodity Credit Corporation inventory of nonfat dry milk has been depleted and is no longer available for donation to FNS for reprocessing and distribution within FNS programs. Also, we will handle all substitutions that do not meet the required specifications through future policy making. Thus, we are removing references to these products in the definition.

### 3. Administration at the Federal Level, § 250.3

In § 250.3, we proposed to include the actions that may be undertaken by FNS, as the Federal administering agency for USDA food assistance programs, in ensuring the effective distribution and control of donated foods. No comments were received on these

proposed changes. Thus, the proposed provision is retained without change in this final rule.

4. Administration at the State Level, § 250.4

In § 250.4, we proposed to include the responsibilities of the State distributing agency in administering the distribution of donated foods at the State level. We also proposed to provide clarification on the relationship between State distributing agencies and subdistributing agencies, and between State distributing agencies and recipient agencies. Many of the comments were supportive, asked for further clarification, or requested modification of the proposed changes to more effectively maintain program integrity. Thus, many of the proposed revisions at § 250.4 are retained in this final rule, with minor changes detailed as follows.

In § 250.4(a), we proposed to require the State distributing agency to ensure compliance with requirements in 7 CFR part 250, and in other Federal regulations referenced in this part. Specifically, we proposed to remove the provision, in current § 250.2(c), that the State distributing agency must provide adequate personnel to administer the program, as the need to comply with requirements for effective administration would necessitate the employment of adequate personnel to do so. Two commenters were concerned about the removal of this provision in current § 250.2(c), as this would no longer ensure consistent and effective administration, training, and service to recipient agencies in all states. We agree with the commenters' recommendation, and are adding language to promote consistency with prior regulatory requirements. This will serve to underscore the need for effective administration at the State level.

In § 250.4(b), we proposed to clarify State distributing agency responsibilities and the allowance to delegate select duties to a subdistributing agency. Three commenters requested clarification on these duties. In proposed § 250.2, a subdistributing agency would be defined in part as 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. The State 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, per proposed § 250.4(b). For example, applicable requirements which State distributing agencies would not be able to delegate to a subdistributing agency include, but are not limited to, conducting reviews of subdistributing and recipient agencies in CSFP, TEFAP, and the Food Distribution Program on Indian Reservations (FDPIR), and storage facilities at the State distributing agency and subdistributing agency levels; selecting recipient agencies; initiating and pursuing claims for donated food losses; and meeting the basic performance standards included in proposed § 250.22 in the ordering, distribution, processing, if applicable, and control of donated foods. Consistent with current and proposed requirements, though the State distributing agency may enter into an agreement with a subdistributing agency to handle the distribution and control of donated foods, the State distributing agency still has the overarching responsibility for program administration and integrity. We do not intend to change current or proposed requirements in this regard.

In § 250.4(c), we proposed to clarify the relationship between State distributing agencies and recipient agencies. We received several comments supporting the proposed amendments. One commenter agreed with the proposed revision to current § 250.11(b) that only State distributing agencies in household programs must consider past performance in selecting recipient agencies to receive donated foods. Another commenter agreed with the proposal to remove current durational requirements for agreements between State distributing agencies and recipient agencies/subdistributing agencies to allow State distributing agencies to determine the duration that will best meet the needs of the program. An additional commenter also supported these proposed revisions but requested allowing State distributing agencies to make such agreements permanent. We are modifying language from the proposed regulations to allow for permanent agreements, which may be amended at the initiation of State distributing agencies.

Another commenter solicited clarification as to which TEFAP recipient agencies must enter into written agreements with the State distributing agency. TEFAP regulations at § 251.2(c)(2) require State distributing agencies to enter into a written agreement with eligible recipient agencies and subdistributing agencies to which they plan to distribute donated foods and/or administrative funds. State distributing agencies must ensure that eligible recipient agencies and subdistributing agencies in turn enter into a written agreement with other eligible recipient agencies to which they plan to further distribute donated foods and/or administrative funds. Therefore, the State distributing agency only needs to enter into a written agreement with those eligible recipient agencies and subdistributing agencies to which they distribute food and/or administrative funds

directly. The proposed changes would not contradict this requirement, nor would they require State distributing agencies to be the entity that enters into written agreements with all eligible recipient agencies that receive donated foods through TEFAP. Therefore, we are not changing the proposed requirements in this regard.

One commenter demonstrated concern that eliminating the requirement for periodic re-competition of agreements between State distributing agencies and subdistributing agencies could discourage State distributing agencies from ensuring that current agreements with TEFAP emergency feeding organizations (EFOs) continue to work effectively. The commenter references multiple EFOs which are likely not subdistributing agencies, but rather recipient agencies. Specific requirements regarding the selection of EFOs are outlined in TEFAP regulations at 7 CFR part 251. Under these requirements, State distributing agencies have discretion in determining how they select recipient agencies in TEFAP. Thus, the proposed provisions are retained without change in this final rule.

In § 250.4(d), we proposed to clarify that procurement requirements now contained in 2 CFR part 200, subpart D, and USDA implementing regulations at 2 CFR part 400 and part 416, are applicable to distributing and recipient agencies in obtaining such services. No comments were received on these proposed changes. Thus, the proposed revisions are retained without change in this final rule.

##### 5. Civil Rights, § 250.5

In § 250.5, we proposed to include civil rights requirements in accordance with current § 250.21. No comments were received on these proposed changes. However, we are making a minor, non-substantive revision for clarity in this final rule.

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

The Department proposed to completely revise current Subpart B of 7 CFR part 250 to more clearly present the specific requirements in the ordering and delivery of donated foods, the distribution of donated foods to recipient agencies, and the control of donated foods at the State distributing agency and recipient agency levels. Comments received on this subpart are outlined below.

1. Availability and Ordering of Donated Foods, § 250.10

In § 250.10(a), we proposed to require the State distributing agency to utilize a request-driven ordering system which must provide recipient agencies the opportunity to provide input at least annually in determining the donated foods made available for ordering. One commenter supported the proposed provision, while two other commenters cited this proposed requirement as being too burdensome and impractical, given the need to balance recipient agency requests with other food ordering factors, such as filling full truckloads, abiding by fixed delivery periods, and ordering within the State's entitlement funding level. We do not intend to change this proposed requirement, though we recognize that State distributing agencies may take into account the quantity of food orders and balance competing demands prior to making final determinations on which foods are ultimately ordered. Still, the system must be request-driven. State

distributing agencies may solicit recipient agency input through annual surveys or other cost-effective means. Recipient agency feedback should be incorporated in the State distributing agency decision process in a way that collectively balances the needs of all recipient agencies in the state and uses donated foods efficiently and without waste. Thus, the proposed provision at § 250.10(a) is retained without change in this final rule.

In § 250.10(b), we proposed to require the State distributing agency to ensure that recipient agencies have information on the types and quantities of donated foods that may be ordered, donated food specifications and nutritional value, and procedures for the disposition of donated foods that are out-of-condition or that are subject to a food recall. Two commenters expressed concerns about the availability of product information on USDA foods, including specifications and nutritional values. USDA Foods Information Sheets are acceptable forms of documentation to meet this requirement, along with information from the USDA Foods website. The specifications for USDA foods are also available on the USDA Agricultural Marketing Service website. USDA will continue to provide these materials to assist State distributing agencies in meeting this requirement. We are clarifying the proposed language in this provision to allow for the use of materials provided by USDA.

We also proposed to remove the specific stipulation, in current § 250.13(d)(2), that Section 416 bonus foods may not be distributed to recipient agencies if normal food expenditures would be reduced. The provision of donated foods is meant, in part, to assist recipient agencies in meeting their food assistance needs in a cost-effective manner. One commenter recommended retaining this provision to ensure bonus foods do not displace SFAs' orders placed using entitlement dollars. After further review, we agree

with the commenter's recommendation and are placing the current language in revised § 250.10(c).

2. Delivery and Receipt of Donated Food Shipments, § 250.11

In § 250.11, we proposed to include requirements for the receipt of donated food shipments from USDA vendors or from a Federal storage facility, and the conditions for the replacement of donated foods delivered unsafe or out-of-condition by such entities. Three commenters requested clarification on the specifics of these proposed requirements. More detailed information on the procedures for the receipt of donated foods, the replacement of out-of-condition and damaged foods, and the payment of costs relating to shipments is provided in FNS Instruction 709-5, Revision 2, Shipment and Receipt of USDA Foods. Thus, the proposed provision in this regard is retained without change in this final rule.

In § 250.11(a), we proposed to remove the provision, in current § 250.13(a), that refers to the Department's responsibility to conform to scheduled delivery periods. While the Department strives to ensure timely deliveries to State distributing agencies and recipient agencies, such deliveries are subject to vendor and storage facility contracts and performance. Two commenters requested retaining this provision or amending the language, which would help State distributing agencies maintain an efficient and cost-effective program. We are retaining the current regulatory language in § 250.13(a) and moving it to § 250.11(a), clarifying that the Department will make every reasonable effort to meet scheduled delivery periods.

Another commenter requested including subdistributing agencies, distributors, and CSFP agencies in § 250.11(a) when referencing deliveries of donated foods from the vendor or Federal storage facility. In § 250.2 of this final rule, Definitions, we provide definitions for the distributing and recipient agencies referenced in this part. Recipient agencies are 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 7 CFR part 250. “Distributor” is defined separately in § 250.2 of this final rule.

In § 250.11(b), we proposed to require that the distributing or recipient agency, or other consignee, comply with all applicable Federal requirements in the receipt of donated food shipments. No comments were received on this section. Thus, the proposed revisions are retained without change in this final rule.

In § 250.11(c), we proposed to include requirements for the replacement of donated foods that are delivered out-of-condition by the vendor. Two commenters supported these proposed requirements. A third commenter recommended adding a timeline for replacing out-of-condition foods or crediting entitlement, as applicable, to ensure the food or entitlement can be used in the current program year. FNS cannot provide a specific timeline, as these issues must be treated on a case-by-case basis. To the greatest extent possible, FNS will continue to work to ensure that food or entitlement issues are addressed in a timely manner. Another commenter questioned whether the proposed

regulations should be defining the terms of replacement by the vendor. Regulations at § 250.2 in this final rule define “Vendor” as a commercial food company from which the Department purchases foods for donation. For vendors currently responsible for delivering donated foods in good condition, this section further clarifies that requirement. We are providing further clarification in this final rulemaking to state that the vendor’s responsibility to replace donated foods delivered out-of-condition extends until the expiration of the vendor warranty period included specifically in the vendor contract with USDA. Using specifically the vendor warranty period in the vendor contract with USDA will provide greater consistency for all donated foods vendors for the replacement of out-of-condition foods.

In § 250.11(d), we proposed to include the information, in current § 250.13(b), that the Department is responsible for payment of the cost of delivering donated foods from vendors or Federal storage facilities to consignees, as well as any processing or handling costs incurred up to the time of delivery, as is deemed in the best interest of the Department. In § 250.11(e), we proposed to include the provisions, in current § 250.13(c), relating to transfer of title to donated foods. No comments were received on these sections. Thus, the proposed revisions are retained without change in this final rule.

### 3. Storage and Inventory Management at the Distributing Agency Level, § 250.12

In § 250.12, we proposed to describe the requirements for the storage and management of donated food inventories at storage facilities used by the State distributing agency or subdistributing agency, which may include commercial storage

facilities under contract with either the State distributing agency or the subdistributing agency. We received several comments on this section, as discussed below.

In § 250.12(a), we proposed to require that the State distributing agency ensure storage facilities comply with all Federal, State, or local requirements related to food safety and health, as applicable, and obtain all required health inspections. These proposed requirements should also include compliance with procedures for responding to a food recall, as suggested by one commenter. We agree with the commenter's recommendation, and are adding this language to this section of this final rule. Two commenters also requested additional clarification on the steps needed to fulfill food safety and health requirements, and recommended continuing to require compliance by subdistributing agencies and recipient agencies. The proposed requirements for storage facilities used by State distributing agencies (or subdistributing agencies, as applicable) may include commercial storage facilities under contract with either the State distributing agency or subdistributing agency. We are making this language more explicit in this final rule; however, we are not providing further clarification on the necessary steps, as the State distributing agency is responsible for maintaining the overarching responsibility of storage facility compliance, and retains discretion within applicable regulations to determine the manner in which such requirement is met.

In § 250.12(b), we proposed to retain language in current § 250.14(b) that State distributing agencies ensure that a separate inventory record of donated foods be maintained at all storage facilities utilized by the State distributing agency, and such foods must be distinguishable from other foods. No comments were received specific to

proposed State distributing agency inventory management requirements in this regard. Thus, the proposed revision is retained without change.

In § 250.12(b), we proposed to retain the requirements in current §§ 250.14(e) and 250.15(c) that the State distributing agency conduct a physical review of donated food inventories and report donated food losses to FNS, respectively. One commenter noted that subdistributing agencies should also be allowed to conduct inventory reviews. The State distributing agency has the overarching responsibility for administration of programs, including physical reviews of inventories at subdistributing agency storage facilities. Therefore, we are not revising the physical review requirement in this regard. Another commenter asked for clarification on the proposed threshold for food loss that must be reported. Clarification on these proposed regulations is provided in § 250.16 of the preamble below, in regards to claims and restitution for donated food losses. Thus, the proposed language is retained without change.

In § 250.12(c), we proposed to include a six-month limitation on the amount of donated food inventories on-hand at the State distributing agency level for TEFAP, NSLP, and other child nutrition programs, with FNS approval required to maintain larger inventories, in accordance with current § 250.14(f)(2). The proposed provision is consistent with current regulatory requirements. Two commenters recommended including alternative means of maintaining inventories at acceptable levels, asserting that State distributing agencies should be permitted to exceed this limit within the FY or school year. One commenter also requested that the regulation clarify that these limitations be calculated for each food category. We are revising the language in this provision to provide additional clarification in regards to food categories. However, we

are not changing the maximum inventory requirement in this final rule, which is consistent with the current regulatory standard. State distributing agencies should monitor their inventories on a monthly basis and plan their ordering and delivery schedules accordingly to ensure that inventories do not exceed six month levels at any given time without approval to maintain more from FNS. This practice helps to conserve program resources and to ensure that foods do not go out of condition before they are served.

In § 250.12(d), we proposed to require insurance for donated food inventories at State distributing agency, subdistributing agency, and recipient agency storage facilities. Two commenters supported this proposed provision. Several other commenters requested clarification on these requirements, particularly for smaller recipient agencies with limited financial resources. Under the proposed rule, insurance requirements would be enforced through management reviews and/or requests for documentation, both at the Federal and State levels, in accordance with proposed § 250.19. The proposed requirement would be intended for State distributing agencies, warehouses contracted with State distributing agencies, and recipient agencies that have direct agreements with State distributing agencies or subdistributing agencies. It would not apply to recipient agencies that have agreements with other recipient agencies, e.g., many food pantries, soup kitchens, and community action agencies.

Under the proposed rule, the smaller recipient agencies that have direct agreements with a State distributing agency or subdistributing agency would have insurance commensurate with its average inventories; thus, costs incurred from obtaining insurance would be less. Nevertheless, in instances where obtaining insurance of donated foods

would cause undue burden on recipient agencies that have direct agreements with State distributing agencies or subdistributing agencies but do not maintain significant inventories of donated foods, FNS is amending the insurance requirement in this final rulemaking to provide an exemption for those recipient agencies that maintain inventories with a value of donated foods that fall below a defined threshold. Such recipient agencies do not maintain sufficient inventory levels to justify the potential financial burden of obtaining insurance. We will issue a policy memorandum to define the threshold level for the value of donated foods in inventory that would exempt such recipient agencies.

In § 250.12(e), we proposed to include requirements for the transfer of donated foods between State distributing agencies and/or programs. Specifically, we proposed to permit the State distributing agency to transfer donated foods to another State distributing agency operating the same program without FNS approval. One commenter supported this proposed provision. However, after further review, we are clarifying in this final rulemaking that FNS approval is needed for all transfers of donated foods between State distributing agencies and/or programs, in accordance with current regulations at § 250.13(h). Obtaining approval for such transfers of donated foods is intended to ensure program integrity in the administration of food distribution programs.

We also proposed to require the State distributing agency to obtain an inspection of donated foods by State or local health officials before transferring them, if there is a question of food safety or at the direction of FNS, to ensure that only foods that are safe and not out-of-condition are transferred. One commenter recommended waiving the requirement to obtain a health inspection in cases of obvious spoilage or infestation. We agree it is unlikely that a transfer would be considered where obvious signs of spoilage or

infestation exist. We also agree that inspections should be performed as necessary or as directed by FNS, and are revising the language accordingly.

We also proposed in this section to use the term “transfer” to refer to any redistribution of donated foods from one agency to another, or from one program to another, at the State distributing agency or recipient agency level, and to cease using the term “redonation.” One commenter inquired about whether this terminology would be updated on USDA forms. FNS plans to incorporate these language revisions on all USDA forms to ensure consistency with Federal regulations.

In § 250.12(f), we proposed to revise the current provision which provides for termination of the contract between State distributing agencies and commercial storage facilities and extends the notification of termination of contracts by either party from 30 to 60 days. Two commenters supported this proposed change. One commenter suggested revising the language to provide for termination with or without cause, rather than noncompliance or other cause. Current regulations at § 250.14(d) allow the State distributing agency to terminate a contract with the State-contracted warehouse immediately due to noncompliance, which we are carrying forward into this final rulemaking. We are not otherwise making changes to the proposed language in this regard. Another commenter requested modifying the 60-day extension for notification of termination of contracts to also include an inventory limitation at the end of the school year. Regulatory inventory limitations are separate and distinct from contract termination. State solicitations/contracts for commercial storage facilities may include inventory limitations, as long as they are not less stringent than the six-month inventory

limit set forth at proposed § 250.12(c)(1). Thus, the proposed provision at § 250.12(f) is retained without change in this final rule.

#### 4. Efficient and Cost-Effective Distribution of Donated Foods, § 250.13

In § 250.13, we proposed to include requirements to ensure the distribution of donated foods to recipient agencies in the most efficient and cost-effective manner. In § 250.13(a), we proposed to retain the requirements, in current §§ 250.14(a) and 250.24(e), that the State distributing agency distribute donated foods to recipient agencies in the most efficient and cost-effective manner, and that such distribution is responsive to the needs of recipient agencies, as feasible. No comments were received on the proposed changes in this section. Thus, the proposed provision is retained without change in this final rule.

In § 250.13(b), we proposed to clarify that the State distributing agency must use State Administrative Expense (SAE) funds, as available, to meet the costs of storing and distributing donated foods, or related administrative costs, for SFAs or other recipient agencies in child nutrition programs, or must use other Federal or State administrative funds received for such purpose. We are clarifying in this final rulemaking that SAE funds only apply to child nutrition programs. We also proposed to require that the State distributing agency 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. Four commenters suggested providing further clarification on SAE utilization, while another commenter inquired about to whom the recordkeeping requirements would apply. This section references SFAs or other recipient agencies in child nutrition programs, and

would not apply to household programs. Additionally, the existing requirements for SAE usage are outlined in the Child Nutrition Program regulations at § 235.4 and in Policy Memorandum FD-131, “Questions and Answers Regarding the Use of SAE Funds and SAE Reallocation Funds in the Food Distribution Program for Child Nutrition Programs.” The SAE reallocation guidance is also updated every FY by FNS Child Nutrition Programs in a memorandum to State distributing agencies which administer these programs. As a result, FNS is not providing additional guidance in this final rule.

Another commenter pointed out that SAE funds are not sufficient to cover storage and distribution costs in their entirety and that receiving reallocated SAE funds is not guaranteed. We recognize in proposed § 250.13 that there are circumstances when a State distributing agency could charge additional fees to SFAs if all SAE has been expended. We further recognize reallocated SAE funds are limited. To the greatest extent practical with available SAE resources, such funding should be used for storage and distribution costs at the State distributing agency level.

In § 250.13(c), we proposed to retain the requirement, in current § 250.14(a)(7), that the State distributing agency obtain FNS approval for changes to distribution charges at least 90 days in advance. These charges also include State administrative fees charged to a recipient agency by the State distributing agency (e.g., per case fee). One commenter suggested reducing the notification period to 60 days, while another argued that the competitive procurement process for obtaining storage and distribution services should be sufficient justification for changes in fees equal to the contracted costs, and that we should remove this requirement altogether. The competitive procurement process by itself is not sufficient justification for changes to distribution charges, as there may be

Federal (e.g., SAE) or State funding available for distributing agencies to offset these costs. In addition, the 90-day window is required in the current 7 CFR part 250 regulations. This timeframe provides for sufficient review of any proposed change to ensure the distribution charge continues to cover only allowable costs, in accordance with 2 CFR part 200, subpart E, and USDA implementing regulations at 2 CFR part 400. It further allows for appropriate notification to impacted entities, should such charges be approved.

In the proposed rule, this language is meant as clarification, as pre-approval is already being implemented in most cases. The proposed rule is meant to minimize distribution charges to recipient agencies, as provided in this part. Thus, FNS is not changing these requirements, as they are meant to ensure that State distribution systems provide the most efficient and cost-effective service for SFAs in the provision of donated foods.

In § 250.13(d), we proposed to indicate that FNS may disapprove the State distributing agency's proposed new distribution charge or changes to an existing distribution charge, if FNS determines that such amount would not provide for the most cost-effective distribution of donated foods or would otherwise impact recipient agencies negatively. One commenter suggested providing clarification in § 250.13(c) and (d) on which programs would be required to meet the proposed requirements and whether distribution and storage fees can be placed on recipient agencies for household programs. Assessing distribution and storage fees to recipient agencies is prohibited in TEFAP, in accordance with § 251.9(d). Though assessing these fees is allowable in other household programs, it is not a common practice. We are clarifying in the regulatory text that these

sections reference State distributing agency distribution charges to SFAs and other recipient agencies in child nutrition programs specifically.

5. Storage and Inventory Management at the Recipient Agency Level, § 250.14

In § 250.14, we proposed to include requirements for the storage and management of donated foods at the recipient agency level, including commercial storage facilities or other entities under contract with the recipient agency. In § 250.14(a), we proposed to require recipient agencies to meet the same requirements for food safety and health at their storage facilities as those proposed for the State distributing agency in § 250.12(a) of this rule. One commenter supported the proposed strengthening of language describing food safety standards in this provision, while another recommended including compliance with procedures for responding to a food recall in the requirements. We agree with the second commenter's recommendation, and are adding language to this provision in this final rule.

In § 250.14(b), we proposed to require that recipient agencies in household programs store donated foods in a manner that permits them to be distinguished from other foods at their storage facilities, and to maintain a separate inventory record of donated foods. One commenter requested clarification on this proposed provision in regards to whether a physical or electronic separation of donated foods is mandated. USDA foods must be distinguishable from non-USDA foods at the recipient agency level in household programs, though USDA is flexible with regard to how this distinction is made (e.g., slotting USDA foods next to commercial foods, while still being able to distinguish

between the two). However, the State distributing agency must ensure that USDA foods are ultimately further distributed in full for use in the appropriate household program.

Four additional commenters expressed confusion about the requirement to maintain a separate inventory record or stated that TEFAP recipient agencies should be permitted to utilize a single inventory management system, given the small amount of donated foods some carry for TEFAP. The proposed language in this section is meant to clarify existing requirements on inventory management and is not proposing any new changes. Policy Memorandum FD-020, “Single Inventory and Related Commodity Issues – Clarification of Regulatory Changes and Other Guidance,” states that the regulatory changes related to single inventory referenced in this memorandum “do not apply to recipient (or local) agencies participating in FDPIR, CSFP, and TEFAP.” FNS is codifying this policy in this final rule, as it helps to ensure that regulatory requirements are met. However, we recognize that this requirement may be burdensome for some recipient agencies and will continue to discuss possible solutions with State distributing agencies and local TEFAP agencies.

In § 250.14(c), we proposed to clarify that all recipient agencies in child nutrition programs, and those receiving donated foods as charitable institutions, are not required to separately monitor and report donated food use, distribution, or loss to the State distributing agency, unless there is evidence indicating that donated food loss has occurred as a result of theft or fraud. One commenter supported this proposed provision. Another commenter requested clarity on whether single inventory management for child nutrition programs and charitable institutions is optional or required, and whether the use of donated foods for training purposes under a single inventory management system is

allowed. Recipient agencies in child nutrition programs, and those receiving donated foods as charitable institutions, have the flexibility to use single inventory management if they choose. They are not required to maintain separate records of donated foods. In regards to using donated foods for nutrition education and training purposes, this is allowable under a single inventory management system.

In § 250.14(d), we proposed to include requirements in current § 250.13(a)(1)(iii) for the transfer of donated foods from one recipient agency to another recipient agency and to clarify the types of transfers to which these requirements apply. We proposed to clarify that a recipient agency operating a household program request approval from the State distributing agency to transfer donated foods to another recipient agency in the same program, and that the transfer of donated foods to a recipient agency in another program (i.e., through the State distributing agency) receive FNS approval. One commenter supported this proposal.

In this section, we also proposed to indicate that a recipient agency operating a child nutrition program, or one receiving donated foods as a charitable institution (in accordance with current § 250.67), may transfer donated foods to another recipient agency or charitable organization without prior approval from the State distributing agency or FNS. One commenter requested clarification on whether this applies to all child nutrition recipient agencies. All Child Nutrition Program recipient agencies would be considered agencies within the same program. This includes agencies administering NSLP, CACFP, and the Summer Food Service Program (SFSP).

Two additional commenters disagreed with this proposed provision and recommended retaining the current requirement for State distributing agency approval of

transfers to maintain program integrity. Another commenter agreed with this proposed provision, but requested that the State distributing agency be notified if entitlement also needs to be transferred and that recipient agencies maintain records of such transfers for food safety and inventory management purposes. In child nutrition programs, donated foods cannot be readily identified once they enter into a single inventory management system at the recipient agency level, in accordance with current § 250.13(c). Therefore, the State distributing agency is no longer required to monitor such recipient agency's use and management of donated foods. Additionally, if the Child Nutrition Program recipient agency wants its State distributing agency to credit its entitlement after a transfer of donated foods takes place, the recipient agency would still have the option of contacting its State distributing agency to request such action. Recipient agencies are currently required to maintain records of donated food inventories, in accordance with current § 250.16(a)(2). Thus, the proposed changes are retained in this final rule, with only a minor clarification that the recipient agency must still maintain records of donated food inventories.

In § 250.14(e), we proposed to indicate that recipient agencies may obtain the services of a commercial storage facility to store and distribute donated foods, but must do so in compliance with procurement requirements now contained in 2 CFR part 200, subpart D, and USDA implementing regulations at 2 CFR parts 400 and 416, as applicable. No comments were received on this section. Thus, the proposed revisions are retained without change in this final rule.

#### 6. Out-of-Condition Donated Foods, Food Recalls, and Complaints, § 250.15

In § 250.15, we proposed to include requirements for the disposition of donated foods that are out-of-condition, or that are subject to a food recall, and requirements for the resolution of recipient complaints related to donated foods. In § 250.15(a), we proposed to require the State distributing agency to 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. In this final rulemaking, we are providing clarifying changes to state that out-of-condition donated foods should be removed, destroyed, or otherwise disposed of, in accordance with FNS instruction and State or local requirements. This new language is consistent with and codifies guidance in FNS Instruction 709-5, Revision 2. One commenter expressed concern about requiring State distributing agencies to obtain inspections if donated foods show obvious signs of spoilage. The proposed language specifies that inspections should be performed “as necessary, or as directed by FNS”. FNS will continue to exercise its discretion and work to ensure no undue burden is placed on State distributing agencies in this regard. The proposed revisions are retained with only clarifying changes in this final rule.

In § 250.15(b), we proposed to require that recipient agencies in household programs report out-of-condition donated foods at their storage facilities to the State distributing agency, and ensure that such donated foods are destroyed, or otherwise disposed of, in accordance with State or local requirements pertaining to food safety and health. No comments were received on this section; however, we are adding clarifying changes to ensure that out-of-condition donated foods are also removed from storage facilities in accordance with FNS instruction and State or local requirements. This new language is

consistent with and codifies FNS guidance in Instruction 709-5, Revision 2. Thus, the proposed revisions are retained with only clarifying changes in this final rule.

In § 250.15(c), we proposed to require that the State distributing agency or recipient agency, as appropriate, follow all applicable Federal, State, or local requirements for donated foods subject to a food recall. One commenter requested USDA guidance for household programs in regards to client notifications during food recalls. In accordance with proposed § 250.15(c), in the event of a recall, FNS will issue guidance to all parties in responding to that food recall, replacing recalled donated foods, and reimbursing specific costs incurred as a result of such actions. This guidance will include procedures or instructions to clients receiving donated foods. Thus, the proposed revisions are retained without change in this final rule.

In § 250.15(d), we proposed to require the State distributing agency to submit any complaints regarding donated food quality or specifications to FNS, and to prohibit the State distributing agency from disposing of any donated food that is the subject of a complaint prior to guidance and authorization from FNS. One commenter expressed concern regarding the proposed timeframe for complaint resolution, as well as the proposed prohibition of disposing of donated foods without prior FNS approval, even in cases of infestation. We acknowledge that receiving a response from the procurement agency or vendor regarding such complaints may cause delays. For this reason, we are unable to provide a specific timeline for the resolution of complaints but agree that complaints should be resolved as expeditiously as possible. Additionally, we are retaining the proposed regulatory requirement which prohibits the disposal of donated foods without prior FNS approval. This is due to contractual obligations with USDA's

vendors, as well as food safety regulations. Thus, the proposed provision is retained without change in this final rule.

7. Claims and Restitution for Donated Food Losses, § 250.16

In § 250.16, we proposed to include requirements to ensure that restitution is made for donated food losses, including claims against parties responsible for such losses. In § 250.16(a), we proposed to require that the distributing agency ensure that restitution is made for donated food losses, and for the loss or improper use of funds provided for, or obtained incidental to, donated food distribution. One commenter was concerned that the State distributing agency would be held liable for unreported losses at the recipient agency level. In accordance with proposed § 250.15(b), losses must be reported by the recipient agency to the State distributing agency. The State distributing agency is responsible for following up on reported losses, while at the same time ensuring that recipient agencies are taking appropriate steps to limit food losses.

In § 250.16(b), we proposed to clarify that FNS may initiate and pursue a claim against the distributing agency or other entities for the loss of donated foods, and for the loss or improper use of funds provided, or obtained incidental to donated food distribution. One commenter requested clarification on the quantity or value of donated food losses that would be required to submit a claim. In accordance with FNS Instruction 410-1, Revision 2, Claims for Losses of Donated Foods and Related Administrative Losses – Procedures for the State Distributing Agency, if the State distributing agency determines that the value of the donated food loss, or improper use of funds, does not exceed \$500, or does not exceed an amount established by State statute for pursuit of a

claim (if greater than \$500), the State distributing agency is not required to pursue a claim, except in cases of theft, embezzlement, willful misapplication, or fraud. The proposed regulations in this section stated that FNS may compromise, forgive, or waive a claim. However, FNS waiver is not guaranteed. In addition, we proposed to remove blanket exemptions for inventory losses from the regulations for the purpose of encouraging more efficient inventory management. The proposed revisions are retained without change in this final rule.

8. Use of Funds Obtained Incidental to Donated Food Distribution, § 250.17

In § 250.17, we proposed to include requirements for the use of funds obtained incidental to donated food distribution. In § 250.17(a), we proposed to clarify requirements in current § 250.15(f)(2) related to the use of funds obtained from the distribution charge imposed on recipient agencies in child nutrition programs, in accordance with proposed § 250.13(b). In § 250.17(b), we proposed to require that SFAs use funds obtained from processors in the processing of donated foods into end products, or from food service management companies (FSMCs) in crediting for the value of donated foods, in support of the nonprofit school food service. In § 250.17(c), we proposed to clarify requirements in current § 250.15(f)(1) and (2) related to funds collected in claims for donated food losses, and funds obtained from other sources incidental to donated food distribution. In § 250.17(d), we proposed to clarify that the distributing agency is prohibited from using funds obtained incidental to donated food distribution to meet State matching requirements for other Federal grants received—e.g.,

for FDPIR or TEFAP. No comments were received on paragraphs (a) through (d) of this section. Thus, these proposed provisions are retained without change in this final rule.

In § 250.17(e), we proposed to clarify the “Buy American” requirement, in current § 250.23, for the purchase of foods with such funds. One commenter expressed appreciation for this clarification, but requested guidance for State distributing agencies on how to enforce the Buy American provision for cash-in-lieu schools and CACFP agencies, and whether enforcement would be part of the State’s administrative review. Enforcement of the Buy American provision for cash-in-lieu schools and CACFP agencies is not a formal part of the State’s administrative review. However, State distributing agencies are required to monitor such agencies like they would any other SFA receiving funds under child nutrition programs. Consistent with the requirements found in FNS Instruction 796-2, “Financial Management – CACFP,” institutions are required to maintain sufficient records to document the proper use of these payments, including the purchase of only domestic products. Thus, the proposed provision is retained without change in this final rule.

9. Reporting Requirements, § 250.18

In § 250.18, we proposed to include requirements for the submission of reports related to the distribution and control of donated foods. No comments were received on these proposed changes. Thus, the proposed provision is retained without change in this final rule.

10. Recordkeeping Requirements, § 250.19

In § 250.19, we proposed to include recordkeeping requirements relating to the distribution and control of donated foods. In § 250.19(a), we proposed to require that processors maintain records documenting the sale of end products to recipient agencies, including the sale of such end products by distributors, and that failure to maintain required records must be considered prima facie evidence of improper distribution or loss of donated foods and may result in a claim. One commenter requested guidance for State distributing agencies on how to ensure that applicable entities are maintaining agency records properly. The proposed language states that processors must maintain records of sales to recipient agencies. The recipient agency would therefore have a record of such sales through invoices from a distributor or processor. Another commenter recommended adding that the processor must also maintain records of monthly performance reports. Proposed § 250.30(c) requires processors to 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, and current regulations at § 250.30(m) require processors to submit processing performance reports to State distributing agencies. We are referencing the applicable section in § 250.19 of this final rule. The commenter also requested clarification on who would be authorized to make the claim referenced in § 250.19(a). Under the proposed rule and consistent with current regulatory requirements at § 250.54(d) and applicable instruction, failure of the State distributing agency, recipient agency, or other entity to comply with recordkeeping requirements may result in a claim being assessed by FNS or the State distributing agency against such entity. We are clarifying in this final rule that “other entities” may include processors.

In § 250.19(a), we also proposed to require State distributing agencies to keep a record of the value of donated foods received by each of its SFAs. One commenter requested clarification on when and how this value should be determined. Section 250.58(e) of the proposed rule states that the State distributing agency must use either the cost-per-pound donated food prices posted annually by USDA or the most recently published cost-per-pound price in the USDA donated foods catalog in meeting the value of donated foods each SFA should receive. States may also use a rolling average of the USDA prices (average cost per pound), as further described in the discussion of § 250.58(e) in the preamble to this final rule. The State distributing agency would be required to credit the SFA using the USDA purchase price (cost-per-pound), and update the price at least semi-annually to reflect the most recent purchase price. This price would be considered the valuation of record. We are citing this regulatory reference within § 250.19(a) to provide greater clarity.

In § 250.19(b), we proposed to retain, without change, requirements in current § 250.16(b) relating to the length of time that records must be retained. No comments were received on this section. Thus, the proposed provision is retained without change in this final rule.

#### 11. Audit Requirements, § 250.20

In § 250.20, we proposed to include reference to Federal audit requirements for State distributing agencies and recipient agencies, and audit requirements for processors. In § 250.20(a), we proposed to reference audit requirements now contained in 2 CFR part 200, subpart F and appendix XI, Compliance Supplement, and USDA implementing

regulations at 2 CFR part 400 for State or local government agencies and nonprofit organizations that receive Federal grants, as such requirements apply to distributing and recipient agencies. No comments were received on this section. Thus, the proposed provision is retained without change in this final rule.

In § 250.20(b), we proposed to amend the current audit requirement for multi-state processors by requiring that a multi-state processor obtain an independent CPA audit in each of the first two years that it receives donated foods for processing. After the first two years, we proposed to require a multi-state processor to obtain such an audit at a frequency determined by the average value of donated foods received for processing per year, as currently required. One commenter supported this provision.

In § 250.20(b), to more closely align the requirements for in-state and multi-state processors, we also proposed to include requirements for in-state processors to obtain an independent CPA audit to determine compliance with processing requirements for donated foods. One commenter showed concern that these proposed requirements may prohibit in-state processors from participating in the program, due to the cost of the required audit, and that there are no guidelines for what the CPA audit should include. The proposed regulatory thresholds that would trigger an audit in § 250.20(b) are already in place via Policy Memorandum FD-102, “Waiver and Replacement of Current Regulatory Thresholds for Independent CPA Audits of Multi-State Processors.” The audit thresholds are being extended to in-state processors as proposed, and applicable guidance will be provided as necessary. These proposed revisions are meant to prioritize alleviating burden on and costs for State distributing agencies to perform on-site reviews. The FNS Audit Guide for Processors, which is available on the FNS website, details the

guidelines for a nonfederal auditor to use in conducting audits of processors. The proposed regulations would refer to this guide as the basis for both in-state and multi-state reviews. The proposed revisions are retained without change in this final rule.

The commenter also expressed concern that given that CPAs are not food safety inspectors, processors should still conduct food safety inspections through independent agreements. In-state processors should continue to follow state and local laws and the procedures outlined in the State agreement, as long as the agreement is in compliance with current Federal regulatory requirements. Since CPA audits are separate and distinct from food safety inspections, the proposed revisions are retained without change in this final rule.

In regards to the proposed requirements in § 250.20(a) and (b), two commenters recommended requiring in-state processors to go through the NPA Program and managing all processors at the Federal level to alleviate burden on State distributing agencies. We appreciate the commenters' recommendation; however, requiring in-state processors to sign NPAs is outside the scope of this final rule. Also, the requirement to obtain independent CPA audits would alleviate, not add, burden on the State distributing agency. Therefore, we do not intend to change the proposed rule in this regard. We will, however, further consider these comments in upcoming rulemaking.

In § 250.20(c), we proposed to include the actions required of processors resulting from the audits, including requiring in-state processors to submit a copy of the audit to the distributing agency for review by December 31 of each year in which an audit is required. One commenter requested clarification on how this proposed rule relates to OMB's Uniform Guidance at 2 CFR part 200 in regards to audits for nonfederal entities.

Title 2 CFR part 200 does not cover processors or other private, for-profit contractors. The definition of “Non-Federal entity” at 2 CFR 200.69 includes only State distributing agencies, local governments, Indian Tribal Organizations, institutions of higher education, and nonprofit organizations. For this reason, we have a separate, program-specific regulatory requirement for audits of processors. Therefore, the audit requirement in this section of the proposed rule is retained without change in this final rule.

In § 250.20(d), we proposed to indicate that a State distributing agency or recipient agency is subject to sanctions for failure to obtain the required audit, or for failure to correct deficiencies identified in audits. One commenter noted that a multi-state processor operating under an NPA submits its audits to FNS, and State distributing agencies and local agencies do not see the findings or corrective action plans. The commenter recommended that this section reflect that only FNS sees the audit and plans. We are revising the language in this section of the final rule to provide clarification in this regard.

## 12. Distributing Agency Reviews, § 250.21

In § 250.21, we proposed to include the requirements for the State distributing agency to review subdistributing agencies, recipient agencies, and other entities to ensure compliance with requirements related to the distribution and control of donated foods. In § 250.21(a), we proposed to clarify that the State administering agency, not the distributing agency, is required to review SFAs and other recipient agencies in child nutrition programs. One commenter agreed with this proposed clarification. We also proposed in § 250.21(b) to remove the requirement, in current § 250.19(b)(1)(iii), that the

State distributing agency perform on-site reviews of in-state processors, as the on-site review would be replaced by review of the audits required of such processors, in accordance with § 250.20 of the proposed rule. One commenter agreed with this proposal, but recommended that this approach be expanded to require all processors, both in-state and multi-state, to go through the NPA Program, as many States do not allow in-state processing due to a lack of resources to manage the approval process. As discussed above, we appreciate this commenter's recommendation; however, it is outside the scope of this final rule. We can further consider this comment in upcoming rulemaking.

In § 250.21(b), we proposed to require that the State distributing agency ensure compliance with requirements in 7 CFR part 250, and in other Federal regulations as applicable, through its review of required reports, and through on-site reviews of the recipient agencies and other entities. One commenter requested clarification on whether State distributing agencies would be allowed to delegate the review of recipient agencies to a subdistributing agency. Though the State distributing agency may enter into an agreement with a subdistributing agency to handle the distribution and control of donated foods, the State distributing agency would still have the overarching responsibility of program administration and integrity, in accordance with proposed § 250.4(b), including reviews of subdistributing and recipient agencies, and other entities. Thus, the proposed revisions are retained without change in this final rule.

In § 250.21(c), we proposed to include the requirement, in current § 250.19(b)(3) and (4), that the distributing agency report deficiencies identified in its review to recipient agencies or other entities, recommend corrective actions, and ensure that such actions are

completed. No comments were received on this section. Thus, the proposed provision is retained without change in this final rule.

13. Distributing Agency Performance Standards, § 250.22

In § 250.22, we proposed to include the performance standards that the State distributing agency must meet, most of which are included in current § 250.24. No comments were received on these proposed changes. Thus, the proposed provision is retained without change in this final rule.

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

In § 250.30, we proposed to amend current subpart C of 7 CFR part 250 to reduce reporting requirements related to the processing of donated foods, and to remove the requirement that the processor make a payment to the State distributing agency for the value of excessive donated food inventories at the annual reconciliation, but rather reduce such inventories. We proposed to remove the requirement, in current § 250.30(k)(3), that the processor submit copies of requests for refunds and refund payments to the distributing agency. We also proposed to remove the requirements, in current § 250.30(n)(4) and (o), that the distributing agency submit monthly performance reports, or information from such reports, to FNS on a periodic basis. In addition, we proposed to remove the requirement, in current § 250.30(m)(1)(viii), that the processor report sales verification findings to the distributing agency.

Current regulations at § 250.30(n)(3) require a processor that has a processing agreement with the State distributing agency for the following year to pay the State

distributing agency for the value of any donated food inventory held at the end of the current year that is in excess of the six-month inventory limit, or that is in excess of a higher inventory level approved by the State distributing agency in accordance with § 250.30(n)(1). We proposed to revise the regulations in this section to require such processors to reduce excessive donated food inventories as part of the annual reconciliation with the distributing agency, rather than paying the distributing agency for the value of such donated foods. In this final rule, we are providing additional flexibility to State distributing agencies in this regard to further align the regulatory language with the requirements for the management of donated food inventories at processors set forth in Policy Memorandum FD-064. In cases where reducing excessive inventories at processors, as required in proposed § 250.30(n)(3), is not practical, distributing agencies must require the processor to pay for the donated foods held in excess of allowed levels, at the replacement value of the donated foods. These changes are reflected in § 250.30(n)(3) of this final rulemaking.

Two commenters supported the proposed changes overall. One commenter also recommended that USDA work to assess the contributing issues behind excessive inventories. FNS has been working with the program community to find ways to prevent excessive inventory levels at processors and in food distribution programs, and will continue to do so moving forward. Thus, the remaining proposed revisions in this Subpart are retained without change in this final rule.

**D. Subpart D—Donated Foods in Contracts with Food Service Management Companies**

We proposed to amend current subpart D of 7 CFR part 250 to clarify requirements in the storage, control, and use of donated foods in contracts with FSMCs. In current § 250.50(a), we proposed to amend regulatory language to clarify that the FSMC must use all donated foods received in the recipient agency's food service, or must use commercial substitutes in place of such donated foods only as permitted in § 250.51(d). One commenter requested that USDA provide examples of acceptable commercial substitutions and when they may be used. Another commenter asked for clarification in regards to substitution in advance of purchase of donated foods. Though specific to processing of donated foods, information on acceptable commercial substitutions which is also applicable to FSMCs can be found in current policy memoranda, including FD-130, "Substitution of USDA Beef and Pork," FD-122, "Substitution of Donated Foods in Advance of Purchase and Negative Inventories," and FD-049, "Substitution and Valuation of USDA Cheese." Additionally, the intent behind the proposed regulation was to allow FSMCs to have more flexibility in managing inventory. FSMCs receive donated foods, credit the SFA, and then use donated foods for other accounts and replace it later with commercial food. Although substitution in advance of purchase is not prohibited by current regulations, FNS does not recommend it. As stated in Policy Memorandum FD-122, USDA cannot guarantee the purchase and provision of donated foods for processing. We are not providing clarification to a scenario which we do not encourage and that is limited.

Current requirements in § 250.51(d) also state that the FSMC must fully utilize all ground beef and pork in the client school district. This requirement is also referenced in § 250.52, Storage and inventory management of donated foods, and § 250.53, Contract

provisions. Another commenter recommended amending this subpart to add meat products other than ground, given the addition of alternative raw meat products for further processing to the donated foods catalog, such as boneless beef. Current regulations allow for the use of all meat products - not just ground - in the recipient agency's food service. Nevertheless, we are removing reference to “ground” beef and pork in §§ 250.51(d), 250.52(b) and (c), and 250.53(a)(5) of the final rule to provide greater clarity.

In § 250.52(a), we proposed to clarify that the FSMC must meet the requirements in proposed § 250.14(a) for the safe storage and control of donated foods. No comments were received on this section. Thus, the proposed revisions are retained without change in this final rule.

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

We proposed to amend current subpart E of 7 CFR part 250 to ensure that SFAs are able to order and receive the donated foods they can best utilize in the school food service, and to clarify requirements for SFAs in the storage, inventory management, and use of donated foods. In § 250.58(a), we proposed to require that the State distributing agency ensure that all SFAs are able to submit orders for donated foods electronically, and that distribution of these foods to SFAs is done in a cost-effective manner. One commenter agreed with these proposed revisions.

In crediting the SFA’s donated food assistance level, under current regulations at § 250.58(e), the State distributing agency may choose among three options in valuing

donated foods, including (1) the USDA purchase price (cost per pound), (2) the estimated cost-per-pound data included in survey memoranda, and (3) the commodity file cost as of a specified date. In § 250.58(e), we proposed to require that the State distributing agency use either the donated food cost-per-pound prices posted annually by USDA or the most recently published cost-per-pound in the USDA donated foods catalog in meeting the commodity offer value of donated foods provided to the SFA, as required in current § 250.58(b). One commenter agreed with this proposed change. Two other commenters demonstrated confusion about the proposed change and requested further clarification.

The commodity offer value, as defined in the proposed rule and current regulations, means the minimum value of donated foods that the State distributing agency must offer to SFAs 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 SFA in the previous school year. To provide further clarification on State distributing agency responsibilities in this regard, we are revising the regulatory language in this final rulemaking to clarify that the methods referenced above are for measuring whether the SFA has received the commodity offer value of donated foods (i.e., credit entitlement).

The overall intent of the proposed changes is to ensure that State distributing agencies do not use outdated pricing information in crediting their SFAs' entitlement. Price updates would reflect the donated foods value at a specific point in time up until prices are updated again later in the year. Importantly, pricing information does not need to be updated retroactively. Thus, the two proposed methods remain in this final rule.

In this final rulemaking, in response to comments received, we are also providing a third option for State distributing agencies to determine the donated foods value in crediting SFAs' entitlements. State distributing agencies may choose to calculate a rolling average of USDA cost-per-pound prices found in each State distributing agency's USDA foods sales orders in the FNS electronic donated foods ordering system, Web-Based Supply Chain Management (WBSCM). A rolling average meets the proposed requirement of updating prices at least semi-annually, and provides State distributing agencies with additional flexibility. These changes are reflected in § 250.58(e) of this final rulemaking.

In § 250.59(a), we proposed to indicate that the SFA must ensure the safe and sanitary storage, inventory management, and use of donated foods and purchased foods, in accordance with requirements in current § 210.13. One commenter noted that sections of 7 CFR part 250 should be referenced here as well. We are clarifying and revising these references to provide that SFAs are required to maintain storage facilities in accordance with § 210.13 and proposed §§ 250.13 and 250.14.

In § 250.59(b), we proposed to include the requirements in current § 250.60(a) for the use of donated foods in the nonprofit school food service, with only minor clarifications. In § 250.59(e), we proposed to clarify requirements for two or more SFAs acting as a collective unit in conducting activities relating to donated foods. No comments were received on these sections. Thus, the proposed revisions are retained without change in this final rule.

## **F. Subpart F—Household Programs**

We proposed to revise current subpart F to streamline and clarify current descriptions of, and requirements for, the distribution of donated foods in CSFP and FDPIR, and to include such information for TEFAP. No comments were received on these proposed changes. Thus, the proposed revisions are retained without change in this final rule.

#### **G. Subpart G—Additional Provisions**

We proposed to amend current subpart G of 7 CFR part 250 by clarifying requirements for the distribution of donated foods in response to disasters and situations of distress. Comments received on this subpart are outlined below.

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

In § 250.68, we proposed to retain the same language as provided in current regulations on NSIP. In this final rulemaking, we are removing outdated references to “AoA” and “State Agencies on Aging,” given the use of new terminology and changes to program administration at DHHS. NSIP is now administered by DHHS’ ACL, not AoA. In addition, NSIP grants are provided to State Units on Aging, which were formerly referred to as “State Agencies on Aging.”

##### **2. Disasters, § 250.69**

In § 250.69, we proposed to revise current § 250.69 to clarify requirements for the distribution and use of donated foods in a disaster, contingencies for replacement of such foods, and reporting requirements. In § 250.69(a), we proposed to retain the current provision in § 250.69(b) that the distributing agency may provide donated foods from

current inventories, at the distributing or recipient agency level, to approved disaster organizations for use in providing congregate meal assistance to persons in need of food assistance as a result of a disaster. Two commenters agreed with the proposed provisions, including the proposed revision to allow the transfer of donated foods without FNS approval during emergencies and disasters.

In § 250.69(b), we proposed to retain the current provision in § 250.69(c) that the distributing agency may provide donated foods to disaster organizations for distribution to households in need of food assistance once FNS approval has been obtained for such distribution. No comments were received on this section. Thus, the proposed provision is retained without change in this final rule.

In § 250.69(c), we proposed to retain the current requirement that the State distributing agency review and approve a disaster organization's application to provide donated food disaster assistance before distributing donated foods to such organization. One commenter expressed concern about the proposed application requirements not being comprehensive enough in this section and in § 250.70(c). FNS already provides guidance on this topic on the FNS website and in the FNS USDA Foods Program Disaster Manual, which includes an application template. We are adding to the regulatory text in proposed §§ 250.69(c) and 250.70(c) that these requirements are in accordance with applicable FNS guidance.

In § 250.69(d), we proposed to include the current requirement that disaster organizations collect information from households receiving donated foods, if issuance of Disaster – Supplemental Nutrition Assistance Program (D-SNAP) benefits has also been approved, in order to ensure that households receiving D-SNAP benefits do not also

receive donated foods. In § 250.69(e), we proposed to include the provision, in current § 250.13(d)(1), that permits disaster relief workers to receive meals containing donated foods due to their service to eligible recipients. In § 250.69(f), we proposed to include the current requirement that the distributing agency 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. No comments were received on these sections. Thus, the proposed provisions are retained without change in this final rule.

In § 250.69(g), we proposed to clarify that, for food diverted from inventories of recipient agencies in child nutrition programs, FNS will replace such food if the recipient agency received the same types of donated food during the year preceding the onset of the disaster assistance. One commenter recommended amending this proposed language to require that the State distributing agency confirm that the recipient agency received the donated food before replacement can occur. Replacement of donated foods would occur at the State distributing agency's request, in accordance with this proposed part. Thus, the proposed revisions are retained without change in this final rule.

In § 250.69(h), we proposed to indicate that FNS will, upon receiving a distributing agency request via public voucher, reimburse the distributing agency for any costs incurred in transporting donated foods within the State, or from one State to another, for use in disasters. No comments were received on this section. Thus, the proposed provision is retained without change in this final rule.

### 3. Situations of Distress, § 250.70

In § 250.70, we proposed to revise current § 250.70 to clarify requirements for the distribution and use of donated foods in a situation of distress, contingencies for replacement of such foods, and reporting requirements. No comments were received on these proposed changes. Thus, the proposed provisions at § 250.70(c) are retained in this final rule with only minor change to clarify that the State distributing agency must review and approve a disaster organization's application to receive donated foods "in accordance with applicable FNS guidance," before forwarding the application to FNS for review and approval.

### **7 CFR part 251**

We proposed to amend 7 CFR part 251 to conform certain requirements for distribution of donated foods in TEFAP to requirements for such distribution in other programs, or with changes to 7 CFR part 250 in the proposed rule. We proposed to align requirements in the transfer of TEFAP foods, and in ensuring restitution for losses of TEFAP foods, with such requirements for other donated foods, as proposed in this rule. One commenter requested clarification on the quantity or value of food losses that must be reported. We responded to this comment in this preamble discussion of §§ 250.12(b) and 250.16. Thus, the proposed revisions are retained without change in this final rule.

In this final rule, we are also amending § 251.4(c) to establish that, beginning in FY 2015, allocations of donated food funds for distribution through TEFAP will be available to States for two FYs and will expire at the end of the FY after the FY in which they were appropriated. For example, donated food funds allocated in FY 2015 will be available in FY 2015 and FY 2016, and will expire at the end of FY 2016. This change is being

added after the proposed rulemaking to implement new legislation under the 2014 Farm Bill.

### Miscellaneous Updates to Financial Management Regulatory Citations and other Non-Substantive Changes

We are making other non-substantive changes in this final rulemaking to rewrite the regulations in a more user-friendly, “plain language” format, and to keep regulatory references current. We are amending current regulations at 7 CFR parts 250 and 251 in this final rule to revise outdated citations to financial management circulars and regulations. OMB issued new guidance at 2 CFR part 200 titled Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance). OMB’s Uniform Guidance replaces 7 CFR parts 3015, 3016, 3019, and 3052, and cost principles addressed in 2 CFR parts 220 (A-21), 225 (A-87), and 230 (A-122). The USDA regulations implementing OMB’s Uniform Guidance are located at 2 CFR parts 400, 415, 416, and 418. We are amending current regulations after the proposed rulemaking to make conforming revisions to citations at 2 CFR part 200 and 2 CFR parts 400, 415, 416, and 418. We are also amending the regulatory language by replacing the word “shall” with “must” wherever it appears.

### **III. Procedural Matters**

#### A. Executive Order 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory

approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This final rule has been determined to be not significant and was not reviewed by OMB in conformance with Executive Order 12866.

#### B. Regulatory Impact Analysis

This rule has been designated as not significant by OMB; therefore, no Regulatory Impact Analysis is required.

#### C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601-612) requires agencies to analyze the impact of rulemaking on small entities and consider alternatives that would minimize any significant impacts on a substantial number of small entities. Pursuant to that review, it has been certified that this rule would not have a significant impact on a substantial number of small entities. Although the rule would require specific procedures for distributing and recipient agencies to follow in the distribution and control of donated foods, USDA does not expect them to have a significant impact on such entities.

#### D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory

actions on State, local and tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures by State, local or tribal governments, in the aggregate, or the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the most cost-effective or least burdensome alternative that achieves the objectives of the rule.

This final rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local and tribal governments or the private sector of \$100 million or more in any one year. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

E. Executive Order 12372

The donation of foods in USDA food distribution and child nutrition programs is listed in the Catalog of Federal Domestic Assistance Programs under 10.555, 10.558, 10.559, 10.565, 10.567, 10.568, and 10.569. For the reasons set forth in the final rule in 2 CFR part 415, subpart C, and related Notice (48 FR 29115, June 24, 1983), this program is included in the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

F. Federalism Summary Impact Statement

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13121. FNS has considered the impact of this rule on State and local governments and has determined that this rule does have Federalism implications.

1. Prior Consultation with State Officials

The programs affected by the regulatory proposals in this rule are all State-administered, Federally-funded programs. Hence, our national headquarters office has formal and informal discussions with State and local officials, as well as commercial contractors, on an ongoing basis regarding issues relating to the distribution and control of donated foods. FNS attends annual conferences of the American Commodity Distribution Association, a national group with State, local, and industry representation, and the School Nutrition Association, as well as other conferences.

2. Nature of Concerns and the Need to Issue This Rule

The rule addresses the concerns of program operators that distribute and use donated foods in food distribution and child nutrition programs. The rule would reduce the reporting and administrative workload for State distributing agencies and recipient agencies involved in the distribution and control of donated foods.

3. Extent to Which We Meet Those Concerns

FNS has considered the impact of the rule on State distributing agencies and local agencies. The overall effect of this rule is to ensure that such agencies are able to utilize

and distribute donated foods safely and efficiently, with a minimal reporting and recordkeeping burden. FNS is not aware of any case in which the provisions of the rule would preempt State law.

#### G. Executive Order 12988, Civil Justice Reform

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full and timely implementation. This rule is not intended to have retroactive effect unless so specified in the Effective Dates section of the final rule. Prior to any judicial challenge to the provisions of the final rule, all applicable administrative procedures must be exhausted.

#### H. Civil Rights Impact Analysis

FNS has reviewed this final rule in accordance with USDA Regulation 4300-4, “Civil Rights Impact Analysis,” to identify any major civil rights impacts the rule might have on program participants on the basis of age, race, color, national origin, sex or disability. After a careful review of the rule’s intent and provisions, FNS has determined that this rule is not expected to affect the participation of protected individuals in food distribution and child nutrition programs.

#### I. Executive Order 13175

Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. On February 13, 2013, as part of its regular quarterly Tribal consultation schedule, USDA engaged in a consultative session to obtain input by Tribal officials, or their designees, and Tribal members concerning the effect of this and other rules on the Tribes or Indian Tribal governments. In regard to the provisions of this rule, at the consultative session a Tribal member requested, and FNS provided, clarification regarding the purpose of this rule. No concerns regarding the provisions of the rule were expressed. We are unaware of any current Tribal laws that could be in conflict with the final rule.

#### J. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; 5 CFR part 1320) requires OMB to approve all collections of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number. No changes have been made to the proposed information collection requirements in this final rulemaking. Thus, in accordance with the Paperwork Reduction Act of 1995, the information collection requirements associated with this final rule, which were filed under 0584-0293,

have been submitted for approval to OMB. When OMB notifies FNS of its decision, FNS will publish a notice in the Federal Register of the action.

K. E-Government Act Compliance

The Department is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects

7 CFR Part 250

Disaster assistance, Food assistance programs, Grant programs-social programs, Reporting and recordkeeping requirements.

7 CFR Part 251

Food assistance programs, Grant programs-social programs, Reporting and recordkeeping requirements, Surplus agricultural commodities.

Accordingly, 7 CFR parts 250 and 251 are amended as follows:

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

1. The authority citation for part 250 continues to read as follows:

**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.

2. Revise subpart A to read as follows:

**Subpart A—General Purpose and Administration**

Sec.

250.1 Purpose and use of donated foods.

250.2 Definitions.

250.3 Administration at the Federal level.

250.4 Administration at the State level.

250.5 Civil rights.

**§ 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.

3. Revise subpart B to read as follows:

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

Sec.

250.10 Availability and ordering of donated foods.

250.11 Delivery and receipt of donated food shipments.

250.12 Storage and inventory management at the distributing agency level.

250.13 Efficient and cost-effective distribution of donated foods.

250.14 Storage and inventory management at the recipient agency level.

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

250.16 Claims and restitution for donated food losses.

250.17 Use of funds obtained incidental to donated food distribution.

250.18 Reporting requirements.

250.19 Recordkeeping requirements.

250.20 Audit requirements.

250.21 Distributing agency reviews.

250.22 Distributing agency performance standards.

**§ 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 31<sup>st</sup> 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 31<sup>st</sup> 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**

4. In § 250.30:

a. Remove all references to “FNSRO” and add in its place “FNS Regional Office”.

- b. Amend paragraph (b)(2) by removing the reference “§ 250.12(b)” and adding in its place the reference “§ 250.4(c)”.
- c. Amend paragraph (b)(2)(i) by removing the words “as defined in § 250.3” and adding in their place the words “in accordance with paragraph (d) of this section”.
- d. Revise paragraph (c)(1)(vi) and remove the undesignated paragraph following paragraph (c)(1)(vi).
- e. Amend paragraphs (c)(4)(iii) and (f)(1) by removing the reference “§ 250.3” and adding in its place the reference “§ 250.2”.
- f. Revise paragraphs (c)(4)(viii)(G) and (c)(4)(xi).
- g. Remove paragraph (c)(4)(xiv) and redesignate paragraphs (c)(4)(xv) through (xviii) as paragraphs (c)(4)(xiv) through (xvii).
- h. Revise paragraphs (d)(1)(i) and (e)(1)(i).
- i. Remove the second and third sentences of paragraph (d)(1)(iii).
- j. Amend paragraph (f)(2) by removing the reference “§ 250.16” and adding in its place the reference “§ 250.19”.
- k. Amend paragraph (f)(3)(vii) by removing the reference “§ 250.16(a)(4)” and adding in its place the reference “§ 250.19(a)”.
- l. Amend paragraph (j)(3) by removing the reference “FNS Instruction 410-1, Non-Audit Claims, Food Distribution Program” and adding in its place the reference “§ 250.17(c)”.
- m. Remove the last sentence of paragraph (k)(3).
- n. Remove paragraphs (m)(1)(vii) and (viii) and redesignate paragraph (m)(1)(ix) as paragraph (m)(1)(vii).

- o. Revise the second sentence and add a sentence following the second sentence of paragraph (n)(3).
- p. Remove paragraph (n)(4) and redesignate paragraph (n)(5) as paragraph (n)(4).
- q. Remove paragraphs (o), (q), and (r) and redesignate paragraphs (p), (s), and (t) as paragraphs (o), (p), and (q), respectively.

The revisions read as follows:

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

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

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

(B) 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 parts 400 and 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 parts 400 and 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.

\* \* \* \* \*

(4) \* \* \*

(viii) \* \* \*

(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;

\* \* \* \* \*

(xi) Meet the requirements in § 250.20(b) and (c) in obtaining an independent certified public accountant audit, and in performing post-audit actions;

\* \* \* \* \*

(d) \* \* \*

(1) \* \* \*

(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;

\* \* \* \* \*

(e) \* \* \*

(1) \* \* \*

(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;

\* \* \* \* \*

(n) \* \* \*

(3) \* \* \* 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. \* \* \*

\* \* \* \* \*

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

**Companies**

5. In § 250.50:

a. Revise the second sentence of paragraph (a).

b. Amend paragraph (c) by removing the reference “CFR parts 3016 or 3019” and adding in its place the reference “2 CFR part 200, subpart D, and USDA implementing regulations at 2 CFR parts 400 and 416”.

The revision reads as follows:

**§ 250.50 Contract requirements and procurement.**

(a) \* \* \* 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). \* \* \*

\* \* \* \* \*

6. In § 250.51, revise paragraph (d) to read as follows:

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

\* \* \* \* \*

(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).

7. Revise § 250.52 to read as follows:

**§ 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.

8. In § 250.53, revise paragraph (a)(5) to read as follows:

**§ 250.53 Contract provisions.**

(a) \* \* \*

(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;

\* \* \* \* \*

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

9. In § 250.58, revise paragraphs (a) and (e) to read as follows:

**§ 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.

\* \* \* \* \*

(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.

10. Revise § 250.59 to read as follows:

**§ 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.

**§ 250.60 [Removed]**

11. Remove § 250.60.

**§§ 250.61 and 250.62 [Redesignated as §§ 250.60 and 250.61]**

12. Redesignate §§ 250.61 and 250.62 as §§ 250.60 and 250.61, respectively.

13. In newly redesignated § 250.60, revise paragraph (d) to read as follows:

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

\* \* \* \* \*

(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.

\* \* \* \* \*

14. In newly redesignated § 250.61, revise paragraph (d) to read as follows:

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

\* \* \* \* \*

(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.

\* \* \* \* \*

15. Revise subpart F to read as follows:

**Subpart F—Household Programs**

Sec.

250.63 Commodity Supplemental Food Program (CSFP).

250.64 The Emergency Food Assistance Program (TEFAP).

250.65 Food Distribution Program on Indian Reservations (FDPIR).

250.66 [Reserved]

**§ 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]**

16. Revise the heading of subpart G to read as follows:

**Subpart G—Additional Provisions**

17. Revise §§ 250.68, 250.69, and 250.70 to read as follows:

**§ 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.

**§ 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.

**§ 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.

18. Add § 250.71 to read as follows:

**§ 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.

| CFR Cite                                 | OMB Control No.      |
|--|----------------------|
| § 250.4(a)                               | 0584-0067            |
| § 250.19(a)                              | 0584-0067, 0584-0293 |
| §§ 250.69(f) and (g) & 250.70(f) and (g) | 0584-0067, 0584-0293 |

**PART 251—THE EMERGENCY FOOD ASSISTANCE PROGRAM**

19. The authority citation for part 251 is revised to read as follows:

**Authority:** 7 U.S.C. 7501-7516; 7 U.S.C. 2011-2036

20. In § 251.4:

- a. Add paragraphs (c)(4) and (5).
- b. Remove paragraph (f)(4) and redesignate paragraph (f)(5) as paragraph (f)(4).
- c. Revise paragraph (g).
- d. Remove paragraph (l).

The additions and revision read as follows:

**§ 251.4 Availability of commodities.**

\* \* \* \* \*

(c) \* \* \*

(4) FNS will make allocations of donated commodity or food funding available to State agencies for two fiscal years. States will be allowed to carry over unexpended balances of donated food funding from one fiscal year into the next fiscal year.

(5) A State's donated food funding allocation remaining at the end of the fiscal year after the fiscal year in which it was initially appropriated will expire and will be unavailable to the State.

\* \* \* \* \*

(g) Distribution and control of donated commodities. The State agency must ensure that the distribution, control, and use of donated commodities are in accordance with the requirements in this part, and with the requirements in 7 CFR part 250, to the extent that requirements in 7 CFR part 250 are not inconsistent with the requirements in this part. Transfers of donated commodities must comply with requirements in §§ 250.12(e) and 250.14(d), as applicable. In accordance with § 250.16, the State agency must ensure that restitution is made for the loss of donated commodities, or for the loss or improper use of funds provided for, or obtained as an incidence of, the distribution of donated commodities. The State agency is also subject to claims for such losses for which it is responsible, or for its failure to initiate or pursue claims against other parties responsible for such losses.

\* \* \* \* \*

21. In § 251.8, revise paragraph (b) to read as follows:

**§ 251.8 Payment of funds for administrative costs.**

\* \* \* \* \*

(b) Uniform Federal Assistance regulations. Funds provided under this section shall be subject to the regulations issued under 2 CFR part 200, and USDA implementing regulations at 2 CFR parts 400 and 416, as applicable.

\* \* \* \* \*

22. In § 251.9, revise paragraphs (c) introductory text and (c)(2)(i) to read as follows:

**§ 251.9 Matching of funds.**

\* \* \* \* \*

(c) Applicable contributions. States shall meet the requirements of paragraph (a) of this section through cash or in-kind contributions from sources other than Federal funds which are prohibited by law from being used to meet a Federally mandated State matching requirement. Such contributions shall meet the requirements set forth in 2 CFR part 200, subpart D, and USDA implementing regulations at 2 CFR part 400. In accordance with the aforementioned regulations, as applicable, the matching requirement shall not be met by contributions for costs supported by another Federal grant, except as provided by Federal statute. Allowable contributions are only those contributions for costs which would otherwise be allowable as State or local-level administrative costs.

\* \* \* \* \*

(2) In-kind. (i) Allowable in-kind contributions are any contributions, which are non-cash outlays, of real property and non-expendable personal property and the value of goods and services specifically identifiable with allowable State administrative costs or, when contributed by the State agency to an eligible recipient agency, allowable local-level administrative costs. Examples of in-kind contributions include, but are not limited to, the donation of office supplies, storage space, vehicles to transport the commodities, loading facilities and equipment such as pallets and forklifts, and other non-cash goods or services specifically identifiable with allowable State-level administrative costs or, when contributed by the State agency to an eligible recipient agency, allowable local-level administrative costs. In-kind contributions shall be valued in accordance with 2 CFR part 200, subpart D, and USDA implementing regulations at 2 CFR part 400, as applicable.

\* \* \* \* \*

**§ 251.10 [Amended]**

23. In § 251.10, amend paragraph (a)(2) by removing the reference “7 CFR part 3016” and adding in its place “2 CFR part 200, subpart D, and USDA implementing regulations at 2 CFR part 400”.

Dated: April 8, 2016.

Yvette S. Jackson,  
Acting Administrator,  
Food and Nutrition Service.

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