

**DEPARTMENT OF AGRICULTURE****Food and Nutrition Service****7 CFR Part 250**

RIN 0584-AD45

**Management of Donated Foods in Child Nutrition Programs, the Nutrition Services Incentive Program, and Charitable Institutions****AGENCY:** Food and Nutrition Service, USDA.**ACTION:** Proposed rule.

**SUMMARY:** This rule proposes to revise and clarify requirements with respect to the distribution, management, and use of donated foods in the National School Lunch Program and other child nutrition programs, the Nutrition Services Incentive Program, and by charitable institutions. Most significantly, it would establish specific requirements to ensure that school food authorities and other recipient agencies in child nutrition programs receive the value of all donated foods provided to food service management companies for use in providing school lunches and other meals. The latter requirements are proposed in response to an audit of the USDA Office of the Inspector General; the proposals relating to the Nutrition Services Incentive Program result from amendments to the Older Americans Act of 1965. This proposed rule would also include amended regulatory provisions using a plain language format, including the addition of new subparts, and several new sections under those subparts, in order to make them easier to understand.

**DATES:** To be assured of consideration, comments must be received on or before August 7, 2006.

**ADDRESSES:** The Food and Nutrition Service invites interested persons to submit comments on this proposed rule. You may submit comments, identified by RIN number 0584-AD45, by any of the following methods:

*E-mail:* Send comments to [Robert.Delorenzo@fns.usda.gov](mailto:Robert.Delorenzo@fns.usda.gov). Include RIN number 0584-AD45 in the subject line of the message.

*Fax:* Submit comments by facsimile transmission to (703) 305-2420.

*Disk or CD-ROM:* Submit comments on disk or CD-ROM to Lillie F. Ragan, Assistant Branch Chief, Policy Branch, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, Room 500, 3101 Park Center Drive, Alexandria, Virginia 22302-1594.

*Mail:* Send comments to Lillie F. Ragan at the above address.

*Hand Delivery or Courier:* Deliver comments to the above address.

*Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Further information on the submission of comments, or the review of comments submitted, may be found under Part III, Procedural Matters, under **SUPPLEMENTARY INFORMATION.**

**FOR FURTHER INFORMATION CONTACT:**

Lillie F. Ragan at the above address or telephone (703) 305-2662. A regulatory impact analysis has been prepared for this rule. You may request a copy of the analysis by contacting us at the above address or by e-mail to [Robert.Delorenzo@fns.usda.gov](mailto:Robert.Delorenzo@fns.usda.gov).

**SUPPLEMENTARY INFORMATION:****I. Background**

The Department of Agriculture's (the Department or USDA) Food and Nutrition Service (FNS) provides donated foods to State distributing agencies for distribution to recipient agencies such as schools participating in the National School Lunch Program (NSLP) and other child nutrition programs, elderly nutrition projects that receive donated foods under the Nutrition Services Incentive Program (NSIP), and charitable institutions and other local nonprofit organizations providing nutritional assistance to recipients. This rule proposes to amend provisions contained in 7 CFR part 250 to accomplish several objectives, including:

- Incorporation of provisions designed to ensure that recipient agencies receive the value of donated foods provided to food service management companies in contracts with those recipient agencies to conduct a meal service;
- Reduction of the paperwork burden associated with the distribution of donated foods to charitable institutions and summer camps;
- Streamlining of provisions associated with the distribution of donated foods to elderly feeding sites in NSIP to reflect the transfer of responsibility for the allocation of resources in the program from USDA to the Department of Health and Human Services (DHHS).

To meet the objectives, we are proposing minor changes to current §§ 250.3, 250.12, 250.19, and 250.24, as well as a major restructuring of other sections. We propose to remove the current subpart E, which includes only

§ 250.60, which contains addresses of FNS Regional Offices from which to obtain further information. This information is readily available on the FNS Web site at <http://www.fns.usda.gov/fdd>, and from other sources. We propose to restructure the current subpart D into three distinct subparts E, F, and G. We propose to include under a revised subpart D new sections describing the requirements for the use of donated foods under contracts between recipient agencies and food service management companies. The new sections would replace the current § 250.12(d). We propose to include under a new subpart E new sections describing the distribution of donated foods in the National School Lunch Program and other child nutrition programs—i.e., the Child and Adult Care Food Program (CACFP) and the Summer Food Service Program (SFSP). The new sections would replace the current §§ 250.48, 250.49, and 250.50.

We propose to add a new subpart F to include the current §§ 250.45, 250.46, 250.47, and 250.51, which describe the distribution of donated foods in household programs—i.e., the Commodity Supplemental Food Program (CSFP), the Food Distribution Program in the Trust Territory of the Pacific Islands, the Food Distribution Program on Indian Reservations (FDPIR), and the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC). While the content of these sections would not change, we would redesignate them as §§ 250.63, 250.64, 250.65, and 250.66, respectively. We propose to add a new subpart G to include the distribution of donated foods to other outlets—i.e., charitable institutions, the Nutrition Services Incentive Program, and to organizations assisting in situations of disasters and distress. Under this new subpart, we would:

- Include current §§ 250.40 and 250.41, revised and redesignated as § 250.67, to describe the distribution of donated foods to charitable institutions and summer camps.
- Include current § 250.42, revised and redesignated as § 250.68, to describe the distribution of donated foods in NSIP.
- Include the current §§ 250.43 and 250.44 unchanged, but redesignated as §§ 250.69 and 250.70, respectively.

The following table provides a summary of the proposed locations in the restructured 7 CFR part 250 for each of the current sections in this part.

| Current CFR structure                      | Proposed rule structure               |
|--|---------------------------------------|
| Subpart A, §§ 250.1–250.3 .....            | Same.                                 |
| Subpart B, §§ 250.10–250.24 .....          | Same.                                 |
| Subpart B, § 250.12(d) .....               | Subpart D, §§ 250.50 through 250.55.  |
| Subpart C, § 250.30 .....                  | Same.                                 |
| Subpart D, §§ 250.40 and 250.41 .....      | Subpart G, § 250.67.                  |
| Subpart D, § 250.42 .....                  | Subpart G, § 250.68.                  |
| Subpart D, § 250.43 .....                  | Subpart G, § 250.69.                  |
| Subpart D, § 250.44 .....                  | Subpart G, § 250.70.                  |
| Subpart D, §§ 250.45, 250.46, 250.47 ..... | Subpart F, §§ 250.63, 250.64, 250.65. |
| Subpart D, § 250.48 .....                  | Subpart E, §§ 250.56 through 250.60.  |
| Subpart D, § 250.49 .....                  | Subpart E, § 250.61.                  |
| Subpart D, § 250.50 .....                  | Subpart E, § 250.62.                  |
| Subpart D, § 250.51 .....                  | Subpart F, § 250.66.                  |
| Subpart E, § 250.60 .....                  | No longer exists.                     |

In new subparts D and E, and in new §§ 250.67 and 250.68 in new subpart G, we propose to rewrite the regulations using a plain language format, including an increase in the number of subparts and sections, to make them easier to read and understand for the general public. The proposed changes in content and format to 7 CFR part 250 are discussed in detail below.

## II. Discussion of the Rule's Provisions

### *Definitions, § 250.3*

Due to recent changes in food distribution programs, and use of the plain language initiative, we propose to remove, revise, and add definitions in § 250.3 to provide program operators and recipients with a better understanding of the requirements contained in 7 CFR part 250.

We propose to remove the following definitions:

*Nonprofit summer camps for children.* This would be replaced by a new definition of “summer camps”, which may be private nonprofit organizations or public institutions.

*Nonresidential child or adult care institution.* This would be replaced by new definitions of “child care institution” and “adult care institution”, which, by definition, must be nonresidential. We would clarify that such institutions may participate independently in CACFP, or under the auspices of a sponsoring organization, in accordance with an agreement with the distributing agency.

*Nutrition program for the elderly.* This would be replaced by a new definition of “elderly nutrition project”, to more clearly designate the organizations eligible to receive donated foods under NSIP, and to avoid confusion with the former Nutrition Program for the Elderly.

*Offer-and-acceptance system.* We propose to remove this term and to more clearly explain the ordering of donated foods and their provision to school food

authorities in the proposed § 250.58. There is no longer a need for State distributing agencies to maintain an offer-and-acceptance system since, as discussed in detail later in the preamble, they are required by the Richard B. Russell National School Lunch Act (42 U.S.C. 1751 et seq.) to permit school food authorities to order from the complete list of donated foods available.

*Program.* This would be replaced by reference to recipient agencies.

*Students in home economics.* This is self-explanatory, and is applicable only with respect to the use of donated foods by such students participating in general home economics instruction, as described in the proposed § 250.60.

We propose to revise the following definitions:

*Charitable institutions.* We propose to revise the definition of “charitable institutions” to mean public institutions or nonprofit organizations, as defined in this section, that provide a meal service on a regular basis to predominantly needy persons in the same place without marked changes. The revised definition would reflect changing circumstances and provide greater clarity. The volume and variety of donated foods purchased under agriculture support programs and made available to charitable institutions has decreased significantly in recent years, as the capacity of organizations participating in the Emergency Food Assistance Program (TEFAP) to utilize such foods has increased, and schools participating in NSLP and other child nutrition programs have absorbed more of such foods. Therefore, we are proposing to narrow the definition from entities that serve at least some needy persons to those that serve predominantly needy persons, so that limited resources will be better targeted. The vast majority of organizations that currently receive donated foods as charitable institutions already serve

mostly needy persons. We would retain the current requirement that charitable institutions be public institutions or nonprofit organizations that provide a meal service on a regular basis, and operate in the same place without marked changes. Under the revised definition, we would include examples of charitable institutions, such as emergency shelters, soup kitchens, hospitals, retirement homes, elderly nutrition projects; schools, summer camps, service institutions, and child and adult care institutions that do not participate in a child nutrition program, or as a commodity school, as they are defined in this section; and adult correctional institutions that conduct rehabilitation programs for a majority of inmates.

As with charitable institutions, the volume and variety of donated foods available to summer camps has decreased significantly in recent years. The proposed definition of “charitable institution” explicitly includes summer camps that do not participate in child nutrition programs. A result of this inclusion is that summer camps wanting to receive donated foods as charitable institutions must demonstrate that they serve predominantly needy children. Thus, the proposed definition would narrow eligibility for summer camps as charitable institutions. Their eligibility to participate in child nutrition programs would not be altered by this proposal.

The proposed definition would also remove the current requirement that charitable institutions be “non-penal” and “non-educational”, in order to make the definition consistent with current regulations. In accordance with current § 250.41(a)(2), adult correctional facilities that conduct rehabilitation programs for a majority of inmates are eligible to receive donated foods as charitable institutions. Educational institutions such as schools, service institutions, and child care institutions

that do not participate in child nutrition programs are included in the current definition of “charitable institution.”

*Child nutrition program.* We would revise this definition to include the acronyms of the respective programs.

*Commodity school.* We propose to clarify and define “commodity school” as a school operating a nonprofit food service, in accordance with 7 CFR part 210, but that receives additional donated food assistance rather than the general cash assistance available to it under section 4 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1753). We propose to include further detail on the provision of assistance to such schools in the proposed § 250.57.

*End product.* We propose to clarify that an “end product” is a food product that contains processed donated foods.

*Food service management company.* We propose to clarify the current definition of “food service management company” by stating that a food service management company is 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 parts 210, 225, 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 would be subject to the requirements proposed in the new subpart D of this rule. We propose to clarify, however, that a school food authority participating in NSLP that performs such functions is not considered a food service management company. Additionally, we propose to clarify that, in accordance with the definition in § 250.3, 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, and is subject to the requirements for processors in subpart C of 7 CFR part 250. We also make this distinction in the proposed § 250.50(a).

*Processing.* We propose to revise the current definition of “processing” by restricting it to the currently described activities at a commercial facility, by a commercial enterprise, and not at a recipient agency facility; and, to specifically include the use of donated foods in the preparation of meals at a commercial facility as processing. Under the current definition, the use of donated foods to prepare meals at a recipient agency facility may be

considered processing, as explained in the following paragraph.

*Processor.* We propose to revise the current definition of “processor” by clarifying that it is a commercial enterprise that processes donated foods at a commercial facility. We propose to retain the current statement that commercial enterprises that process donated foods on-site (i.e., at a recipient agency facility) are not included as processors. Under the current definition of “processor”, recipient agencies that prepare meals for one or more other recipient agencies are categorized as processors unless they maintain separate records accounting for the donated foods that they handle on behalf of other recipient agencies. Their categorization as processors, which was implemented in a final rule published in the **Federal Register** on December 7, 1994 at 59 FR 62973, was intended to ensure that such recipient agencies properly accounted for donated foods, in accordance with Federal requirements in place at the time. However, as discussed later in the preamble, in a final rule published in the **Federal Register** on October 23, 2002 at 67 FR 65011, such recipient agencies were permitted, with the approval of the distributing agency, to maintain a single inventory management system, thus making it impossible for the recipient agencies to account for the donated foods separately from commercially purchased foods. Hence, it would no longer be logical or reasonable for regulations to impose the inventory and recordkeeping requirements required of processors on such recipient agencies. We propose to describe the situation in which a school food authority provides donated foods to another school food authority to conduct food service activities using donated foods in the proposed § 250.60.

*Recipient agencies.* We propose to clarify that the definition of “recipient agencies” means agencies or organizations that receive donated foods, in accordance with an agreement signed with the distributing agency or with another recipient agency.

*Recipients.* We propose to revise the definition of “recipients” to include persons receiving donated foods, or meals containing donated foods, provided by recipient agencies. The current definition includes only persons receiving donated foods for household consumption.

*Section 311.* We propose to revise the definition to reflect amendments to the Older Americans Act of 1965 (42 U.S.C. 3030a), which now permits State Agencies on Aging to receive all, or part, of their NSIP grant as donated foods.

*Service institutions.* We propose to clarify by defining “service institutions” as recipient agencies that participate in SFSP.

*State Agency on Aging.* We propose to revise this definition to refer to the State agencies and Indian tribal organizations administering NSIP.

We propose to add definitions of *Adult care institution*, *AoA*, *Bonus foods*, *CACFP*, *Child care institution*, *Commodity offer value*, *DHHS*, *Elderly nutrition project*, *Entitlement*, *Entitlement foods*, *National per-meal value*, *Nonprofit organization*, *Nonprofit school food service account*, *NSIP*, *NSLP*, *Reimbursable meals*, *SBP*, *7 CFR part 3016*, *7 CFR part 3019*, *SFSP*, *Single inventory management*, and *Summer camp*. Inclusion of the acronyms would alert the reader to the programs or agencies referred to in the regulations. *Definitions of Adult care institution*, *Child care institution*, and *Summer camp* would replace similar definitions currently included in this section without substantial change, as previously indicated.

Definitions of *Bonus foods* and *Entitlement foods* would clearly distinguish between those donated foods purchased and provided to distributing agencies in addition to legislatively authorized levels of assistance, and those donated foods purchased and provided in accordance with levels of assistance mandated by program legislation. Similarly, *Entitlement* is the value of donated foods a distributing agency is authorized to receive in a specific food distribution or child nutrition program, in accordance with program legislation. A definition of *National per-meal value* would help the reader to understand the determination of the value of donated foods provided to distributing agencies in NSLP and CACFP each year, while *Commodity offer value* describes the minimum value of donated foods that the distributing agency must offer to a school food authority in NSLP each school year. A definition of *Reimbursable meals* would further explain the per-meal value of donated food assistance in NSLP and other child nutrition programs. A definition of *Nonprofit school food service account* would help the reader to understand the role of donated foods in the nonprofit school food service.

*Elderly nutrition project* categorizes a recipient agency eligible to receive donated foods in NSIP, while *Nonprofit organization* clarifies that such an organization must have tax-exempt status under the Internal Revenue Code to meet the definition. Additionally, it clarifies that a nonprofit organization

operated exclusively for religious purposes is automatically tax-exempt under the Internal Revenue Code.

A definition of 7 *CFR part 3016* would alert the reader to the departmental regulations relevant to administrative requirements for grants and cooperative agreements with State, local, and Indian tribal governments, while a definition of 7 *CFR part 3019* would reference those regulations with applicability to private non-profit organizations, institutions of higher education, and hospitals. A definition of *Single inventory management* would help to describe the current option for school food authorities and other recipient agencies in the storage and inventory management of donated foods.

#### *Agreements and Contracts, § 250.12*

Section 217 of the Consolidated Appropriations Resolution, 2003 (Pub. L. 108–7) amended section 311 of the Older Americans Act of 1965 (42 U.S.C. 3030a) by transferring the responsibility for the allocation of resources in NSIP from USDA to DHHS. Under the amended Older Americans Act, State Agencies on Aging may still choose to receive all, or part, of their NSIP grants in the form of donated foods (rather than funds), on behalf of their participating elderly nutrition projects. However, USDA is responsible only for the purchase of the foods and their delivery to the appropriate State agency. Therefore, we propose to amend § 250.12(a) by removing reference to agreements between the Department and State Agencies on Aging that elect to receive cash in lieu of commodities.

As mentioned earlier in the preamble, we are proposing to revise current requirements associated with food service management company contracts to ensure that schools and other recipient agencies that participate in child nutrition programs receive the value of donated foods used by those commercial enterprises in conducting the food service. We propose to include these revised requirements in the new subpart D. Therefore, we propose to remove § 250.12(d). We propose to remove, without replacement, the current requirements in § 250.12(d) that, for nonprofit summer camps for children, charitable institutions, and nutrition programs for the elderly, a contract with a food service management company: (1) May not exceed one year, with an option for four additional one-year periods; and, (2) must include the provision that it may be terminated for cause by either party upon 30 days notice. Summer camps and charitable institutions do not

receive Federal funds for distribution of donated foods or other administrative activities. Hence, Federal regulations in 7 *CFR part 3019* relating to contracts do not apply to them. Additionally, donated foods are only a very small part of the food service provided by such recipient agencies. Thus, it is unreasonable to require specific provisions in their contracts with food service management companies. As indicated above, USDA would not oversee the use of donated foods in NSIP, as it is now responsible only for procurement and delivery of donated foods in the program. Therefore, current contract requirements with food service management companies, as well as those proposed in this rule, do not apply to donated foods provided in NSIP.

We also propose to remove § 250.12(e) and (f), as requirements relative to storage facility and processor contracts are currently addressed in §§ 250.14 and 250.30, respectively. As the changes proposed above would remove all reference to contract requirements in this section, we propose to revise the section heading to *Agreements*.

#### *Reviews, § 250.19*

We propose to amend the current review requirements for distributing agencies in § 250.19(b), primarily as they relate to management reviews of elderly nutrition projects, and of food service management companies under contract with several types of recipient agencies that receive donated foods for use in their food service.

We propose to amend the introductory text of § 250.19(b)(1) to state that the distributing agency must establish review procedures encompassing the listed activities as they apply to specific programs. For example, the distributing agency would not be expected to establish procedures to review donated food inventories for school food authorities utilizing a single inventory management system.

As previously mentioned, under the amended Older Americans Act the responsibility for the allocation of resources in NSIP now rests with DHHS, and not USDA; hence, program funds are appropriated to DHHS for allocation to State Agencies on Aging. USDA is now responsible only for the purchase of donated foods for those State Agencies on Aging that choose to receive donated foods as part of their NSIP grant, and for delivering those foods to State or local agencies. USDA may also provide bonus foods to such outlets, although their availability for donation has increasingly diminished. Therefore, we propose to remove

§ 250.19(b)(1)(i), which requires on-site reviews of nutrition programs for the elderly (i.e., elderly nutrition projects, as proposed in this rule) participating in NSIP. Consequently, current § 250.19(b)(1)(ii), (b)(1)(iii), (b)(1)(iv), and (b)(1)(v), which address reviews of charitable institutions, processors, distributing agency storage facilities, and food service management companies, would be redesignated as § 250.19(b)(1)(i), (b)(1)(ii), (b)(1)(iii), and (b)(1)(iv) respectively, but otherwise without change, except as noted below.

We propose to revise the redesignated § 250.19(b)(1)(i) to retain the current review requirement for charitable institutions and summer camps, and the food service management companies under contract with them, in a more streamlined form. The revised language would require on-site reviews of charitable institutions (which include summer camps), or the food service management companies under contract with them, whenever the distributing agency identifies actual or probable deficiencies in the use of donated foods by such institutions, or by their contractors, through audits, investigations, complaints, or any other information.

We propose to revise the redesignated § 250.19(b)(1)(iv) to require the distributing agency to conduct an on-site review of recipient agencies in NSLP, CACFP, and SFSP, to ensure compliance with the requirements for the use of donated foods in contracts with food service management companies. We propose to require such a review at a frequency established in 7 *CFR parts 210, 225, or 226*, as applicable, for the State administering agency, in the conduct of its reviews. Lastly, we propose to permit the distributing agency to enter into an agreement with the appropriate State administering agency to include its review as part of the State administering agency's review. An integrated review of all aspects of the food service operation has the potential to be more effective and efficient than piecemeal reviews by two separate agencies.

We propose to remove § 250.19(d), which requires the monitoring of cash disbursements to nutrition programs for the elderly by State Agencies on Aging to ensure purchase of only U.S. agricultural products. Under the amended Older Americans Act, this responsibility now rests with DHHS.

#### *Distributing Agency Performance Standards, § 250.24*

As discussed in detail later in the preamble, we propose to revise current regulatory provisions associated with

the ordering of donated foods and their distribution to school food authorities in the proposed § 250.58. In conjunction with these proposals, we are also proposing here to revise current distributing agency performance standards in § 250.24(d) relating to these areas. We propose to consolidate the content of § 250.24(d)(8) and (d)(10) in a revised § 250.24(d)(8) to state that distributing agencies are responsible for providing recipient agencies with ordering options and commodity values, and considering the specific needs and capabilities of such agencies in ordering donated foods. We propose to revise § 250.24(d)(9) to state that distributing agencies are responsible for offering school food authorities participating in NSLP, at a minimum, the commodity offer value of donated food assistance, and for determining an adjusted assistance level in consultation with school food authorities, as appropriate, in accordance with the proposed § 250.58. We propose to include a new § 250.24(d)(10) to state that distributing agencies are responsible for providing each school food authority in NSLP with the opportunity to order, or select, donated foods from the full list of available foods, and to distribute the selected donated foods to each school food authority, to the extent that distribution of such foods to, and within, the State would be cost-effective, in accordance with the proposed § 250.58.

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

Over the last 10–15 years, school food authorities have increasingly entered into contracts with food service management companies to provide the school meals and to conduct other food service activities. As cited in the Department's Office of Inspector General (OIG) audit referenced below, 905 school food authorities participating in NSLP contracted with a food service management company in school year 1991, while in school year 2000, 1,648 school food authorities had such contracts. In providing the school meals, food service management companies may use the donated foods provided to school food authorities.

Currently, in § 250.12(d), a contract between a recipient agency and a food service management company must ensure that donated foods provided to the food service management company are used solely for the benefit of the recipient agency's food service. Additionally, the recipient agency must demonstrate that the full value of the donated foods is utilized for its benefit.

However, the regulations do not require that the contract indicate what actions must be taken to ensure that donated foods benefit the recipient agency, or how the recipient agency is to demonstrate that the full donated food value has been received.

In April 2002, OIG conducted an audit (#27601–0027–CH) of several school food authorities under contract with food service management companies. The OIG found that, for contracts in which the food service management company charges a fixed price per meal, school food authorities did not always receive the full value of the donated foods provided for use in the school food service. The OIG found this to result, in part, from the lack of specific instructions in Federal regulations regarding the means by which the contract with the food service management company must incorporate requirements that ensure school food authorities receive the full value of the donated foods. To correct this, the OIG recommended that, for fixed-price contracts, the donated food value be deducted on monthly invoices. The OIG also recommended that bid documents to procure food service management company services reflect that this type of crediting is required.

In the absence of specific regulatory requirements, school food authorities have developed different means to ensure that they receive the benefit of the donated foods provided by the Department. Some school food authorities require the food service management company to credit them for the value of donated foods used in the food service through reductions on monthly invoices or other means. However, food service management companies have not always used and credited donated foods in an expeditious or accurate manner. Some school food authorities may ensure the receipt of the donated food benefit through a review of production or inventory records, or a review of menu plans or the meals served. Other school food authorities allow the food service management company to “pre-credit” for donated foods in the contracted fixed price per meal. Under a pre-credit method, the value of donated foods is deducted from the cost of the food service upfront, at the per-meal value of donated food assistance established for that school year. However, the full amount of donated foods received by the school food authority is often not established until later in the year, for several reasons. For example, initial donated food entitlements are based on preliminary meal counts that are adjusted when final meal counts

become available later in the year. Additionally, the bonus foods that are to be provided are generally not known at the beginning of the school year. Furthermore, donated food assistance in NSLP is sometimes augmented to ensure, in accordance with section 6(e) of the National School Lunch Act (42 U.S.C. 1755), that the total amount of such assistance equals at least 12 per cent of the total assistance provided under sections 4, 6, and 11 of that Act. Hence, unless end-of-year adjustments are made, a pre-crediting system would not include crediting for all donated foods received in a school year.

In its response to the OIG recommendation, FNS agreed that Federal regulations must be revised to include specific requirements to ensure that school food authorities receive the full benefit of the donated foods provided in NSLP. However, before developing specific regulatory proposals, FNS indicated that it would seek input from State distributing agencies, school food authorities, food service management companies, and industry consultants. On October 24, 2002, FNS conducted a public meeting at its headquarters office in Alexandria, Virginia to allow interested parties the opportunity for dialogue. In advance of the meeting, FNS presented the OIG recommendations for regulatory revision in a notice published in the **Federal Register** on October 8, 2002 at 67 FR 62683. The meeting was attended by several food service management companies and a number of industry consultants, as well as a few State distributing agency directors or staff members. Some of the issues or concerns expressed at this meeting include the following:

- Food service management companies do not always receive donated foods that are easily utilized in the food service.
- Food service management companies are sometimes able to purchase foods on the commercial market for a lower price than the price the Department paid for the same, or similar, food.
- In the absence of standard contract language, school food authorities are not sure what provisions relating to donated foods must be included in a contract with a food service management company.
- The uncertainty of donated food availability or deliveries presents difficulties in utilization of donated foods, and may result in an increase in the price charged by food service management companies for the food service.

We propose to address the concerns raised in the OIG audit by proposing specific requirements to ensure that recipient agencies in child nutrition programs receive the value of all donated foods provided to food service management companies with which they have contracts, in a new subpart D, which is discussed below. As mentioned previously, this new subpart would replace the current § 250.12(d). Subpart D would contain the following 6 new sections:

- § 250.50, Food service management companies.
- § 250.51, Contracts and procurement.
- § 250.52, Crediting for, and use of, donated foods.
- § 250.53, Storage and inventory management of donated foods.
- § 250.54, Contract provisions.
- § 250.55, Recordkeeping and reviews.

*Food Service Management Companies, § 250.50*

In the new § 250.50(a), we propose to clarify that, in accordance with the definition in § 250.3, as we are proposing to revise it in this rule, a food service management company is 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 7 CFR parts 210, 225, or 226, or, with respect to charitable institutions, in accordance with 7 CFR part 250. We propose to require that, to the extent that such management includes the use of donated foods, the food service management company is subject to the applicable requirements proposed in this subpart. We propose to clarify, however, that a school food authority participating in NSLP that performs such functions is not considered a food service management company. We also propose to indicate, for the sake of clarity, that 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 § 250.3, is considered a processor in this part, and is subject to the requirements in subpart C of 7 CFR part 250, rather than the requirements of this proposed subpart.

In § 250.50(b), we propose to indicate the food service activities using donated foods that a food service management company is permitted to perform, in accordance with its contract. We propose to permit a food service management company to perform the following activities:

- (1) Preparing and serving meals;

- (2) Ordering or selection of donated foods, in coordination with the recipient agency, and in accordance with § 250.58(c);

- (3) Storage and inventory management of donated foods, in accordance with the proposed § 250.53;

- (4) Payment of processing fees or costs on behalf of the recipient agency, in accordance with the requirements in the proposed § 250.52(e); and

- (5) Submittal of refund applications to the processor, and the remittance of refunds to the recipient agency, for donated foods contained in processed end products, in accordance with the current § 250.30(k).

All of these activities are currently performed by some food service management companies. Their performance helps school food authorities and other recipient agencies to conduct the food service in the most cost-efficient manner. However, we propose to clarify that, in ordering or selecting donated foods for use in preparing meals, the food service management company must coordinate with the recipient agency, in accordance with the proposed requirements in § 250.58(c).

*Contracts and Procurement, § 250.51*

In the new § 250.51(a), we propose to require that, prior to donated foods being made available to a food service management company, a recipient agency must enter into a written contract with a food service management company to allow it to perform food service activities, including the use of donated foods. We propose to require that the contract ensure that all donated foods received by the recipient agency for use in its food service in a school year or a fiscal year, as applicable, be used to benefit the recipient agency's food service. We propose to require that recipient agencies in child nutrition programs (i.e., NSLP and commodity schools, CACFP, SFSP, and SBP) meet additional requirements in this subpart, as discussed below, and also indicate that such recipient agencies must comply with Federal regulations in 7 CFR parts 210, 220, 225, and 226, (which concern, respectively, NSLP, SBP, SFSP, and CACFP), and 7 CFR parts 3016 or 3019 (the Department's regulations establishing administrative requirements for grants to governmental entities and nonprofit organizations, respectively), as applicable, in the procurement of such contracts.

In § 250.51(b), we propose to indicate that recipient agencies may enter into a fixed-price or a cost-reimbursable contract with food service management

companies, except that recipient agencies in CACFP are prohibited from entering into cost-reimbursable contracts, in accordance with 7 CFR part 226. Under a fixed-price contract, the recipient agency pays a fixed cost per meal provided or a fixed cost for a certain time period. Under a cost-reimbursable contract, the food service management company charges the recipient agency for food service operating costs, and also charges fixed fees for management or services. We include a reference to the FNS guidance entitled "Contracting with Food Service Management Companies: Guidance for School Food Authorities", which contains more detail on the distinguishing characteristics of the two allowable types of contracts, as well as their procurement.

In § 250.51(c), we propose to indicate that recipient agencies in child nutrition programs must adhere to the Federal regulations referenced above in the procurement of food service management companies. We also state that the required contract provisions proposed in § 250.54 of this rule must also be included in the contract solicitation documents, as required in 7 CFR parts 3016 and 3019. Such provisions include the method used to determine the donated food values to be used in crediting, or the actual values assigned, in accordance with the proposed § 250.52. The method used to determine the donated food values cannot be established through a post-award negotiation, or by another method that may directly or indirectly alter the terms and conditions of the solicitation or contract.

In § 250.51(d), we propose to prohibit a food service management company from entering into a contract or agreement with a processor to process donated foods or end products for use in the recipient agency's food service. In accordance with § 250.30, processing of donated foods must take place under a contract or agreement between a processor and the distributing or recipient agency, in order to ensure that the requirements in that section are met.

*Crediting for, and Use of, Donated Foods, § 250.52*

In the new § 250.52, we propose to describe how the recipient agency must ensure that it receives the value of donated foods in the meal service provided. In § 250.52(a), we propose to state that, in both fixed-price and cost-reimbursable contracts, the recipient agency must require the food service management company to credit it for the value of all donated foods received for use in the recipient agency's food

service in a school year or fiscal year (including both entitlement and bonus foods). We propose to require that crediting be performed through invoice reductions, refunds, discounts, or by another means of crediting.

The above proposals would permit the use of pre-crediting for donated foods in fixed-price contracts. If provided for in the contract between a recipient agency and food service management company, the recipient agency may permit the food service management company to deduct the value of donated foods from the established fixed price per meal. However, as noted previously in this preamble, the use of pre-crediting has not always resulted in crediting of recipient agencies for all donated foods received for the school or fiscal year. This has resulted because availability of some donated foods is not established until later in the year. Hence, we propose to clarify that the recipient agency must require the food service management company to provide an additional credit for the value of any donated foods not accounted for in the fixed-price per meal. Additionally, we propose to clarify that, in cost-reimbursable contracts, crediting may be performed by disclosure: i.e., the food service management company may indicate the value of donated foods credited for the period in which it bills the recipient agency for food costs.

To ensure that the food service management company credits the recipient agency for all donated foods received in the school or fiscal year, in the new § 250.55(c) we are proposing to require that the recipient agency conduct a reconciliation of such crediting at least annually in its review of food service management company activities. In § 250.52(a), we also propose to require that all forms of crediting, including pre-crediting, provide clear documentation of the value received from donated foods. For example, in crediting by invoice reductions, the value of donated foods must be included as separate line item entries on invoices.

In § 250.52(b), we propose to require that crediting be performed not less frequently than annually, and that such frequency be determined by the recipient agency. The frequency must be provided for in the contract between the recipient agency and the food service management company. For example, a food service management company that billed a school food authority for all meals provided in a quarter could include a reduction on the invoice for the value of all donated foods received by the school food authority in that

quarter. Or, as another example, the food service management company may simply provide a refund at the end of the school year for the value of all donated foods received by the school food authority for that year. In determining the frequency of crediting, the recipient agency must ensure that the specified method of valuation of donated foods, as described in the following paragraphs, permits crediting to be achieved in the time period established. Additionally, a school food authority must ensure that the method, and timing, of crediting does not cause its cash resources to exceed the limits established in 7 CFR 210.9(b)(2).

In § 250.52(c), we propose to establish the donated food values that must be used in crediting. We propose to require that the recipient agency ensure that the food service management company uses the donated food values determined by the distributing agency, in accordance with the proposed § 250.58(g), or, if approved by the distributing agency, donated food values determined by an alternate means of the recipient agency's choosing. For example, the recipient agency may, with the approval of the distributing agency, specify that the value will be the average price per pound for a food, or for a group or category of foods (e.g., all frozen foods or cereal products), as listed in market journals over a specified period of time. This flexibility in valuing donated foods for the purpose of crediting would help to ensure that donated foods always provide a good value to the recipient agency, when compared, for example, to the cost of the same, or similar, foods in the commercial market.

In § 250.52(d), we propose to clarify that the actual donated food values are not required to be included in the solicitation and contract, but that the method of determining the donated food values to be used in crediting must be included in the solicitation and contract. For example, the solicitation and contract may stipulate that the average USDA purchase price for purchases made during the duration of the contract with the food vendor will be utilized, or the average price per pound listed in market journals over a specified period of time. Although the actual donated food values may also be included, the donated foods that a recipient agency will receive often are not known until after the procurement has taken place. However, we propose to require that the method of valuation specified must result in the determination of actual values, and may not permit any negotiation of such values. Additionally, we propose to state that the method of valuation must

ensure that crediting may be achieved in accordance with the time frame established in the solicitation and contract (e.g., quarterly or annually).

In § 250.52(e), we propose to indicate that the food service management company is not required to credit the recipient agency for donated foods contained in processed end products. In accordance with current § 250.30, the processor must credit the recipient agency for donated foods contained in end products through a discount or refund sales system, or charge the recipient agency a fee-for-service to produce the end product, either directly or through a distributor. However, as indicated in proposed § 250.50(c), the food service management company, under its contract with the recipient agency, may be responsible for the payment of processing costs on behalf of the recipient agency, or the submittal of refund applications and remittance of refunds for donated foods contained in processed end products. In order to ensure that the recipient agency is credited for donated foods in such cases, we propose to require the recipient agency to ensure that the food service management company:

(1) Bills the recipient agency separately for processing costs, and not include these costs in a fixed-price charge for the food service; and

(2) Submits refund applications to processors, in accordance with the requirements in § 250.30(k), and remits refunds to the recipient agency in an expeditious manner.

In § 250.52(f), we propose to indicate that, with certain exceptions, as listed below, the food service management company is not required to use the donated foods received, or a commercial substitute of the same generic identity, in the recipient agency's meal service, unless the contract specifically stipulates that such foods must be used. However, the food service management company must ensure that:

(1) Donated ground beef and ground pork products, and all end products received from processors, are used in the recipient agency's meal service, for the benefit of eligible program recipients; and,

(2) If menu plans include foods of the same generic identity as the donated foods received, then such donated foods, or commercially purchased foods of the same generic identity, of U.S. origin, and identical or superior in quality, must be used in the recipient agency's food service.

The proposals described above would provide the recipient agency and its contractor with the flexibility needed to integrate donated foods into the food



service with minimal time and effort. Hence, as long as the food service management company credits the recipient agency for the donated foods, it would not be obligated to use those foods in the food service, with the following exceptions. Since USDA specifications for ground beef and ground pork include more stringent requirements for grading and testing for microbial pathogens than such products produced for the commercial market, we want to ensure that these donated foods are used in the recipient agency's food service. For the same reason, processors are currently prohibited from substituting commercial beef and pork for donated beef and pork. Additionally, since recipient agencies provide donated foods to processors for processing into specific end products in accordance with processing agreements or contracts, they must be assured of receiving those end products for use in their food service. Lastly, if menu plans include foods of the same generic identity as the donated foods received, then such donated foods, or commercially purchased foods of the same generic identity, of U.S. origin, and identical or superior in quality to the donated foods, must be used in the food service. For example, we would not want commercial canned corn of Grade B quality to be included in meals in place of the donated canned corn of Grade A quality that the recipient agency has received.

In § 250.52(g), we propose to require that, when a contract terminates, and is not extended, the food service management company must return any unused donated ground beef and ground pork products, and end products received from processors, to the recipient agency. This proposal is in accordance with the requirement that these foods must be used in the recipient agency's food service, for the reasons indicated above. We propose to state that the food service management company must, at the discretion of the recipient agency, return other donated foods for which the recipient agency has not been credited, or pay the recipient agency the value of such donated foods.

#### *Storage and Inventory Management of Donated Foods, § 250.53*

In the new § 250.53, we propose to include requirements for food service management companies to follow in the storage and inventory management of donated foods. In § 250.53(a), we propose to include the requirement that food service management companies must meet the general requirements in § 250.14 for the storage and inventory management of donated foods.

In § 250.53(b), we propose to allow the food service management company to store and inventory donated foods together with commercially purchased foods—i.e., utilize a single inventory management system, as defined in this part—if allowed in its contract with the recipient agency. The use of single inventory management would reduce the time and effort required of food service management companies in the management and use of donated foods, and could result in reduced costs to schools. However, the food service management company must ensure that donated ground beef and ground pork products, and end products received from processors, are stored in a manner that assures they will be used in the recipient agency's food service.

We would also include a statement that, in 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. Under such contracts, the food service management company often charges the recipient agency for food costs by measuring changes in its inventory records, which, under single inventory management, may result in a charge for donated foods in its billings for food costs. The food service management company may prevent this by checking inventory records against its actual costs for food purchases, or by differentiating between donated foods and end products, and commercially purchased foods, in its inventory records.

#### *Contract Provisions, § 250.54*

In the new § 250.54, we propose to require specific contract provisions relating to donated foods in fixed-price and cost-reimbursable contracts. We would stipulate, again, that such provisions must also be included in the contract solicitation documents. In § 250.54(a), we propose to require the following provisions in fixed-price contracts:

(1) A statement that the food service management company will credit the recipient agency for all donated foods received for use in the recipient agency's food service in the school year or fiscal year, as applicable.

(2) The method and frequency by which crediting will occur—e.g., through invoice reductions, refunds, discounts, or other means of crediting—and the means of documentation to be utilized to verify that the value of all donated foods has been credited.

(3) The method of determining the donated food values to be used in crediting, in accordance with

§ 250.52(c), or the actual donated food values;

(4) If applicable, a statement that the food service management company will ensure that the recipient agency receives the full benefit of all refunds and discounts received from processors and distributors for processed end products, and will not charge the recipient agency for processing costs paid on its behalf as part of a fixed-price charge for the food service.

(5) Any activities relating to donated foods that the food service management company will be responsible for, such as the payment of processing fees, or the remittance of refunds to the recipient agency for donated foods contained in processed end products.

(6) A statement that donated ground beef and ground pork products, and all end products received from processors, will be used in the food service, and will not be substituted with commercial products.

(7) A statement that, if menu plans include foods of the same generic identity as donated foods received, then those donated foods, or commercially purchased foods of the same generic identity, of U.S. origin, and identical or superior in quality to the donated foods, will be used.

(8) An assurance that the food service management company will use donated foods in accordance with the requirements in 7 CFR part 250.

(9) An assurance that the food service management company will not enter into a contract or agreement with a processor to process donated foods or end products for use in the recipient agency's food service.

(10) A statement that the distributing agency, subdistributing agency, or recipient agency, the Comptroller General, the Department of Agriculture, or their duly authorized representatives, may perform on-site reviews of the food service management company's food service operation to ensure that all activities relating to donated foods are performed in accordance with the requirements in 7 CFR part 250.

(11) A statement that the food service management company will maintain records to document that crediting for all donated foods received for the school year or fiscal year, as applicable, has been achieved, and will meet other recordkeeping requirements in 7 CFR part 250; and

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

In § 250.54(b), we propose to require the same provisions in cost-



reimbursable contracts as those listed in paragraph (a) of new § 250.54, but to propose, in addition, that the food service management company assure that its system of inventory management will not result in the recipient agency being charged for donated foods.

#### *Recordkeeping and Reviews, § 250.55*

In the new § 250.55, we propose to include the recordkeeping and review requirements for distributing and recipient agencies in contracts with food service management companies, to ensure that the use and management of donated foods is in accordance with the requirements of this part. In § 250.55(a), we propose to require that the recipient agency maintain the following records:

(1) The donated foods and end products received and provided to the food service management company for use in the food service.

(2) Crediting for donated foods by the food service management company, including documentation verifying that the full donated food value has been credited.

(3) The donated food values used in crediting.

In § 250.55(b), we propose to require that the food service management company maintain the following records:

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

(2) Documentation that all donated foods received for use in the recipient agency's food service have been credited.

In § 250.55(c), we propose to require that the recipient agency include a review of food service management company activities relating to the use and management of donated foods as part of its monitoring of the food service operation required in 7 CFR parts 210, 220, 225, or 226, as applicable. We also propose to require that the recipient agency conduct a reconciliation of the food service management company's crediting for donated foods at least annually to ensure that it has received credit for all donated foods received in the school year.

In § 250.55(d), we propose to require that the distributing agency conduct an on-site review of the recipient agency's use of donated foods in its food service in contracts with food service management companies, in accordance with the management reviews required in § 250.19(b)(1), as we propose to revise in this rule. In accordance with the proposed § 250.19(b)(1)(iv), the distributing agency would be permitted to enter into an agreement with the State

administering agency (if a different agency) for NSLP, SFSP, or CACFP, to include its review as part of the administrative review required of the State administering agency in 7 CFR parts 210, 225, or 226, as applicable.

Lastly, in § 250.55(e), we propose to state that USDA may conduct reviews of food service management company operations with respect to the use and management of donated foods, to ensure compliance with the requirements of this part.

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

As described earlier in the preamble, we propose to provide a clearer, more comprehensive, description of the requirements relating to donated foods in NSLP and other child nutrition programs in a new subpart E, which is described below. This new subpart would include seven new sections, which would replace the current §§ 250.48, 250.49, and 250.50. The new sections under subpart E would include the following:

§ 250.56, Provision of donated foods in NSLP.

§ 250.57, Commodity schools.

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

§ 250.59, Storage and inventory management of donated foods.

§ 250.60, Use of donated foods in the school food service.

§ 250.61, Child and Adult Care Food Program (CACFP).

§ 250.62, Summer Food Service Program (SFSP).

#### *Provision of Donated Foods in NSLP, § 250.56*

In the new § 250.56, we propose to describe the basis for providing donated foods for use in NSLP, and for determining the types and amounts provided. In § 250.56(a), we propose to include the current regulatory provisions regarding the distribution of donated foods to distributing agencies, which provide them to school food authorities that participate in NSLP. The distributing agency must confirm the participation of school food authorities in NSLP with the State education agency (if different from the distributing agency). We would also indicate that, in addition to the requirements of this part relating to donated foods, distributing agencies, subdistributing agencies, and school food authorities that participate in NSLP must adhere to the requirements in 7 CFR part 210, as applicable. We propose to remove the reference in current § 250.48(a) to the

provision of donated foods in the School Breakfast Program, as donated foods are not specifically provided for this program at the current time. However, school food authorities participating in NSLP may also use donated foods in their school breakfast programs, as indicated in the proposed § 250.60(a).

In § 250.56(b), we propose to indicate that a wide variety of donated foods is purchased for distribution to school food authorities participating in NSLP each school year. A list of available donated foods is made available to distributing agencies and school food authorities on the FNS Web site. We propose to include the types of available donated foods by legislative purchase authority, as currently included in § 250.48(e)—*i.e.*, section 6 and 14 foods under the Richard B. Russell National School Lunch Act (42 U.S.C. 1755 and 1762a), and section 32, 416, and 709 foods, as available.

In § 250.56(c), we describe how FNS determines the quantity of donated foods to provide to distributing agencies each school year, as currently described in § 250.48(b). We indicate that, in accordance with section 6(c) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1755(c)), the distributing agency receives, at a minimum, the national per-meal value of donated food assistance multiplied by the number of reimbursable lunches served in the previous school year. We describe the annual adjustment of the national per-meal value of donated food assistance to reflect changes in the Bureau of Labor Statistic's Producer Price Index for Foods Used in Schools and Institutions, in accordance with the Richard B. Russell National School Lunch Act (42 U.S.C. 1753). However, we propose to remove the detail regarding the calculation of that value currently included in current § 250.48(b)(2). We propose, instead, to include a reference to the publication of a notice in the **Federal Register** each July that includes a more detailed description of the calculation of the national per-meal value for the school year. We propose to state that reimbursable lunches are those that meet the nutritional standards established in 7 CFR part 210, and that are reported to FNS, in accordance with the requirements in that part. We propose to remove the current description of the determination of the number of meals used in the above calculation through the submittal of claims, and the modification of such numbers in subsequent years based on current data, as this information is currently included in 7 CFR part 210.

In § 250.56(d), we propose to state that FNS uses the average price for USDA purchases of donated food made during the duration of the purchase contract to credit distributing agency entitlement levels. This information is not currently included in 7 CFR part 250.

Finally, in § 250.56(e), we propose that those States that phased out food distribution operations prior to July 1, 1974, are permitted to choose to receive cash in lieu of the donated foods to which they would be entitled in NSLP, in accordance with the Richard B. Russell National School Lunch Act (42 U.S.C. 1765) and 7 CFR part 240.

#### *Commodity Schools, § 250.57*

In the new § 250.57, we propose to describe the provision of donated foods to commodity schools. In § 250.57(a), we propose to describe commodity schools as schools that operate a nonprofit school food service, in accordance with 7 CFR part 210, but receive additional donated food assistance rather than the general cash assistance available to them under section 4 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1753). We would also indicate that, in addition to the requirements of this part relating to donated foods, commodity schools must adhere to the requirements in 7 CFR part 210.

In § 250.57(b), we propose to describe how FNS determines the quantity of donated foods to provide to distributing agencies for commodity schools each school year, as described in current § 250.48(b)(2)(ii). We would indicate that, in accordance with section 6(c) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1755(c)), the distributing agency receives, at a minimum, donated foods valued at the sum of the national per-meal value of donated food assistance and the national average cash payment established under section 4 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1753), multiplied by the number of reimbursable lunches served by commodity schools in the previous school year. We would include the current option for the commodity school to receive, from the total value of donated food assistance available to it, 5 cents per meal in cash to cover processing and handling expenses related to donated foods. We would also include the types of donated foods available to commodity schools by legislative purchase authority—*i.e.*, in addition to section 6 and section 14 foods under the Richard B. Russell National School Lunch Act (42 U.S.C. 1755 and 1762(a)), and section 32, 416,

and 709 foods, as included in current § 250.48(e).

We propose to remove provisions in current § 250.48 describing the distribution of donated foods to schools not participating in NSLP or as commodity schools, since we are proposing to include the distribution of donated foods to such schools as charitable institutions in the new § 250.67.

#### *Ordering Donated Foods and Their Provision to School Food Authorities, § 250.58*

In the new § 250.58, we propose to describe the means by which the distributing agency orders donated foods, and ensures that school food authorities receive the quantities and types of donated foods that they can best utilize in their food service each school year. In § 250.58(a), we state that the distributing agency orders donated foods through a web-based system called the Electronic Commodity Ordering System (ECOS). ECOS was fully implemented for all distributing agencies in July 2003, and replaced the more cumbersome system of data submission formerly utilized.

In § 250.58(b), we propose to describe the value of donated foods that the school food authority is eligible to receive each school year, as described in current § 250.48(c)(1). We propose to include the requirement, under section 6(c)(2) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1755(c)(2)), that the distributing agency offer the school food authority, at a minimum, the national per-meal value of donated food assistance multiplied by the number of reimbursable lunches served by the school food authority in the previous school year. This is referred to as the commodity offer value. We also propose to include the requirement, under section 14(f) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1762(f)), that the distributing agency offer commodity schools the national per-meal value of donated food assistance plus the national average cash payment established under section 4 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1753), multiplied by the number of reimbursable lunches served by the school in the previous school year, less, if applicable, the 5 cents per meal available as cash in lieu of donated foods. We would also include the eligibility of the school food authority to receive bonus foods in addition to the Section 6 foods. We propose to remove the current option provided to the distributing agency in § 250.48(c)(1) to use another method

(instead of the one described above) to determine the value of donated foods offered to school food authorities that would provide them with an equitable share of foods.

Section 6(c)(2) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1755(c)(2)) mandates that distributing agencies offer school food authorities the full range of commodities that are available from the Secretary of Agriculture to the extent that quantities requested are sufficient to allow efficient delivery to and within the State. Accordingly, § 250.48(c)(2) of current regulations requires the distributing agency to allow their school food authorities to order from the full range of donated foods offered by USDA. In the new § 250.58(c), we would retain this provision and clarify the legislative mandate by requiring additionally that the distributing agency solicit and receive orders from school food authorities before the distributing agency submits its orders to FNS.

Current regulations may be interpreted in a way that needlessly restricts school food authorities' access to some foods. Under current § 250.48(c)(2), the State must offer and efficiently deliver the full variety of available foods to the extent that quantities requested or available are sufficient to make a statewide distribution. However, depending on the State's storage and distribution system, it may be efficient to provide a given donated food to some of the school food authorities that have ordered it, but not to others. All school food authorities should not be denied a particular donated food because it would not be cost-effective to provide that food to one or more of them. Therefore, the proposal would remove the standard of statewide distribution, and the current stipulation that the distributing agency develop a procedure for the distribution of donated foods when the amount of such foods is not sufficient to make a statewide distribution. Instead, pursuant to the legislative standard (*i.e.*, to allow efficient delivery to and within a State), we propose to require in § 250.58(d) that the distributing agency ensure distribution of all donated foods selected by school food authorities that may be cost-effectively distributed to them.

In order to further ensure school food authorities' access to a wide variety of donated foods, we also propose to require, in § 250.58(d), that the distributing agency explore all available storage and distribution options to determine if distribution of the desired foods to each individual school food

authority that ordered them would be cost-effective. We propose to require that the distributing agency not prohibit the use of split shipments—*i.e.*, shipments that provide for a single truckload of a donated food to be divided among multiple stops. Other options that should be explored include direct shipments from vendors to a school food authority or to a processor designated by the school food authority to receive the foods. We also propose to require that, if distribution of donated foods to a school food authority would not be cost-effective, the distributing agency provide the school food authority with the opportunity to select other available donated foods that may be distributed to it cost-effectively. While this proposal would help to ensure that school food authorities receive the desired donated foods, we invite comments on whether further regulatory action would provide additional assurance. We are especially interested in receiving input from program operators at the State and local levels, and other parties, on what would constitute cost-effective distribution of donated foods, and whether further requirements in this area would be helpful.

Most States currently use the system proposed above to order and provide donated foods to school food authorities. However, some States order for delivery to a distributing agency storage facility a limited variety of the donated foods that USDA has made available, and then offer this limited selection to their school food authorities. This practice, which would be prohibited under the proposed rule, finds implicit support in current § 250.48(f). This section establishes an “offer and refusal” system under which school food authorities may refuse donated foods offered by the distributing agency, and receive other foods instead. The distributing agency is not required to replace more than 20 percent of donated foods so refused with other foods. We propose to remove this “offer and refusal” provision because implementation of the proposals described above would render it unnecessary. Under these proposals, the distributing agency must allow all school food authorities to order from the full list of available foods, and must provide all such foods that can be distributed to them in a cost-effective manner. If a selected food cannot be distributed cost-effectively to a school food authority that has ordered it, the distributing agency must allow the school food authority to select other available foods.

Under the proposals described above, school food authorities would have a better opportunity to select and receive the donated foods that they can best utilize in their food service. The proposals would also facilitate more efficient and effective use of donated foods by the food service management companies with which school food authorities enter into contracts to conduct their food service.

In § 250.58(e), we propose to describe some factors that may result in a school food authority receiving less than the commodity offer value of donated foods, which would be termed an “adjusted assistance level”. We propose to state that a school food authority may receive an adjusted assistance level if, for example:

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

A school food authority may not be able to utilize the commodity offer value of donated foods due, for example, to current food inventories, scheduled food purchases in the commercial market, or a projected reduction in school enrollment. Additionally, in certain cases a school food authority may not order, or select, donated foods equal to the commodity offer value that may be distributed to it cost-effectively. For example, a school food authority may order a specific type of donated food that may not be distributed to it in a full truckload, resulting in transportation costs that would be prohibitive. Unless the school food authority selects an alternate type of donated food that may be distributed cost-effectively, it may receive less than the commodity offer value.

In § 250.58(f), we propose to describe circumstances in which a school food authority may receive more than the commodity offer value of donated foods. We propose to state that the school food authority may receive more than the commodity offer value of donated foods if the distributing agency, in consultation with the school food authority, determines that the school food authority may efficiently utilize more donated foods than the commodity offer value, and more donated foods are available for distribution. This may occur, for example, if other school food authorities receive less than the commodity offer value of donated foods, for one of the reasons described above.

A larger amount of donated foods may also be available for distribution as a result of the augmentation of donated food purchases to meet section 6(e) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1755(e)), as previously discussed in the preamble, or in accordance with agricultural support provisions under section 32 of the Act of August 24, 1935 (Section 32), of section 416 of the Agricultural Act of 1949 (Section 416), or under section 709 of the Food and Agriculture Act of 1965 (Section 709). This contingency, while already applicable, is not currently described in 7 CFR part 250.

In § 250.58(g), we propose to include the current options in § 250.13(a)(5) that the distributing agency may use to value donated foods in crediting school food authorities for the commodity offer value or adjusted assistance level. However, we propose to clarify that the USDA purchase price may be an average price paid for a donated food over the duration of the contract with the food vendor, rather than the actual price paid for a specific purchase or shipment.

#### *Storage and Inventory Management of Donated Foods, § 250.59*

Over the last several years, FNS has allowed for fuller integration of donated foods with commercially purchased foods in the inventories of program operators, in order to reduce their time and labor in administering the programs. In 1996, the Department initiated a pilot project to test the use of commercial labels for donated foods, instead of a special USDA label. Over the course of the pilot project, the use of commercial labels was found to result in lower costs to the program, as vendors did not have to meet the expense of creating distinct labels for the donated foods, or meet food specifications unique to USDA. Consequently, the Department allowed the use of commercial labels for an increasing number of donated foods; at present, most donated foods are now packed with commercial labels.

In a final rule published in the **Federal Register** on October 23, 2002, at 67 FR 65011, FNS amended § 250.14(b)(4) to remove the requirement that school food authorities, and other recipient agencies providing a meal service, maintain donated food inventories separate from inventories of commercially purchased foods. Hence, most distributing agencies currently allow school food authorities to commingle donated foods with commercially purchased foods in storage, and to maintain a single inventory record of all such foods. This type of system is referred to as single

inventory management, as we propose to define it in this rule. FNS also disseminated Policy Memorandum No. FD-020, on May 23, 2003, to further describe single inventory management and its applicability to the management of donated foods by recipient agencies in food distribution and child nutrition programs.

In the new § 250.59, we propose to describe the requirements for the storage and inventory management of donated foods at the distributing agency, subdistributing agency, and school food authority levels, including the use of commercial storage facilities. In § 250.59(a), we propose to state that distributing agencies, subdistributing agencies, and school food authorities must meet the requirements for storage and inventories of donated foods in § 250.14, in addition to the requirements in this section.

In § 250.59(b), we propose to include the requirement in current § 250.14(b)(4) that the distributing agency or subdistributing agency, or a commercial storage facility under contract with either, store and inventory donated foods separately from commercially purchased foods or other foods. This requirement is necessary to ensure distribution of the donated foods that have been purchased for school food authorities and other recipient agencies in child nutrition programs.

In § 250.59(c), we propose to state that the school food authority is not required to store and inventory donated foods separately from commercially purchased foods, unless the distributing agency requires separate storage and inventory of donated foods. This is in accordance with § 250.14(b)(4), as amended in the final rule of October 23, 2002, as described above. The use of single inventory management significantly reduces the time and paperwork required of school food authorities and other recipient agencies by more effectively integrating donated foods into program operations.

In § 250.59(d), we propose to indicate that a commercial storage facility under contract with the school food authority may store and inventory donated foods together with commercially purchased foods it is storing for the school food authority, unless it is prohibited under its contract with the school food authority. However, the commercial enterprise may not commingle foods it is storing for a school food authority with foods it is storing for a commercial enterprise or other entity, as this would jeopardize the use of the donated foods provided in the school food service. These storage and inventory requirements for commercial storage

facilities are not clearly indicated in the current § 250.14.

#### *Use of Donated Foods in the School Food Service, § 250.60*

In the new § 250.60, we propose to describe the options and requirements for school food authorities in the use of donated foods in the school food service. In § 250.60(a), we propose to state that the school food authority should use donated foods, as far as practical, in the lunches served to schoolchildren, for which they receive, at a minimum, an established per-meal value of donated food assistance each year (i.e., the national per-meal value). However, we also propose to state that the school food authority may use donated foods in other nonprofit school food service activities. We propose to state that, in accordance with the Richard B. Russell National School Lunch Act (42 U.S.C. 1751), revenues received from such meals or activities must accrue to the school food authority's nonprofit school food service account. We propose to include the following meals or activities in which donated foods may be used:

- (1) School breakfasts or other meals served in child nutrition programs.
- (2) A la carte foods sold to children.
- (3) Meals served to adults directly involved in the operation and administration of the nonprofit food service; and,
- (4) Training in nutrition, health, food service, or general home economics instruction for students.

The above list of meals or activities in which donated foods may be used incorporates some current regulatory provisions in 7 CFR part 250. In the current § 250.13(d)(1), donated foods may be used to serve meals to persons that are few in number and receive meals as an incident of service to eligible persons. Such persons may include teachers and other staff members. Also, in the current § 250.48(g), donated foods may be used in training students in the areas of nutrition, health, food service, or general home economics.

In § 250.60(b), we propose to state that donated foods should not be used in food service activities that do not benefit primarily schoolchildren, such as banquets or catered events. However, their use in such activities may not always be avoided. This is true, for example, for a school food authority storing donated foods together with other foods, as in single inventory management. Thus, we propose to state that, in conducting activities described above, the school food authority must, in all cases, ensure reimbursement to

the nonprofit school food service account for donated foods, in addition to reimbursement for other resources utilized from that account. Since school food authorities utilizing single inventory management cannot reimburse the nonprofit food service account based on actual usage of donated foods, they must establish an alternate method to ensure that donated foods do not subsidize food service activities that do not benefit schoolchildren—e.g., by including the current per-meal value of donated food reimbursement in the price charged for the food service activities. We also propose to include a reference to FNS Instruction 782-5, Pricing of Adult Meals in the National School Lunch and School Breakfast Programs, which provides further guidance in this area.

In § 250.60(c), we propose to include the school food authority's option to use donated foods in a contract with a food service management company to conduct its food service. We propose to state that the school food authority must meet the requirements in the proposed subpart D of this part with respect to the use and management of donated foods in such contracts, and must also meet requirements in 7 CFR part 210 and 7 CFR parts 3016 or 3019, as applicable, with respect to the procurement and execution of such contracts. We also propose to require the school food authority to ensure that a food service management company providing catered meals, or other food service activities that do not benefit primarily schoolchildren, ensure reimbursement to the nonprofit food service account for donated foods used in such activities, in accordance with the proposed § 250.60(b), as described above.

In § 250.60(d), we propose to state that a school food authority may use donated foods to provide a meal service to other school food authorities, in accordance with an agreement between the parties. We propose to clarify that the school food authority providing such a service may commingle its own donated foods and the donated foods of the other school food authorities that are parties to the agreement.

#### *Donated Foods in CACFP, § 250.61*

In the new § 250.61, we propose to describe the use of donated foods in CACFP. As previously indicated, this new section would replace the current § 250.49. In § 250.61(a), we propose to describe the provision of donated foods to child and adult care institutions participating in CACFP for use in serving lunches and suppers to eligible recipients. We also propose to indicate that distributing agencies and child and

adult care institutions must also adhere to Federal regulations in 7 CFR part 226, as applicable.

In § 250.61(b), we propose to include the determination of the minimum value of donated foods provided for distribution to institutions participating in CACFP, in accordance with section 6(c) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1755(c)). This is currently described in § 250.49(b). The value is determined by multiplying the national per-meal value of donated food assistance by the number of reimbursable lunches and suppers served in the previous school year. We would describe the annual adjustment of the national per-meal value of donated food assistance to reflect changes in the Bureau of Labor Statistic's Producer Price Index for Foods Used in Schools and Institutions, in accordance with the Richard B. Russell National School Lunch Act (42 U.S.C. 1755). However, we propose to remove the detail regarding the calculation of that value currently included in § 250.49(b)(2). We would include instead a reference to the publication of a notice in the **Federal Register** each July that includes a more detailed description of this calculation. We also propose to remove the current detail regarding the submittal of claims for reimbursement, and the adjustments in the number of reimbursable meals in subsequent years. We would simply indicate that the number of reimbursable lunches and suppers may be adjusted during, or at the end of the year, in accordance with 7 CFR part 226. We also propose to include the types of donated foods the distributing agency may receive for distribution to child and adult care institutions, i.e., section 6 and section 14 foods under the Richard B. Russell National School Lunch Act (42 U.S.C. 1755 and 1762a), and section 32, 416, and 709 foods, as included in current § 250.49(d).

In § 250.61(c), we propose to include the current option in § 250.49(c) for the State education agency to receive cash in lieu of the donated foods to which it would be entitled in CACFP, which is provided under section 17(h)(1) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1766(h)(1)). However, we propose to indicate that, in accordance with 7 CFR part 226, the State administering agency must determine whether child and adult care institutions participating in CACFP wish to receive donated foods or cash in lieu of donated foods, and ensure that they receive the preferred means of assistance. The State administering agency must inform the distributing agency (if a different agency) which

institutions wish to receive donated foods and must ensure that such foods are provided to them. However, if the State administering agency, in consultation with the distributing agency, determines that distribution of such foods would not be cost-effective, it may, with the concurrence of FNS, provide cash payments to the applicable institutions instead.

In § 250.61(d), we propose to include the child or adult care institution's option to use donated foods in a contract with a food service management company to conduct its food service, as included in current § 250.49(a). We propose to state that the contract must meet the requirements with respect to donated foods in the proposed subpart D of 7 CFR part 250, and must also meet requirements in 7 CFR part 226 and 7 CFR parts 3016 or 3019, as applicable, with respect to the procurement of such contracts.

In § 250.61(e), we propose to indicate that the proposed requirements in this subpart relating to the ordering, storage and inventory management, and use of donated foods in NSLP, also apply to CACFP. However, we propose to indicate that, in accordance with 7 CFR part 226, a child or adult care institution that uses donated foods to prepare and provide meals to other such institutions is considered a food service management company.

#### *Donated Foods in SFSP, § 250.62*

In the new § 250.62, we propose to describe the use of donated foods in SFSP. As previously indicated, this new section would replace the current § 250.50. In § 250.62(a), we propose to describe the provision of donated foods to service institutions participating in SFSP for use in serving nutritious meals to needy children primarily in the summer months, in their nonprofit food service programs. We also propose to indicate the applicability of Federal regulations in 7 CFR part 225 to SFSP.

In § 250.62(b), we propose to describe the types and quantities of donated foods received by the distributing agency in SFSP. As currently indicated in § 250.50(c), the distributing agency may receive donated foods under section 14, and may receive donated foods under section 32, 416, and 709. However, we would also indicate that the distributing agency receives donated foods available under section 6 based on the number of meals served in the State in the previous year that are eligible for donated food support. While the Richard B. Russell National School Lunch Act does not establish a per-meal value of donated food assistance in SFSP, as it does in NSLP and CACFP,

FNS has traditionally provided donated food assistance valued at 1.5 cents per meal.

In § 250.62(c), we propose to include the stipulation in current § 250.50(b) that the distributing agency provide donated foods to service institutions based on the number of meals served that are eligible for donated food support, in accordance with 7 CFR part 225.

In § 250.62(d), we propose to include the service institution's option to use donated foods in a contract with a food service management company to conduct its food service, as currently provided in 7 CFR part 225. We propose to state that the contract must meet the requirements in the proposed subpart D with respect to donated foods, and must also meet requirements in 7 CFR part 225 and 7 CFR parts 3016 or 3019, as applicable, with respect to the procurement of such contracts.

In § 250.62(e), we propose to indicate that the proposed requirements in this subpart relating to the ordering, storage and inventory management, and use of donated foods in NSLP, also apply to SFSP.

#### *Subpart F—Household Programs*

We propose to include, in a new subpart F, the current §§ 250.45, 250.46, 250.47, and 250.51, and redesignate them as §§ 250.63 through 250.66, respectively, but otherwise without change.

#### *Subpart G—Other Donated Food Outlets*

As described earlier in the preamble, we propose to add a new subpart G to include the distribution of donated foods to other outlets, including charitable institutions, NSIP, and to organizations assisting in situations of disasters and distress. In this new subpart, we propose to add two new sections to better describe the distribution of donated foods to charitable institutions (including summer camps) and in NSIP. The new sections would replace the current §§ 250.40, 250.41, and 250.42 in their entirety. However, as noted below, several of the provisions currently contained in those sections would be revised and included in the new §§ 250.67, Charitable Institutions, and 250.68, Nutrition Services Incentive Program (NSIP) in subpart G. Additionally, we propose to include the current §§ 250.43 and 250.44, which describe the distribution of donated foods in disasters and situations of distress, in their entirety and otherwise without change. However, we would redesignate the current sections as §§ 250.69 and 250.70.

*Charitable Institutions, § 250.67*

We propose to describe the distribution of donated foods to charitable institutions and summer camps in the new § 250.67. As discussed earlier in the preamble, the volume and variety of donated foods available to charitable institutions and summer camps that do not participate in a child nutrition program has decreased significantly in recent years. Therefore, in addition to including summer camps that do not participate in a child nutrition program in the definition of "charitable institution," as discussed earlier, we propose to revise several of the provisions currently contained in §§ 250.40 and 250.41. These changes, which are discussed in detail below, would reduce the burden imposed on distributing agencies and better target limited resources.

In § 250.67(a), we propose to describe the distribution of donated foods to eligible charitable institutions, as defined in this part. We propose to retain the requirement, in current § 250.41(a)(1), that a charitable institution have a signed agreement with the distributing agency in order to receive donated foods. However, we propose to remove the current requirements in that section that the agreement include information on the days of operation, the number of participants and meals served, and data relating to the number of needy persons served. We also propose to remove the current requirements, in § 250.40(a)(1), that the agreement for summer camps include data on the number of adults participating at the camp relative to the number of children.

We propose to remove the requirement in current § 250.41(a)(1) that agreements between distributing agencies and charitable institutions include a statement assuring that proper inventory controls will be maintained and that all reports will be submitted as required by the distributing agency. In accordance with the current § 250.14(b), charitable institutions are not required to store and inventory donated foods separately from other foods. As stated above, we are proposing to remove the requirements for reporting information on participants and meals served.

In § 250.67(b), we propose to list some types of charitable institutions that may receive donated foods, if they meet the requirements of this section. In accordance with current § 250.41(a)(2), we propose to include the eligibility of adult correctional institutions that conduct rehabilitation programs for a majority of inmates. However, we propose to remove the additional

eligibility requirement in that section that the rehabilitation programs be available to inmates for at least 10 hours per week, as it is overly restrictive. We propose to list schools, summer camps, service institutions, and child and adult care institutions that do not participate in child nutrition programs as eligible charitable institutions in this section. These organizations are currently included under the definition of charitable institution. In addition to the institutions described above, the list of eligible charitable institutions would include, but not be limited to:

- (1) Hospitals or retirement homes.
- (2) Emergency shelters, soup kitchens, or emergency kitchens.
- (3) Elderly nutrition projects or adult day care centers.

In light of the above, we propose to clarify, in § 250.67(a), that the following organizations may not receive donated foods as charitable institutions:

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

In § 250.67(c), we propose to describe how the distributing agency must determine if an institution or organization serves predominantly needy persons, which is a requirement to meet the revised definition of "charitable institution" proposed in this rule. We propose to require that the distributing agency use data similar to the data currently used in 7 CFR part 251 to determine the eligibility of a recipient agency to receive donated foods in TEFAP. We would require the distributing agency to use:

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

Such data would replace the current information that a charitable institution is required to submit as part of the agreement: data on meals served and participation, or, for summer camps, data on the number of adults compared to the number of children at the camp. Thus, in place of the current review of such data, the distributing agency would use readily available data, as described above, to determine if the institution serves predominantly needy persons. The use of such data would significantly reduce the time and

paperwork currently required of charitable institutions and distributing agencies, and would be more appropriate to the small and sporadic distributions of donated foods now provided to charitable institutions, for the reasons described earlier.

In § 250.67(d), we propose to include the types of donated foods provided to charitable institutions—donated foods under section 4(a), 32, 416, and 709 (i.e., surplus foods), as available. We propose to include the requirement that the distributing agency distribute donated foods to charitable institutions based on the amounts that they may effectively utilize without waste, and the total amounts available for distribution to such institutions. The distributing agency may determine the charitable institution's capacity to utilize a specific amount of donated foods by the means indicated under § 250.67(c), which may include specific information provided by charitable institutions, as the distributing agency deems necessary. This approach to donated food allocation renders unnecessary the requirement, in current § 250.41(b), that distribution be based on a calculation of the number of needy persons served by charitable institutions, using data provided by them.

In § 250.67(e), we propose to include the stipulation in current § 250.41(a)(3) that a charitable institution may use donated foods in a contract with a food service management company. We propose to require that the contract ensure that all donated foods received for use by the charitable institution in a fiscal year are used to benefit the charitable institution's food service. However, we propose to state that the charitable institution would not have to meet other requirements in the proposed subpart D to ensure this.

*Nutrition Services Incentive Program (NSIP), § 250.68*

With the enactment of the Older Americans Act Amendments of 2000 (Pub. L. 106–501), the Nutrition Program for the Elderly was renamed the Nutrition Services Incentive Program (NSIP). In addition to the name change, the allocation of resources in NSIP was changed to provide donated foods or funds to State Agencies on Aging and their participating organizations based on the number of meals served in the previous year, and not in the current year. Subsequently, with the enactment of the Consolidated Appropriations Resolution, 2003 (Pub. L. 108–7), section 311 of the Older Americans Act of 1965 (42 U.S.C. 3030a) was amended to transfer the responsibility for the allocation of

program resources from USDA to DHHS. In concert with this legislative change, DHHS' Administration on Aging (AoA) provides NSIP grants to State Agencies on Aging from the annual program appropriations provided to DHHS. However, under the amended Older Americans Act, State Agencies on Aging may still choose to receive all, or part, of their NSIP grants in the form of donated foods (rather than funds), on behalf of their participating elderly nutrition projects. In such cases, USDA is responsible for the purchase of the foods and their delivery to the appropriate State or local agency, using funds advanced to it by DHHS.

In the new § 250.68, we propose to remove provisions in current § 250.42 relating to administrative responsibilities that are now undertaken by AoA, and to revise other provisions to reflect USDA's current role in NSIP, in accordance with the amendments to the Older Americans Act described above. In § 250.68(a), we propose to describe the administration of NSIP by DHHS/AoA, and the FNS role in the purchase and delivery of donated foods to State Agencies on Aging in the program, as described above.

In § 250.68(b), we propose to indicate the types and quantity of donated foods that the State Agency on Aging may receive on behalf of its elderly nutrition projects. We propose to state that the State Agency on Aging may receive donated foods with a value up to its NSIP grant. We propose to state that the State Agency on Aging and its elderly nutrition projects may receive any types of donated foods available in other food distribution or child nutrition programs, to the extent that such foods may be distributed cost-effectively. We also propose to include the provision in current § 250.42(d) that the State Agency on Aging may also receive section 32, section 416, and section 709 donated foods, as available, and section 14 donated foods.

In § 250.68(c), we propose to clarify that FNS delivers the NSIP donated foods to distributing agencies, usually together with shipments of donated foods for NSLP, and the distributing agencies then distribute the NSIP donated foods to elderly nutrition projects selected by the State or Area Agency on Aging. This is the procedure currently used, although it is not currently described in 7 CFR part 250. The small amounts of donated foods ordered for NSIP would make the cost of direct shipments to State Agencies on Aging or elderly nutrition projects prohibitive. We propose to include the provision in current § 250.42(a) that the distributing agency must only distribute

donated foods to elderly nutrition projects with which it has signed agreements. We propose to indicate that the agreements must include provisions that describe the roles of each party in ensuring that the desired donated foods are ordered, stored, and distributed in an effective manner.

In § 250.68(d), we propose to state that the donated food values used in crediting a State Agency on Aging's grant are the average price (cost per lb.) for USDA purchases of donated food made over a contract period. These are the same values used in crediting distributing agency entitlements in NSLP, in accordance with the proposed § 250.56(d).

Finally, in § 250.68(e), we propose to indicate that FNS and AoA coordinate their respective roles in NSIP through the execution of annual agreements. The agreements ensure that FNS is properly reimbursed for donated food purchases and related expenses, and that advanced funds not used for donated food purchases are returned to AoA for disbursement to the appropriate State Agencies on Aging.

We propose to remove the current provision in § 250.42(a) that allows food service management companies to use donated foods to provide the food service for elderly nutrition projects. Since USDA is now responsible only for the procurement and delivery of donated foods in the program, their use in contracts with food service management companies no longer falls under USDA's regulatory authority.

We propose to remove several other provisions included in current § 250.42 to reflect the legislative changes. These include provisions in § 250.42(b) relating to the per-meal value of donated foods and the reporting of meals served, and provisions in § 250.42(c) relating to the provision and use of program funds. The specific provisions in the latter section that would be removed include:

- Payments in funds made by FNS.
- Agreements between FNS and State Agencies on Aging choosing to receive funds.
- Monitoring of the disbursement of funds to elderly nutrition projects.
- Monitoring of the use of funds by elderly nutrition projects.
- Maintenance of records of the receipt and use of funds.

### III. Procedural Matters

#### A. Public Comment Procedures

Your written comments on this proposed rule should be specific, confined to issues pertinent to the proposed rule, and should explain your reasons for any change recommended.

Where possible, you should reference the specific section or paragraph of the proposal you are addressing. Comments received after the close of the comment period (see **DATES**) will not be considered or included in the Administrative Record for the final rule.

The comments, including names, street addresses, and other contact information of commenters, will be available for public review at the Food and Nutrition Service, Room 500, 3101 Park Center Drive, Alexandria, Virginia, during regular business hours (8:30 a.m. to 5 p.m.), Mondays through Fridays, except Federal holidays.

Executive Order 12866 requires each agency to write regulations that are simple and easy to understand. We invite your comments on how to make these regulations easier to understand, including answers to questions such as the following:

(1) Are the requirements in the rule clearly stated?

(2) Does the rule contain technical language or jargon that interferes with its clarity?

(3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) make it more or less clear?

(4) Would the rule be easier to understand if it were divided into more (but shorter) sections?

(5) Is the description of the rule in the preamble section entitled "Background and Discussion of the Proposed Rule" helpful in understanding the rule? How could this description be more helpful?

#### B. Executive Order 12866

This proposed rule has been determined to be significant and was reviewed by the Office of Management and Budget (OMB) under Executive Order 12866.

#### C. Regulatory Impact Analysis

##### Need for Action

This action is needed to respond to an OIG audit that found that school food authorities did not always receive the benefit of the donated foods provided for use in NSLP. It also incorporates amendments to the Older Americans Act of 1965 that affect NSIP.

##### Benefits

The regulatory changes would help ensure that school food authorities and other recipient agencies receive the benefit of all donated foods provided to food service management companies for use in serving school lunches and other meals. It would provide some flexibility in the use and management of donated foods by food service management



companies in providing the meal service. It would also help to ensure that school food authorities receive the donated foods they may best utilize in their food service, and would remove reporting requirements for charitable institutions to determine the amount of surplus donated foods they may receive for service to needy persons.

#### Costs

This action is not expected to significantly increase costs of State and local agencies, or their commercial contractors, in using donated foods.

#### D. Regulatory Flexibility Act

This proposed rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). The Under Secretary of Food, Nutrition, and Consumer Services, Eric M. Bost, has certified that this action will not have a significant impact on a substantial number of small entities. Although the rule would require specific procedures for food service management companies and contracting agencies to follow in using donated foods, USDA does not expect them to have a significant impact on such entities.

#### E. Public Law 104–4

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, FNS generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures to State, local, or tribal governments, in the aggregate, or to 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 FNS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no 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. This rule is, therefore, not subject to the requirements of sections 202 and 205 of the UMRA.

#### F. Executive Order 12372

The donation of foods in USDA food distribution and child nutrition

programs, to charitable institutions, and to elderly nutrition projects in NSIP is included in the Catalog of Federal Domestic Assistance under 10.550. For the reasons set forth in the final rule in 7 CFR part 3015, subpart V and related Notice (48 FR 29115, June 24, 1983), the donation of foods in such programs is included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

#### G. Executive Order 13132

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 13132.

#### 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 and regional offices have formal and informal discussions with State and local officials on an ongoing basis regarding program issues relating to the distribution of donated foods. FNS meets annually with the American Commodity Distribution Association, a national group with State, local, and industry representation, to discuss issues relating to food distribution.

#### Nature of Concerns and the Need To Issue This Rule

The rule addresses concerns identified in an OIG audit in a manner that will affect State and local agencies. While it may increase the workload of such agencies to a certain extent, it would help to ensure that school food authorities receive the benefit of the donated foods provided for their use. It also addresses the need to better ensure that all State agencies provide school food authorities with the opportunity to order all varieties of donated foods available for their use.

#### Extent To Which We Meet Those Concerns

FNS has considered the impact of the proposed rule on State and local agencies. The overall effect is to ensure that such agencies receive the greatest benefit from the donated foods made available for their use in food distribution and child nutrition programs. FNS is not aware of any case

in which the provisions of the rule would preempt State law.

#### H. Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This proposed rule, when finalized, would have preemptive effect with respect to any State or local laws, regulations, or policies which conflict with its provisions or which would otherwise impede its full implementation. This proposed rule would not have retroactive effect. Prior to any judicial challenge to the provisions of this rule or the application of its provisions, all applicable administrative procedures must be exhausted.

#### I. Civil Rights Impact Analysis

FNS has reviewed this rule in accordance with the Department Regulation 4300–4, “Civil Rights Impact Analysis”, to identify and address any major civil rights impacts the rule might have on minorities, women, and persons with disabilities. After a careful review of the rule's intent and provisions, FNS has determined that this rule will not in any way limit or reduce the ability of participants to receive the benefits of donated foods in food distribution programs on the basis of an individual's or group's race, color, national origin, sex, age, or disability. FNS found no factors that would negatively and disproportionately affect any group of individuals.

#### J. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR part 1320) requires that OMB approve all collections of information by a Federal agency from the public 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. This proposed rule contains information collections that are subject to review and approval by OMB; therefore, in accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other agencies to comment on the proposed information collections affected by the proposals in the rule. Written comments on this proposed information collection must be received on or before August 7, 2006.

Comments concerning the information collection aspects of this proposed rule should be sent to the Office of Information and Regulatory Affairs, OMB, Room 10235, New Executive Office Building, Washington, DC 20503, Attention: Desk Officer for

the Food and Nutrition Service. A copy of these comments may also be sent to Lillie F. Ragan, at the address listed in the **ADDRESSES** section of this preamble. Commenters are asked to separate their comments on the information collection requirements from their comments on the remainder of the proposed rule.

OMB is required to make a decision concerning the collection of information contained in this proposed regulation between 30 to 60 days after the publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having full consideration if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the Department on the proposed regulation.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

The title, description, and respondent description of the information collections affected by this rule are shown below, with an estimate of the annual reporting and recordkeeping burdens. These burden hours represent proposed changes to current reporting and recordkeeping requirements, and incorporate some additional proposed requirements.

*Title:* Food Distribution Forms.

*OMB Number:* 0584-0293.

*Expiration Date:* March 31, 2009.

*Type of Request:* Revision of a currently approved collection.

*Abstract:* This proposed rule would affect only the following reporting and recordkeeping requirements under 7 CFR part 250.

#### Reporting Requirements

*Section 250.12(c), Recipient agency/food service management company contracts.* Currently, the reporting burden associated with the use of donated foods in contracts with food service management companies is included in § 250.12(c) (the citation is in error, as current regulatory requirements for these contracts are included in

§ 250.12(d)). In this rule, we are proposing new requirements to ensure that recipient agencies in child nutrition programs receive the full benefit of donated foods in contracts with food service management companies. We propose to require that food service management companies credit such recipient agencies for all donated foods through invoice reductions, refunds, discounts, or other means of crediting. Such crediting would be required not less frequently than annually. In addition to the proposed new requirements, the number of contracts that recipient agencies enter into with food service management companies has increased over the last several years. Hence, we project the increase in the reporting burden for the use of donated foods in food service management company contracts as follows.

In school year 2000, 1,648 school food authorities of a total of 19,329 (8.5 percent) had contracts with food service management companies to conduct their food service. Hence, of the total of 20,770 school food authorities operating in school year 2004, we estimate that 1,765 had contracts with food service management companies. We estimate the burden hours needed to meet the requirements proposed for donated foods in the contract to be 1 hour. While each respondent (the food service management company) may submit more than one response per year, our proposal would allow for only one submittal per year. Hence, we project the number of reports submitted annually by each respondent to be 1. Hence, the estimated total annual reporting burden for food service management company contracts would be:

$1,765 \times 1 \text{ hour} = 1,765 \text{ hours.}$

$1,765 \times 1 \text{ response per year} = 1,765 \text{ burden hours annually.}$

The estimated total annual reporting burden of 1,765 hours would be an increase from the current reporting burden of 24.75 hours. As we are proposing to include requirements for the use of donated foods in contracts with food service management companies in the new § 250.54 in this rule, we would also include the burden associated with this activity under § 250.54 in the ICB package.

*Section 250.17(e), Food orders.*

Currently, in § 250.17(e), the distributing agency must submit orders for donated foods in NSLP and other child nutrition programs using form FNS-52, Food Requisition. However, in July 2003, FNS implemented a web-based system called the Electronic Commodity Ordering System (ECOS), which allows distributing agencies to

submit orders for donated foods electronically. In submitting orders through ECOS, the number of submissions has increased but the time needed for each submission has been substantially reduced. We estimate that each distributing agency submits 642 orders per year (one for each donated food ordered), instead of the 112 paper submittals (with multiple food orders) previously submitted annually. Each submission takes an estimated 30 seconds, rather than the current 2 hours. Hence, we propose to reduce the reporting burden for this activity to 416 hours from the current 18,144 hours. As we are proposing to include food ordering in NSLP in the new § 250.58 in this rule, we would also include the burden associated with this activity under § 250.58 in the ICB package.

*Section 250.41(b), Reporting of needy persons served by charitable institutions.* Currently, in § 250.41(b), charitable institutions must report the number of meals served, and information necessary to determine the number of meals served to needy persons. We are proposing to remove this submission requirement for charitable institutions in this rule, and to require instead that the distributing agency use readily available data to determine that a charitable institution serves predominantly needy persons. Hence, the reporting burden of 108 hours currently listed in § 250.41(b) would be removed.

#### Recordkeeping Requirements

*Section 250.12(c), Food service records.* The current recordkeeping burden for the use of donated foods in food service management company contracts is 24 hours. In this rule, we are proposing to require recipient agencies in child nutrition programs to maintain documentation of crediting of donated foods by food service management companies and the donated food values used in crediting. Hence, the recordkeeping burden for this activity would increase. We estimate the total number of respondents would be 1,765, as stated above. We estimate that each response would take 0.25 hours. Hence, the recordkeeping burden associated with the use of donated foods in food service management company contracts would increase to 442 hours from the current 24 hours. As we are proposing to include these recordkeeping requirements in the new § 250.55, we would also include the burden hours under § 250.55 in the ICB package.

*Section 250.42(c)(5), Cash in lieu of donated foods for State Agencies on Aging.* Currently, in § 250.42(c)(5), the State Agency on Aging must keep a

record of the agreement with FNS to receive cash in lieu of donated foods. We are proposing to remove this agreement requirement in this rule, as DHHS is now responsible for making cash disbursements to State Agencies on Aging. Hence, the recordkeeping burden

of 5.60 hours currently listed in § 250.42(c)(5) would be removed.  
*Respondents:* State, local, or Tribal Government; Program participants; Business or other for-profit; Nonprofit institutions; Federal government.  
*Total Annual Responses:* Current: 1,272,952; Proposed: 1,317,518.

*Estimated Total Annual Burden on Respondents:* Current: 1,101,497; Proposed: 1,085,814.

The proposed changes in the reporting and recordkeeping requirements described above are included in the following table.

| Section        |          | Respondents | Responses per year | Total responses | Hours/ response | Total hours |
|----------------|----------|-------------|--------------------|-----------------|-----------------|-------------|
| Reporting:     |          |             |                    |                 |                 |             |
| 250.54         | Current  | 300         | 0.25               | 75              | 0.33            | 24.75       |
|                | Proposed | 1,765       | 1                  | 1,765           | 1               | 1,765       |
| 250.58         | Current  | 81          | 112                | 9,072           | 2               | 18,144      |
|                | Proposed | 81          | 642                | 52,002          | 0.008           | 416         |
| 250.67         | Current  | 54          | 1                  | 54              | 2               | 108         |
|                | Proposed | 0           | 0                  | 0               | 0               | 0           |
| Recordkeeping: |          |             |                    |                 |                 |             |
| 250.54/250.55  | Current  | 300         |                    |                 | 0.08            | 24          |
|                | Proposed | 1,765       |                    |                 | 0.25            | 442         |
| 250.68         | Current  | 70          |                    |                 | 0.08            | 5.60        |
|                | Proposed | 0           |                    |                 | 0               | 0           |

The resulting changes in the reporting and recordkeeping requirements in OMB Number 0584–0293 are included in the following table.

|              | Respondents | Annual responses | Total hours |
|--------------|-------------|------------------|-------------|
| Part 250:    |             |                  |             |
| Current      | 255,452     | 35,803           | 68,733      |
| Proposed     | 258,258     | 80,369           | 53,049      |
| Grand total: |             |                  |             |
| Current      | 367,182     | 1,272,952        | 1,101,497   |
| Proposed     | 369,988     | 1,317,518        | 1,085,814   |

#### K. Government Paperwork Elimination Act Compliance

FNS is committed to compliance with the Government Paperwork Elimination Act, which requires government agencies to provide the public with the option of submitting information or transacting business electronically to the maximum extent possible. This commitment is exemplified by our transition to an electronic web-based system for the submittal of donated food orders, as described earlier in the preamble.

#### List of Subjects in 7 CFR Part 250

Administrative practice and procedure, Food assistance programs, Grant programs, Social programs, Indians, Reporting and recordkeeping requirements, Surplus agricultural commodities.

Accordingly, 7 CFR part 250 is proposed to be 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. In § 250.3:

a. Remove definitions of *Nonprofit summer camps for children*, *Nonresidential child or adult care institution*, *Nutrition program for the elderly*, *Offer-and-acceptance system*, *Program*, and *Students in home economics*.

b. Revise definitions of *Charitable institutions*, *Child nutrition program*, *Commodity school*, *End product*, *Food service management company*, *Processing*, *Processor*, *Recipient agencies*, *Recipients*, *Section 311*, *Service institutions*, and *State Agency on Aging*.

c. Add definitions, in the appropriate alphabetical order, of *Adult care*

*institution*, *AoA*, *Bonus foods*, *CACFP*, *Child care institution*, *Commodity offer value*, *DHHS*, *Elderly nutrition project*, *Entitlement*, *Entitlement foods*, *National per-meal value*, *Nonprofit organization*, *Nonprofit school food service account*, *NSIP*, *NSLP*, *Reimbursable meals*, *SBP*, *7 CFR part 3016*, *7 CFR part 3019*, *SFSP*, *Single inventory management*, and *Summer camp*.

The revisions and additions read as follows:

#### § 250.3 Definitions.

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

*AoA* means the Administration on Aging, which is the DHHS agency that administers NSIP.

*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, 7 CFR part 226.

*Charitable institutions* means public institutions or nonprofit organizations, as defined in this section, that provide a meal service on a regular basis to predominantly needy persons in the same place without marked changes. Charitable institutions include, but are not limited to, emergency shelters, soup kitchens, hospitals, retirement homes, elderly nutrition projects; schools, summer camps, service institutions, and child and adult care institutions that do not participate in a child nutrition program, or as a commodity school, as they are defined in this section; and adult correctional institutions that conduct rehabilitation programs for a majority of inmates.

*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 meals 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 National School Lunch Act (42 U.S.C. 1753).

\* \* \* \* \*

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

\* \* \* \* \*

*Elderly nutrition project* means a recipient agency selected by the State or Area Agency on Aging to receive donated foods in NSIP, for use in serving meals to elderly persons.

*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.

\* \* \* \* \*

*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 parts 210, 225, or 226, or, with respect to charitable institutions, in accordance with 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 of this part.

\* \* \* \* \*

*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 section 6(c) of the National School Lunch Act.

\* \* \* \* \*

*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 account* means the restricted account in which all of the revenue from all food service operations conducted for the school food authority principally for the benefit of school children is retained and used only for the operation or improvement of the nonprofit school food service.

*NSIP* means the Nutrition Services Incentive Program.

*NSLP* means the National School Lunch Program, 7 CFR part 210.

\* \* \* \* \*

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

(a) Convert donated foods into an end product;

(b) Repackage donated foods; or

(c) 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, in accordance with agreements

signed with a distributing agency, or with another recipient agency.

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

\* \* \* \* \*

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

*SBP* means the School Breakfast Program, 7 CFR part 220.

\* \* \* \* \*

*Section 311* means section 311 of the Older Americans Act of 1965 (42 U.S.C. 3030a), which authorizes State Agencies on Aging under Title III of that Act, and any Title VI grantee (Indian Tribal Organization) under that Act, to receive all, or part, of their NSIP grant as donated foods.

\* \* \* \* \*

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

*7 CFR part 3016* means the Department's regulations establishing uniform administrative requirements for Federal grants and cooperative agreements and subawards to State, local, and Indian tribal governments.

*7 CFR part 3019* means the Department's regulations establishing uniform administrative requirements for Federal grants and cooperative agreements awarded to institutions of higher education, hospitals, and other nonprofit organizations.

*SFSP* means the Summer Food Service Program, 7 CFR part 225.

\* \* \* \* \*

*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.

\* \* \* \* \*

*State Agency on Aging* means:

(a) The State agency that has been designated by the Governor and approved by DHHS to administer the Nutrition Services Incentive Program; or

(b) The Indian Tribal Organization that has been approved by DHHS to administer the Nutrition Services Incentive Program.

\* \* \* \* \*

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

\* \* \* \* \*

3. In § 250.12:

a. Revise the section heading to read, as set forth below.

b. Remove the last sentence in paragraph (a).

c. Remove paragraphs (d), (e), and (f). The revision reads as follows:

#### § 250.12 Agreements.

\* \* \* \* \*

4. In § 250.19:

a. In the first sentence of the introductory text of paragraph (b)(1), after the word “provisions”, add the words, “, as they apply to specific programs.”

b. Remove paragraph (b)(1)(i), and redesignate paragraphs (b)(1)(ii), (b)(1)(iii), (b)(1)(iv), and (b)(1)(v), as paragraphs (b)(1)(i), (b)(1)(ii), (b)(1)(iii), and (b)(1)(iv), respectively.

c. Revise newly redesignated paragraphs (b)(1)(i) and (b)(1)(iv).

d. Remove paragraph (d).

The revisions read as follows:

#### § 250.19 Reviews.

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(i) An on-site review of all charitable institutions, or the food service management companies under contract with them, at a minimum, whenever the distributing agency identifies actual or probable deficiencies in the use of donated foods by such institutions, or by their contractors, through audits, investigations, complaints, or any other information.

\* \* \* \* \*

(iv) An on-site review of recipient agencies in NSLP, CACFP, and SFSP, to ensure compliance with requirements for the use of donated foods in contracts with food service management companies. Such a review must be conducted at the frequency established in 7 CFR parts 210, 225, or 226, as applicable, for the State administering agency, in the conduct of its reviews. The distributing agency may enter into an agreement with the appropriate State administering agency to include its review as part of the State administering agency's review.

\* \* \* \* \*

5. In § 250.24, revise paragraphs (d)(8), (d)(9), and (d)(10), to read as follows:

#### § 250.24 Distributing agency performance standards.

\* \* \* \* \*

(d) \* \* \*

(8) Providing recipient agencies with ordering options and commodity values, and considering the specific needs and capabilities of such agencies in ordering donated foods;

(9) Offering school food authorities participating in NSLP, or as commodity schools, at a minimum, the commodity offer value of donated food assistance,

and determining an adjusted assistance level in consultation with school food authorities, as appropriate, in accordance with § 250.58; and

(10) Providing each school food authority participating in NSLP with the opportunity to order, or select, donated foods from the full list of available foods, and to distribute the selected donated foods to each school food authority, to the extent that distribution of such foods to, and within, the State would be cost-effective, in accordance with § 250.58.

\* \* \* \* \*

6. Add the heading for new subpart F to read as follows:

#### Subpart F—Household Programs

7. Redesignate §§ 250.45, 250.46, 250.47, and 250.51, as §§ 250.63, 250.64, 250.65, and 250.66, respectively, and transfer them from subpart D to new subpart F.

8. Add the heading for new subpart G to read as follows:

#### Subpart G—Other Donated Food Outlets

9. Add new §§ 250.67 and 250.68 to new subpart G to read as follows:

#### § 250.67 Charitable institutions.

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

(1) Schools, summer camps, service institutions, and child and adult care institutions that participate in child nutrition programs or as commodity schools; and

(2) Adult correctional institutions that do not conduct rehabilitation programs for a majority of inmates.

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

(1) Hospitals or retirement homes;

(2) Emergency shelters, soup kitchens, or emergency kitchens;

(3) Elderly nutrition projects or adult day care centers;

(4) Schools, summer camps, service institutions, and child care institutions that do not participate in child nutrition programs; and

(5) Adult correctional institutions that conduct rehabilitation programs for a majority of inmates.

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

(1) Socioeconomic data of the area in which the organization is located, or of the clientele served by the organization;

(2) Data from other public or private social service agencies, or from State advisory boards, such as those established in accordance with 7 CFR 251.4(h)(4); or

(3) Other similar data.

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

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

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

(a) *Distribution of donated foods in NSIP.* The Department provides donated foods in NSIP to State Agencies 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 on Aging (AoA), which provides an NSIP grant each year to State Agencies 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 Agencies on Aging. AoA is responsible for reimbursing the Department for the cost of donated food purchases and related administrative expenses.

(b) *Types and quantities of donated foods distributed.* The State Agency, 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. The State Agency on Aging may receive donated foods with a value equal to its NSIP grant. The State Agency on Aging and elderly nutrition projects 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 the State or Area Agency 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 Agency 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 Agency on Aging's NSIP grant.

(e) *Coordination between FNS and AoA.* FNS and AoA coordinate their respective roles in NSIP through the execution of annual agreements. The agreement ensures that FNS is properly reimbursed for donated food purchases and related expenses, and that advanced funds not used for donated food purchases are returned to AoA for disbursement to the appropriate State Agencies on Aging.

#### **§§ 250.43, 250.44 [Redesignated]**

10. Redesignate §§ 250.43 and 250.44 as §§ 250.69 and 250.70, respectively, and transfer them from subpart D to new subpart G.

11. Revise subparts D and E to read as follows:

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

- 250.50 Food service management companies.
- 250.51 Contracts and procurement.
- 250.52 Crediting for, and use of, donated foods.
- 250.53 Storage and inventory management of donated foods.
- 250.54 Contract provisions.
- 250.55 Recordkeeping and reviews.

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

- 250.56 Provision of donated foods in NSLP.
- 250.57 Commodity schools.
- 250.58 Ordering donated foods and their provision to school food authorities.

- 250.59 Storage and inventory management of donated foods.
- 250.60 Use of donated foods in the school food service.
- 250.61 Child and Adult Care Food Program (CACFP).
- 250.62 Summer Food Service Program (SFSP).

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

##### **§ 250.50 Food service management companies.**

(a) *Categorizing a food service management company.* As defined in § 250.3, a food service management company is 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 parts 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 subpart. 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 § 250.3, is considered a processor in this part, and is subject to the requirements in subpart C of this part, rather than the requirements of this subpart.

(b) *Activities relating to donated foods.* A food service management company may perform the following activities relating to donated foods, in accordance with its contract with the recipient agency:

- (1) Preparing and serving meals;
- (2) Ordering or selecting donated foods, in coordination with the recipient agency, and in accordance with § 250.58(c);
- (3) Storage and inventory management of donated foods, in accordance with § 250.53;
- (4) Payment of processing fees or costs on behalf of the recipient agency, in accordance with the requirements in § 250.52(e); and
- (5) Submittal of refund applications to the processor, and remittance of refunds to the recipient agency, for donated foods contained in processed end products, in accordance with the requirements of § 250.30(k).

##### **§ 250.51 Contracts and procurement.**

(a) *Contract requirement.* Prior to donated foods being made available to

a food service management company, the recipient agency must enter into a contract with the food service management company. The contract must ensure that all donated foods received for use by the recipient agency for a period specified as either the school year or fiscal year are used to benefit the recipient agency's food service. Contracts between child nutrition program recipient agencies and food service management companies must also ensure that the other requirements in this subpart relating to donated foods, as well as other Federal requirements in 7 CFR parts 210, 220, 225, or 226, as applicable, are met. Contracts between other recipient agencies—i.e., charitable institutions and recipient agencies utilizing TEFAP foods—and food service management companies are not subject to the other requirements in this subpart.

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

(c) *Requirements for procurement.* The recipient agency must meet Federal requirements relating to the procurement of a food service management company in 7 CFR parts 210, 220, 225, or 226, and with 7 CFR parts 3016 or 3019, as applicable. The recipient agency must ensure that required contract provisions relating to donated foods, as listed in § 250.54, are also included in the contract solicitation documents. Such provisions include the method used to determine the donated food values to be used in crediting, or the actual values assigned, in accordance with § 250.52. The method used to determine the donated food values may not be established through a post-award negotiation, or by any other method that may directly or indirectly alter the terms and conditions of the solicitation or contract.

(d) *Prohibition against contracts or agreements with processors.* A food service management company may not enter into a contract or agreement with a processor to process donated foods or end products for use in the recipient agency's food service.

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

(a) *Crediting for donated foods.* In both fixed-price and cost-reimbursable contracts, the recipient agency must require the food service management company to credit 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 (including both entitlement and bonus foods). The recipient agency may permit crediting through invoice reductions, refunds, discounts, or by another means of crediting. All forms of crediting must provide clear documentation of the value received from the donated foods—e.g., by separate line item entries on invoices. If provided for in a fixed-price contract, the recipient agency may permit a food service management company to pre-credit for donated foods. In pre-crediting, a deduction for the value of donated foods is included in the established fixed price per meal. However, the recipient agency must ensure that the food service management company provides an additional credit for any donated foods not accounted for in the fixed price per meal—e.g., for donated foods that are not made available until later in the year. In cost-reimbursable contracts, crediting may be performed by disclosure: i.e., the food service management company may indicate the value of donated foods credited for the period in which it bills the recipient agency for food costs.

(b) *Frequency of crediting.* The recipient agency must require crediting to be performed not less frequently than annually, and must ensure that the specified method of valuation of donated foods permits crediting to be achieved in the required time period. A school food authority must also ensure that the method, and timing, of crediting does not cause its cash resources to exceed the limits established in 7 CFR 210.9(b)(2).

(c) *Donated food values required in crediting.* The recipient agency must ensure that the food service management company uses the donated food values determined by the distributing agency, in accordance with § 250.58(g), or, if approved by the distributing agency, donated food values determined by an alternate means of the recipient agency's choosing. For example, the recipient agency may, with the approval of the distributing agency, specify that the value will be the average price per pound for a food, or for a group or category of foods (e.g., all frozen foods or cereal products), as listed in market journals over a specified period of time.

(d) *Method of determining values of donated foods required in solicitation and contract.* The method of determining the donated food values to be used in crediting must be included in the solicitation and contract: e.g., the value will be the average USDA purchase price for the period of the contract with the food vendor, or the average price per pound listed in market journals over a specified period of time. The method of valuation must result in the determination of actual values; any negotiation of donated food values is not permitted. Additionally, the method of valuation must ensure that crediting may be achieved in accordance with the time frame specifically established in the solicitation and contract (e.g., quarterly or annually).

(e) *Donated foods in processed end products.* In accordance with § 250.30, the processor must credit the recipient agency for donated foods contained in end products through a discount or refund sales system, or charge the recipient agency a fee-for-service to produce the end product. Hence, the food service management company is not required to credit recipient agencies for donated foods contained in processed end products. However, as indicated in § 250.50(b), the food service management company may, under its contract with the recipient agency, be responsible for the payment of processing costs, or the submittal of refund applications, and the remittance of refunds, for donated foods contained in processed end products. In such cases, the recipient agency must ensure that the food service management company:

(1) Bills it separately for processing costs, and does not include these costs in a fixed-price charge for the food service; and

(2) Submits refund applications to processors, in accordance with the requirements in § 250.30(k), and remits refunds to the recipient agency in an expeditious manner.

(f) *Use of donated foods in the recipient agency's meal service.* While the food service management company must credit the recipient agency for all donated foods received, it is not required to use those donated foods, or a commercial substitute of the same generic identity, in the recipient agency's meal service, unless the contract specifically stipulates that such foods must be used. However, the food service management company must ensure that:

(1) Donated ground beef and ground pork products, and all end products received from processors are used in the recipient agency's food service, for the

benefit of eligible program recipients; and

(2) If menu plans include foods of the same generic identity as the donated foods received, then such donated foods, or commercially purchased foods of the same generic identity, of U.S. origin, and identical or superior in quality, are used in the recipient agency's food service.

(g) *Return of unused donated foods upon termination of the contract.* The food service management company must return all donated ground beef and ground pork products, and end products received from processors, to the recipient agency when the contract is terminated by either party, or is not extended. The food service management company must, at the discretion of the recipient agency, return other donated foods for which the recipient agency has not been credited, or pay the recipient agency the value of such donated foods.

**§ 250.53 Storage and inventory management of donated foods.**

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

(b) *Storage with commercially purchased foods.* The food service management company may store and inventory donated foods together with commercially purchased foods, if provided for in its contract with the recipient agency. However, the food service management company must ensure that donated ground beef and ground pork products, and all end products received from processors, are stored in a manner that assures they will be used in the recipient agency's 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.

**§ 250.54 Contract provisions.**

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

(1) A statement that the food service management company will credit the recipient agency for all donated foods received for use in the recipient agency's food service for the school year or fiscal year, as applicable;



(2) The method and frequency by which crediting will occur—e.g., through invoice reductions, refunds, discounts, or other means of crediting—and the means of documentation to be utilized to verify that the value of all donated foods has been credited;

(3) The method of determining the donated food values to be used in crediting, in accordance with § 250.52(c), or the actual donated food values;

(4) If applicable, a statement that the food service management company will ensure that the recipient agency receives the full benefit of all refunds and discounts received from processors and distributors for processed end products, and will not charge the recipient agency for processing costs paid on its behalf as part of a fixed-price charge for the food service;

(5) Any activities relating to donated foods that the food service management company will be responsible for, such as the payment of processing fees, or the remittance of refunds to the recipient agency for donated foods contained in processed end products;

(6) A statement that donated ground beef and ground pork products, and all end products received from processors, will be used in the food service, and will not be substituted with commercial products;

(7) A statement that, if menu plans include foods of the same generic identity as the donated foods received, then those donated foods, or commercially purchased foods of the same generic identity, of U.S. origin, and identical or superior in quality to the donated foods, will be used;

(8) An assurance that the food service management company will use donated foods in accordance with the requirements in this part;

(9) An assurance that the food service management company will not enter into a contract or agreement with a processor to process donated foods or end products for use in the recipient agency's food service;

(10) A statement that the distributing agency, subdistributing agency, or recipient agency, the Comptroller General, the Department of Agriculture, or their duly authorized representatives, may perform on-site reviews of the food service management company's food service operation to ensure that all activities relating to donated foods are performed in accordance with the requirements in this part;

(11) A statement that the food service management company will maintain records to document that crediting for all donated foods received for the school or fiscal year has been achieved, and

will meet other recordkeeping requirements in this part; and

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

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

#### **§ 250.55 Recordkeeping and reviews.**

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

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

(2) Crediting for donated foods by the food service management company, including documentation verifying that the full donated food value has been credited; and

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

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

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

(2) Documentation that all donated foods received for use in the recipient agency's food service have been credited.

(c) *Review requirements for the recipient agency.* The recipient agency must include a review of food service management company activities relating to the use of donated foods as part its monitoring of the food service operation required in 7 CFR parts 210, 220, 225, or 226, as applicable. The recipient agency must also conduct a reconciliation of the food service management company's crediting for donated foods at least annually to ensure that it has received credit for all donated foods received in the school year or fiscal year.

(d) *Review requirements for the distributing agency.* The distributing agency must conduct an on-site review of the recipient agency's use of donated foods in its food service in contracts with food service management companies, in accordance with the management reviews required in § 250.19(b)(1). In accordance with § 250.19(b)(1)(iv), the distributing agency may enter into an agreement with the State administering agency (if a different agency) for NSLP, SFSP, or CACFP, to include its review as part of the administrative review required of the State administering agency in 7 CFR parts 210, 225, or 226, as applicable.

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

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

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

(a) *Distribution of donated foods in NSLP.* The Department provides donated foods in NSLP to distributing agencies. Distributing agencies provide donated foods to school food authorities that participate in NSLP for use in serving nutritious lunches or other meals to schoolchildren in their nonprofit school food service. The distributing agency must confirm the participation of school food authorities in NSLP with the State education agency (if different from the distributing agency). In addition to requirements in this part relating to donated foods, distributing agencies and school food authorities in NSLP must adhere to Federal regulations in 7 CFR part 210, as applicable.

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

(c) *National per-meal value of donated foods.* For each school year, the distributing agency receives, at a minimum, the national per-meal value

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

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

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

#### **§ 250.57 Commodity schools.**

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

(b) *Value of donated foods for commodity schools.* For participating commodity schools, the distributing agency receives donated foods valued at the sum of the national per-meal value and the value of the general cash payment available to it under Section 4 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1753), multiplied by the number of reimbursable lunches served by commodity schools in the previous school year. From the total value of donated food assistance for which it is eligible, a commodity school may elect to receive up to 5 cents per meal in cash

to cover processing and handling expenses related to the use of donated foods. In addition to section 6 and section 14 foods under the Richard B. Russell National School Lunch Act (42 U.S.C. 1755 and 1762(a)), the distributing agency may also receive donated foods under section 32, section 416, or section 709, as available, for commodity schools.

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

(a) *Ordering donated foods.* The distributing agency orders donated foods through a web-based system called the Electronic Commodity Ordering System (ECOS). Through ECOS, the distributing agency places orders directly into a centralized computer system.

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

(c) *Variety of donated foods offered to school food authorities.* Before submitting orders for donated foods to FNS, the distributing agency must provide the school food authority with the opportunity to order, or select, donated foods for its school food service from the full list of available foods.

(d) *Distribution of donated foods to school food authorities.* The distributing agency must ensure distribution of all donated foods selected by the school food authority that may be cost-effectively distributed to it. The distributing agency must explore all available storage and distribution options to determine if distribution of the desired foods to the school food authority would be cost-effective, and may not prohibit the use of split shipments. If distribution of such foods would not be cost-effective, the distributing agency must provide the

school food authority with an opportunity to select other available donated foods that may be distributed to it cost-effectively.

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

(1) The distributing agency, in consultation with the school food authority, determines that the school food authority cannot efficiently utilize the commodity offer value of donated foods; or

(2) The school food authority does not order, or select, donated foods equal to the commodity offer value that can be cost-effectively distributed to it.

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

(g) *Donated food values required in crediting school food authorities.* The distributing agency must use one of the following values for donated foods, in crediting the school food authority for its commodity offer value or adjusted assistance level:

(1) The USDA purchase price (cost per lb.), which may be an average price for purchases made for the duration of the contract with the food vendor;

(2) Estimated cost-per-pound data provided by the Department, as included in commodity survey memoranda; or

(3) The USDA commodity file cost as of a date specified by the distributing agency.

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

(a) *General requirements.* Distributing agencies, subdistributing agencies, and school food authorities must meet the requirements for storage and inventory of donated foods in § 250.14, in addition to the requirements in this section.

(b) *Storage at distributing agency level.* The distributing or subdistributing

agency, or storage facilities with which they have contracts, must store donated foods separately from commercially purchased foods or other foods to ensure distribution of the donated foods that have been purchased for school food authorities.

(c) *Storage by school food authorities.* The school food authority may store and inventory donated foods with commercially purchased foods and other foods, under a single inventory management system, as defined in this part, unless the distributing agency requires separate storage and inventory of donated foods.

(d) *Storage by storage facilities under contract with school food authorities.* A storage facility under contract with a school food authority may store and inventory donated foods together with commercially purchased foods it is storing for the school food authority, unless its contract with the school food authority prohibits this. However, the storage facility may not commingle foods it is storing for a school food authority with foods it is storing for a commercial enterprise or other entity.

#### **§ 250.60 Use of donated foods in the school food service.**

(a) *Use of donated foods in school lunches and other meals or activities.* The school food authority should use donated foods, as far as 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 nonprofit school food service activities. Revenues received from such activities must accrue to the school food authority's nonprofit school food service account. Some examples of other 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 children;
- (3) Meals served to adults directly involved in the operation and administration of the nonprofit food service; and

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

(b) *Use of donated foods outside of the nonprofit school food service.* The school food authority should not use donated foods in meals or food service activities that do not benefit primarily schoolchildren, such as banquets or catered events. However, their use in such meals or activities may not always be avoided, e.g., for a school food authority utilizing single inventory management. In all cases, the school

food authority must ensure reimbursement to the nonprofit food service account for donated foods used in such activities, in addition to reimbursement for other resources utilized from that account. Since school food authorities utilizing single inventory management cannot reimburse the nonprofit food service account based on actual usage of donated foods, they must establish an alternate method to ensure that donated foods do not subsidize food service activities that do not benefit schoolchildren—e.g., by including the current per-meal value of donated food reimbursement in the price charged for the food service activities.

(c) *Use of donated foods in a contract with a food service management company.* A school food authority 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 210 and 7 CFR parts 3016 or 3019, as applicable, with respect to the procurement of such contracts. The school food authority must also ensure that a food service management company providing catered meals, or other food service activities that do not benefit primarily schoolchildren, ensure reimbursement to the nonprofit school food service account for donated foods used in such activities, in accordance with paragraph (b) of this section.

(d) *Use of donated foods in providing a meal service to other school food authorities.* A school food authority may use donated foods to provide a meal service to other school food authorities, under an agreement between the parties. A school food authority providing such a service may commingle its own donated foods and the donated foods of other school food authorities that are parties to the agreement.

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

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

(b) *Types and quantities of donated foods distributed.* For each school year, the distributing agency receives, at a minimum, the national per-meal value of donated food assistance multiplied by

the number of reimbursable lunches and suppers served in the State in the previous school year, as established in section 6(c) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1755(c)). The national per-meal value is adjusted each year to reflect changes in the Bureau of Labor Statistics' Producer Price Index for Foods Used in Schools and Institutions. The adjusted per-meal value is published in a notice in the **Federal Register** in July of each year. Reimbursable lunches and suppers are those meeting the nutritional standards established in 7 CFR part 226. The number of reimbursable lunches and suppers may be adjusted during, or at the end of the school year, in accordance with 7 CFR part 226. In addition to section 6 entitlement foods (42 U.S.C. 1755(c)), the distributing agency may also receive section 14 donated foods (42 U.S.C. 1762(a)), and donated foods under section 32, section 416, or section 709, as available, for distribution to child and adult care institutions participating in CACFP.

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

(d) *Use of donated foods in a contract with a food service management company.* A child 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 and 7 CFR parts 3016 or 3019, as applicable, with respect to the procurement of such contracts.

(e) *Applicability of other requirements in this subpart to CACFP.* The requirements in this subpart relating to the ordering, storage and inventory management, and use of donated foods in NSLP, also apply to CACFP. However, in accordance with 7 CFR part 226, a child or adult care institution that

uses donated foods to prepare and provide meals to other such institutions is considered a food service management company.

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

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

(b) *Types and quantities of donated foods distributed.* The distributing agency receives donated foods available under section 6 and section 14 of the

Richard B. Russell National School Lunch Act (42 U.S.C. 1755 and 1762), and may also receive donated foods under section 32, section 416, or section 709, as available, for distribution to eligible service institutions participating in SFSP. Section 6 donated foods are provided to distributing agencies in accordance with the number of meals served in the State in the previous school year that are eligible for donated food support, in accordance with 7 CFR part 225.

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

(d) *Use of donated foods in a contract with a food service management*

*company.* A service institution may use donated foods in a contract with a food service management company to conduct the food service. The contract must meet the requirements in subpart D of this part with respect to donated foods, and must also meet requirements in 7 CFR part 225 and 7 CFR parts 3016 or 3019, as applicable, with respect to the procurement of such contracts.

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

Dated: May 25, 2006.

**Eric M. Bost,**

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