DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 250 and 251

RIN 0584–AC49

Food Distribution Programs: Implementation of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform)

AGENCY: Food and Nutrition Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule proposes to amend provisions of the Food Distribution Program regulations and the Emergency Food Assistance Program (TEFAP) regulations to implement the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, commonly known as Welfare Reform, while generally streamlining and clarifying these regulations. In accordance with the Welfare Reform legislation, the proposals contained in this rule would address various changes required by the repeal of Section 110 of the Hunger Prevention Act of 1988, which authorized the former Soup Kitchens/ Food Banks Program, the former beneficiaries of which are now served by an expanded TEFAP. It amends the definitions relating to organizational eligibility in TEFAP to reflect the program consolidation, and to achieve consistency with the Emergency Food Assistance Act of 1983 as amended by Welfare Reform. Changes to these and other definitions are also proposed in order to provide greater clarity to the regulations. As mandated by Welfare Reform, this rule also proposes changes in the required content and frequency of submission of the TEFAP State plan of operation, and encourages State agencies to create advisory boards comprised of public and private entities with an interest in the distribution of TEFAP commodities. In addition, this rule proposes to broaden the allowable uses of TEFAP administrative funds at the State and local levels, and provide greater flexibility for State agencies in meeting the TEFAP maintenance-of-effort requirement. Finally, in order to reduce the paperwork burden and afford State agencies greater flexibility, this rule proposes discretionary changes in TEFAP recordkeeping, monitoring, and reporting requirements.

DATES: To be assured of consideration, comments must be postmarked on or before September 7, 1999.

ADDRESSES: Comments should be sent to: Lillie Ragan, Assistant Branch Chief, Household Programs Branch, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, Room 612, 4501 Ford Avenue, Alexandria, Virginia 22302. Comments in response to this rule may be inspected at 4501 Ford Avenue, Room 612, Alexandria, Virginia, during normal business hours (8:30 a.m. to 5 p.m., Mondays through Fridays).

FOR FURTHER INFORMATION CONTACT: Lillie Ragan at the above address or telephone (703) 305–2662.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This proposed rule has been determined to be not significant for purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

This action has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612). The Administrator of the Food and Nutrition Service (FNS) has certified that this action will not have a significant economic impact on a substantial number of small entities. The procedures in this rulemaking would primarily affect FNS regional offices, and the State distributing and recipient agencies that administer food distribution programs. Private enterprises that enter into agreements for the storage of donated food or meal service management would also be affected. While some of these entities constitute small entities, a substantial number will not be affected. Furthermore, any economic impact will not be significant.

Unfunded Mandate Reform Act

Title II of the Unfunded Mandate Reform Act of 1995, Public Law 104–4 (UMRA), 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. Thus this proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

These programs are listed in the Catalog of Federal Domestic Assistance under 10.550, 10.568 and 10.569 and are subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials (7 CFR part 3015, Subpart V and final rule-related notices published at 48 FR 29114, June 24, 1983 and 49 FR 22676, May 31, 1984).

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to 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 rule is not intended to have retroactive effect unless so specified in the ''Effective Date'' section of the preamble. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this rule or the application of its provisions.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), FNS is submitting for public comment the changes in the information collection burden that would result from the adoption of the proposals in the rule.

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; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. To be assured of

consideration, comments must be postmarked on or before September 7, 1999. Comments may be sent to Lori Schack, Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, D.C. 20503. All comments will be summarized and included in the request for OMB approval of the proposed changes in the information collection burden. All comments will become a matter of public record. For further information, or for copies of the information collections discussed below, please contact Lillie Ragan, Assistant Branch Chief, Household Programs Branch, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, Room 612, 4501 Ford Avenue, Alexandria, Virginia 22302, or telephone 703–305–2662.

Title: Food Distribution Regulations and Forms.

OMB Number: 0584–0293.

Expiration Date: 1/31/01.

Type of Request: Revision of a currently approved collection.

Abstract: State plans of operation, household participation reports, monitoring reviews, and review reports. The rule proposes to: (1) require State agencies to submit the TEFAP plan of operation to FNS only once every four years instead of the present annual requirement, with amendments made as necessary; (2) eliminate the requirement that State agencies report semiannually the number of households served through TEFAP; (3) reduce the number of TEFAP agencies required to be reviewed each year by State agencies from one-third or 50, whichever is fewer, to one-tenth or 20, whichever is fewer; and (4) require State agencies to submit review reports to TEFAP agencies they review only if a review discloses deficiencies.

Plans of Operation

Section 202A(a) of the Emergency Food Assistance Act of 1983 (7 U.S.C. 612c note (EFAA), as amended by Section 871(b) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104–193, (Welfare Reform), mandates that each State agency submit certain information to FNS in a TEFAP State plan of operation once every four years. Present regulations specify an annual submission of the State plan. Changes made by Welfare Reform in the required contents of the plan and implemented by this rule are discussed below. It is expected that changes in the amount of time required to prepare the plan will be negligible. Thus, for the purposes of the calculations below, response times are unaltered. The proposed decrease in burden hours reflects only the decreased frequency of response.

Respondents: State agencies administering TEFAP.

Estimated Number of Respondents: State agencies administering TEFAP number 56.

Estimated Number of Responses per Respondent: Frequency of response for the States to submit plans would be every four years, or at a frequency of 0.25 per year.

Household Participation Reports

Present regulations require State agencies to report household participation figures on the FNS–155, Inventory Management Report, semiannually. This rule proposes to eliminate this requirement, thus reducing the time required for completion of the FNS–155.

Respondents: State agencies administering TEFAP.

Estimated Number of Respondents: State agencies administering TEFAP number 56.

Estimated Number of Responses per Respondent: Frequency of response for State agencies to submit the FNS–155 remains 2 per year, but household participation reports would no longer be included, reducing this component of the FNS–155 burden to zero.

Review Reports Submitted to Emergency Feeding Organizations

This rule proposes no changes in the present regulatory requirement that State agencies annually review 25 percent of all emergency feeding organizations, and review all such organizations no less frequently than once every four years. Such organizations are, however, renamed ''eligible recipient agencies which have signed an agreement with the State.'' This rule proposes to require State agencies to conduct an annual review of one-tenth or 20, whichever is fewer, of eligible recipient agencies which have signed an agreement with another eligible recipient agency, rather than the current one-third or 50, whichever is fewer, of ''distribution sites.'' In addition, this rule proposes to require State agencies to submit review reports to those organizations reviewed only if the review discloses deficiencies, rather than the current requirement that a report be submitted for each review conducted. Current specific content requirements for the report would be eliminated. These changes are expected to reduce the number of reviews State agencies conduct each year, and the number of those reviews which will require reports.

Respondents: State agencies administering TEFAP.

Estimated Number of Respondents: State agencies administering TEFAP number 56.

Estimated Number of Responses per Respondent: Frequency of response for the States to submit reviews to emergency feeding organizations would be 1 per year.

	Respndnts.	Freq.	Hrs./Resp.	Total hrs.
TEFAP State Plan:				
Present	56	1	19	1064
Proposed	56	0.25	19	266
Submission of TEFAP Household Participation Data on Inventory Reports (FNS–155):				
Present	56	2	0.25	28
Proposed	56	2	0.00	0
TEFAP Review Reports Submitted to Eligible Recipient Agencies:				
Present	56	7	2	784
Proposed	56	1	2	112

Estimated Total Annual Burden on Respondents: The total annual burden under OMB Control Number 0584–0293 would be reduced from 1,190,971 hours to 1,189,473 hours: a difference of 1,498 hours.

Background

On August 22, 1996, President Clinton signed into law the Personal Responsibility and Work Opportunity

Reconciliation Act of 1996, (hereinafter ''Welfare Reform''). Welfare Reform amended legislation authorizing Department of Agriculture (hereinafter ''USDA'' or ''Department'') food distribution programs operated by FNS. It consolidated the Soup Kitchens/Food Banks Program (SK/FB) and TEFAP under the EFAA and repealed previous authorization for SK/FB under Section 110 of the Hunger Prevention Act of 1988, Pub. L. 100–435, (HPA), (7 U.S.C. 612c note). It also amended the definitions regarding organizational eligibility in TEFAP, as contained in Section 201A(3) of the EFAA, to ensure that organizations formerly served by SK/FB would be eligible to participate in TEFAP. Welfare Reform also made changes in the following areas: (1) allowable uses of TEFAP administrative funds; (2) content and frequency of submission of the TEFAP State plan of operation; (3) the annual date by which TEFAP commodities must be delivered to States; (4) the TEFAP maintenance-of-effort requirement; and (5) the distribution of commodities to aliens.

To assist State agencies in implementing the provisions contained in Welfare Reform, the Department issued a policy memorandum on January 14, 1997, which was sent to all FNS Regional Offices for dissemination to their respective State agencies. The guidance contained in the memorandum generated questions from several State agencies concerning the eligibility of certain types of organizations to receive TEFAP commodities. In response to these questions, the Department once again reviewed the legislative provisions and issued additional supplementary guidance through a policy memorandum dated July 23, 1997.

This proposed rule would incorporate Welfare Reform's legislative mandates into the appropriate regulations. Changes are also proposed as part of the Department's effort to clarify the regulations and reduce the burden associated with the administration of TEFAP. With the latter goal in mind, this rule proposes changes in TEFAP recordkeeping, monitoring, and reporting requirements. Welfare Reform also amended the National School Lunch Act to eliminate the requirement that State education agencies maintain advisory councils for the purpose of advising FNS on schools' needs relative to the selection and distribution of commodities, and to instead require that distributing agencies consult with representatives of schools on this subject. The substance of this provision is being addressed in a separate rulemaking, but this rulemaking removes references to the advisory councils in Food Distribution Program regulations. Provisions contained in Welfare Reform relative to the distribution of commodities to aliens which require a change in current regulations will be addressed under a separate rulemaking. The specific changes proposed in this rule are discussed in detail below.

Absorption of SK/FB into TEFAP

Repeal of Section 110 of the Hunger Prevention Act of 1988

The major change in Food Distribution Programs brought about by Welfare Reform was consolidation of TEFAP and SK/FB. This consolidation was accomplished by Section 873(1) of Welfare Reform, repealing Section 110 of the HPA, which authorized funds specifically for the purchase of commodities for SK/FB. Its authorizing legislation repealed, SK/FB ceased to exist. This rule proposes to amend current Food Distribution Program regulations (7 CFR part 250) by removing Section 250.52, which contained the requirements of Section 110 of the HPA, as well as all other references to Section 110, wherever they appear, in 7 CFR parts 250 and 251.

Definitions

This rule proposes to add definitions of several terms not currently found in Section 251.3 and to change the definitions of some currently existing terms. The accompanying chart graphically represents the existing and proposed definitions in a side-by-side format to assist readers in understanding the changes. A detailed explanation of the changes follows. It should be noted, however, that neither the chart nor the following detailed explanation contain the definitions of ''formula,'' ''state agency,'' and ''value of commodities distributed.'' These definitions are set forth in the proposed regulatory text at the end of this rule. Although definitions of these terms are contained in the current Section 251.3 and are not proposed to be changed, it is easier, given the extensive surrounding additions and changes, to set forth the revised text of the section in its entirety.

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DEFINITIONS CURRENTLY FOUND IN SECTION 251.3 WHICH ARE PROPOSED TO BE AMENDED	PROPOSED DEFINITIONS
(a) The terms used in this part that are defined in part 250 of this chapter shall have the meanings ascribed to them therein.	(a) The terms used in this part that are defined in part 250 of this chapter have the meanings ascribed to them therein, unless a different meaning for such a term is defined herein.
No current definition. (A substantially different definition of Charitable Institutions is found in Section 250.3)	(b) Charitable institution (which is defined differently in this part than in part 250 of this chapter) means an organization which—(1) is public, or (2) is private, possessing tax exempt status pursuant to §251.5(a)(3); and (3) is not a penal institution (this exclusion also applies to correctional institutions which conduct rehabilitation programs); and (4) provides food assistance to needy persons.
(b) Distribution site means the location(s) where the emergency feeding organization actually distributes commodities to needy persons under this part.	(c) Distribution site means a location where the eligible recipient agency actually distributes commodities to needy persons for household consumption or serves prepared meals to needy persons under this part.
No current definition.	(d) Eligible recipient agency means an organization which— (1) is public, or (2) is private, possessing tax exempt status pursuant to §251.5(a)(3); and (3) is not a penal institution; and (4) provides food assistance— (i) exclusively to needy persons for household consumption, pursuant to a means test established in accordance with §251.5 (b), or (ii) predominantly to needy persons in the form of prepared meals pursuant to §251.5(a)(2); and (5) has entered into an agreement with the designated State agency pursuant to §251.2(c) for the receipt of commodities or administrative funds, or receives commodities or administrative funds under an agreement with another eligible recipient agency which has signed such an agreement with the State agency or another eligible recipient agency within the State pursuant to §251.2(c); and (6) falls into one of the following categories: (i) emergency feeding organizations (including food banks, food pantries and soup kitchens); (ii) charitable institutions (including hospitals and retirement homes); (iii) summer camps for children, or child nutrition programs providing food service; (iv) nutrition projects operating under the Older Americans Act of 1965 (Nutrition Program for the Elderly), including projects that operate congregate nutrition sites and projects that provide home-delivered meals; and (v) disaster relief programs.

(c) Emergency feeding organization means any public or nonprofit private organization which has entered into an agreement with the designated State agency to provide nutrition assistance to relieve situations of emergency and distress through the provision of food to needy persons, including low-income and unemployed persons, and which receives commodities under agreements pursuant to §251.2(c). Emergency feeding organizations include charitable institutions, food banks, hunger centers, soup kitchens, and similar public or private nonprofit eligible recipient agencies.	(e) Emergency feeding organization means an eligible recipient agency which provides nutrition assistance to relieve situations of emergency and distress through the provision of food to needy persons, including low-income and unemployed persons. Emergency feeding organizations have priority over other eligible recipient agencies in the distribution of TEFAP commodities, pursuant to §251.4(h).
No current definition. (A substantially similar definition of Food bank is found in Section 250.3)	(f) Food bank means a public or charitable institution that maintains an established operation involving the provision of food or edible commodities, or the products of food or edible commodities, to food pantries, soup kitchens, hunger relief centers, or other food or feeding centers that, as an integral part of their normal activities, provide meals or food to feed needy persons on a regular basis.
No current definition.	(g) Food pantry means a public or private nonprofit organization that distributes food to low-income and unemployed households, including food from sources other than the Department of Agriculture, to relieve situations of emergency and distress.
No current definition. (A substantially similar definition of Soup kitchen is found in Section 250.3)	(i) Soup kitchen means a public or charitable institution that, as an integral part of the normal activities of the institution, maintains an established feeding operation to provide food to needy homeless persons on a regular basis.

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Eligible recipient agency. Accompanying the repeal of Section 110 of the HPA, Section 871(a) of Welfare Reform slightly altered the definition of ''eligible recipient agency'' (ERA) contained in Section 201A of the EFAA. The alteration emphasizes that organizations formerly receiving commodities under SK/FB are eligible to receive TEFAP commodities. Soup kitchens and food banks had always been listed as eligible recipient agencies under Section 201A of the EFAA and in TEFAP regulations, but were not specifically defined, as they were in Section 110 of the HPA. Most States served soup kitchens exclusively under SK/FB. In addition to amending the definition of ERA itself, Welfare Reform incorporated into Section 201A specific definitions for ''food banks'' and ''soup kitchens'' similar to those found in the former Section 110 of the HPA. The term ''food pantry'' had never been listed or defined in the EFAA; Welfare Reform both added food pantries as a type of ERA and added to the EFAA the definition for this term formerly found in section 110 of the HPA. The net result of these changes is that more detailed and specific authority now exists in the EFAA for the distribution of TEFAP commodities to food banks, food pantries, and soup kitchens. Therefore, no organization formerly receiving commodities under SK/FB lost eligibility for food due to this program consolidation.

Section 871(a) of Welfare Reform amended Section 201A of the EFAA to explicitly prohibit the participation of penal institutions in TEFAP. It also removed school lunch programs and Commodity Supplemental Food Program (CSFP) sites from the list of eligible recipient agencies, while not categorically prohibiting their participation. All other types of organizations may participate as long as they meet the organizational eligibility criteria. While mention of school lunch programs as a specific category was removed, child nutrition programs as a category remains, and thus school lunch programs remain eligible. And while the removal of the reference to CSFP sites means that such sites may not receive TEFAP commodities for the sole purpose of serving CSFP participants, CSFP sites may receive TEFAP commodities if they meet the organizational eligibility criteria described below. The result of these changes is that penal institutions are the *only* type of organization which can be termed categorically ineligible for TEFAP. Since TEFAP commodities have never, in fact, been provided to penal institutions, school lunch programs or CSFP sites, this change has had no practical effect.

Although the changes wrought by Welfare Reform in the definition of ERA were minor, the January 14, 1997 guidance memorandum, discussed above, generated questions from several State agencies regarding the eligibility of certain types of organizations to receive TEFAP commodities. Based on an analysis of these questions, it appears that much of the need for clarification can be attributed to the fact that current TEFAP regulations (7 CFR part 251) do not contain a definition of ERA, instead employing the term ''emergency feeding organization'' (EFO). Thus, current regulations do not address the distribution of commodities to all of the various types of organizations specifically encompassed by the definition of ERA as set forth in the EFAA. These organizations include summer camps for children, child nutrition programs providing food service, nutrition projects operating under the Older Americans Act of 1965 (42 U.S.C. 3001 *et seq.*), and disaster relief programs. These organizations have always been eligible to receive commodities under the EFAA. However, 7 CFR part 251 does not currently address the distribution of TEFAP commodities to such organizations because they have traditionally received assistance through other commodity programs.

Another source of misunderstanding appears to be associated with the eligibility of certain adult correctional institutions. As discussed above, Welfare Reform explicitly prohibits penal institutions from receiving TEFAP commodities. Similarly, penal institutions are ineligible to receive commodities as charitable institutions under 7 CFR part 250. However, certain adult correctional institutions are eligible to receive commodities that are made available to States for distribution to charitable institutions under other donation authorities if they meet the requirements for rehabilitation programs set forth in Section 250.41(a)(2).

Therefore, to clarify the types of organizations eligible to receive TEFAP commodities, this rule proposes to amend Section 251.3 to add the following definition of ERA, which specifically includes all the various types of organizations eligible to receive TEFAP commodities that are included under the definition of ERA set forth in the EFAA: ''eligible recipient agency means an organization which—(1) is public, or (2) is private, possessing tax exempt status pursuant to § 251.5(a)(3); and (3) is not a penal institution; and (4) provides food assistance—(i) exclusively to needy persons for household consumption, pursuant to a means test established pursuant to § 251.5(b), or (ii) predominantly to needy persons in the form of prepared meals pursuant to § 251.5(a)(2); and (5) has entered into an agreement with the designated State agency pursuant to § 251.2(c) for the receipt of commodities or administrative funds, or receives commodities or administrative funds under an agreement with another eligible recipient agency which has signed such an agreement with the State agency or another eligible recipient agency within the State pursuant to § 251.2(c); and (6) falls into one of the following categories: (i) emergency feeding organizations (including food banks, food pantries and soup kitchens); (ii) charitable institutions (including hospitals and retirement homes); (iii) summer camps for children, or child nutrition programs providing food service; (iv) nutrition projects operating under the Older Americans Act of 1965 (Nutrition Program for the Elderly), including projects that operate congregate nutrition sites and projects that provide home-delivered meals; and (v) disaster relief programs.''

The only material differences between this definition of ERA and that contained in the EFAA are intended to render the definition more useful to State and local agencies making day-to-day organizational eligibility determinations. Language regarding the execution of agreements between the State and eligible recipient agencies has been added. The term ''needy persons'' and related language have also been included, since the EFAA limits the distribution of commodities to organizations that provide food assistance to the needy. In addition, the proposed rule's ERA definition lists all of the types of EFOs for which Welfare Reform provides a specific, separate definition, i.e., food banks, food pantries, and soup kitchens. The proposed definition of ERA does not, however, limit EFOs to these organizational types, because, as discussed below, any type of ERA may qualify as an EFO, as long as it meets the criteria.

Emergency feeding organization. As discussed above, current regulations contain no definition of ERA. Instead, the regulations use the term ''emergency feeding organization'' and in Section 251.3 define it to mean ''any public or nonprofit private organization which has entered into an agreement with the designated State agency to provide nutrition assistance to relieve situations of emergency and distress through the

provision of food to needy persons, including low-income and unemployed persons, and which receives commodities under agreements pursuant to § 251.2(c). Emergency feeding organizations include charitable institutions, food banks, hunger centers, soup kitchens, and similar public or private nonprofit eligible recipient agencies.''

The program consolidation and the need for greater clarity require that the regulatory definition of EFO be revised to further sharpen the legislative distinction between ERAs which are also EFOs on one hand, and on the other, ERAs which are not also EFOs. This distinction is crucial under the consolidated TEFAP, because it forms the basis of the priority system discussed below, which State agencies must employ in allocating TEFAP commodities. It also affects the requirement that State agencies pass down at least 40 percent of their administrative grants. This requirement, too, is discussed in detail below. Welfare Reform stresses this distinction in Section 201A(1) of the EFAA by removing the definition of EFO from within the definition of ERA, and providing a separate definition of EFO in Section 201A(4). The proposed regulatory definition of EFO removes the present language regarding agreements, which is neither included in the EFAA's definition of EFO nor necessary to distinguish EFOs from other ERAs. Instead agreements are addressed in the definition of ERA, as discussed above. The proposed definition of EFO also removes references to types of organizations which may or may not qualify as EFOs, likewise confining these to the definition of ERA, which is structured to more appropriately contain them. This change shifts the emphasis from types of organizations to criteria which ERAs must meet to be considered EFOs. Under this proposed rule at Section 251.3(e), an EFO would mean ''an eligible recipient agency which provides nutrition assistance to relieve situations of emergency and distress through the provision of food to needy persons, including low-income and unemployed persons. Emergency feeding organizations have priority over other eligible recipient agencies in the distribution of TEFAP commodities pursuant to § 251.4(h).'' Examples of EFOs are food banks, food pantries, soup kitchens, and organizations such as Community Action Programs that distribute TEFAP commodities occasionally, e.g., monthly or quarterly.

Charitable institution. Section 201A of the EFAA authorizes the distribution of TEFAP commodities to charitable institutions. However, Section 251.3 does not currently contain a definition of this term. While Section 250.3 contains such a definition, it is needlessly complex given the limited application the term will have in TEFAP. Therefore, this rule proposes to include a definition of ''charitable institution'' in Section 251.3 which more accurately describes the types of organizations that would be considered eligible to participate in TEFAP and alerts the reader to the fact that the definition differs from that found in Section 250.3. The following definition of ''charitable institution'' would be included in this proposed rule: ''charitable institution (which is defined differently in this part than in part 250 of this chapter) means an organization which—(1) is public, or (2) is private, possessing tax exempt status pursuant to § 251.5(a)(3); and (3) is not a penal institution (this exclusion also applies to correctional institutions which conduct rehabilitation programs); and (4) provides food assistance to needy persons.''

Distribution site. Section 251.3(b) of the current regulations defines ''distribution site'' as ''the location(s) where the emergency feeding organization actually distributes commodities to needy persons under this part.'' To reflect the consolidation of SK/FB into TEFAP, this rule proposes to revise the definition of ''distribution site'' to organizations which prepare meals using TEFAP commodities as well as the traditional distribution of commodities to households for home use. Also, the proposed definition employs the term ERA, rather than EFO, as discussed above, even though in practice, most distribution sites are, and will most likely continue to be, operated by organizations qualifying as EFOs. Under this proposed rule, ''distribution site'' means ''a location where the eligible recipient agency actually distributes commodities to needy persons for household consumption or serves prepared meals to needy persons under this part.''

Food bank, Food pantry, Soup kitchen. Provisions regarding the distribution of Section 110 commodities as set forth in HPA, including the definitions of food banks and soup kitchens, are currently contained in 7 CFR part 250. Since Welfare Reform consolidated SK/FB into TEFAP, this rule proposes to include the definitions of these terms, as slightly revised by Welfare Reform, in Section 251.3 and to remove the corresponding definitions from Section 250.3. While the term ''food pantry'' was also defined in the HPA, the definition was never included in either 7 CFR part 250 or 7 CFR part 251. This rule also proposes to include in Section 251.3 the definition of ''food pantry'' as set forth in Welfare Reform. The changes made by Welfare Reform in the definitions of these terms are in all cases non-material. The proposed rule sets forth these definitions in Sections 251.3(f), 251.3(g), and 251.3(j) as follows: ''Food bank'' means ''a public or charitable institution that maintains an established operation involving the provision of food or edible commodities, or the products of food or edible commodities, to food pantries, soup kitchens, hunger relief centers, or other food or feeding centers that, as an integral part of their normal activities, provide meals or food to feed needy persons on a regular basis.'' ''Food pantry'' means ''a public or private nonprofit organization that distributes food to low-income and unemployed households, including food from sources other than the Department of Agriculture, to relieve situations of emergency and distress.'' ''Soup kitchen'' means ''a public or charitable institution that, as an integral part of the normal activities of the institution, maintains an established feeding operation to provide food to needy homeless persons on a regular basis.''

Eligible Recipient Agency Eligibility Criteria

While Section 201A of the EFAA, in its definition of ERA, lists a broad array of organizations as eligible to participate in TEFAP, Section 202A(b)(4)(A) of the EFAA continues to require that TEFAP commodities be used to provide food assistance to those in need. Organizations applying to participate in TEFAP which distribute foods to households for home consumption meet this criterion by requiring that households applying for assistance pass a ''means test,'' i.e., the household must meet the TEFAP income eligibility criteria established by the State agency. Eligibility cannot be established merely on the basis of a household residing within a specific area. Organizations which provide food assistance through the preparation of meals do not employ a means test because such testing would not be cost-effective, and because people who attend soup kitchens can reasonably be assumed to be needy. Accordingly, this proposed rule would require such organizations to demonstrate that they serve predominantly needy people. The State agency can determine if the organization meets this criterion by considering the socioeconomic data (e.g., poverty, unemployment, vagrancy and welfare

program usage rates) on the area in which the organization is located, or from which it draws its clientele. In the case of most traditional soup kitchens, this minimal standard will no doubt be easily and clearly satisfied. Application of this criterion will, however, render some organizations of a particular type eligible and others of the same type ineligible. For example, a hospital which is located in, or draws its patients from, an economically distressed area could be considered eligible to participate in TEFAP, whereas a hospital located in an area with more positive economic characteristics would not qualify. State agencies remain free to set a higher standard than ''predominantly,'' should they wish to target resources to only their neediest citizens. This rule proposes to amend Section 251.5(a) to include these criteria.

Section 201A(3) of the EFAA continues to require that eligible recipient agencies be public or nonprofit organizations, thus continuing to exclude for-profit organizations. In order to clarify this legislative mandate, this rule also proposes to incorporate within part 251 requirements associated with tax-exempt status. Such requirements are currently contained in Section 250.52(b) which, as discussed above, is removed under this proposed rule as a result of Section 110 of the HPA being repealed by Welfare Reform. Under Section 250.52(b), all organizations receiving Section 110 commodities for distribution under the former SK/FB were required to have obtained tax-exempt status under the Internal Revenue Code (26 U.S.C. 501) (IRC) or to have made application for such status. However, under Section 501(c)(3) of the current IRC, organizations are automatically tax-exempt if they are ''organized or operated exclusively for religious * * * purposes. * * *'' Such organizations are not precluded from seeking Internal Revenue Service (IRS) recognition of their tax-exempt status, but they are not required to do so. Therefore, the Department does not intend to require organizations that are ''organized or operated exclusively for religious * * * purposes. * * *'' to obtain tax-exempt status in order to participate in TEFAP.

These tax exempt status requirements of current Section 250.52(b) also contain a ''moving toward'' exemption that allows an organization which has applied for, but has yet to obtain, IRS recognition of its tax-exempt status to receive Section 110 commodities for 12 months from the date of its approval for participation in TEFAP, and for an indefinite period thereafter, if the organization ''documents to the distributing agency's satisfaction that it has made good faith efforts to obtain recognition of its tax-exempt status and that such recognition has not been provided due to no fault of the organization.'' The Department has learned through experience that this requirement is not strict enough to be consonant with program accountability, and recent legislation has set forth a higher standard. Section 107(d) of the William F. Goodling Child Nutrition Reauthorization Act of 1998, Pub. L. 105–336, amended Section 17(d)(1) of the National School Lunch Act (42 U.S.C. 1766(d)(1)) (NSLA) to limit the ''moving toward'' exemption for the Child and Adult Care Food Program to ''not more than 180 days, except that a State agency may grant a single extension of not to exceed an additional 90 days if the institution demonstrates, to the satisfaction of the State agency, that the inability of the institution to obtain tax-exempt status within the 180-day period is due to circumstances beyond the control of the institution.'' This rule proposes to amend Section 251.5(a)(3) to add tax-exempt requirements consistent with the above discussion. Prior to shipping TEFAP commodities, the State agency or ERA would be required to ensure that a recipient agency (1) possesses documentation from the IRS recognizing tax-exempt status under the IRC, or (2) if not in possession of such documentation, is automatically tax-exempt as ''organized or operated exclusively for religious purposes'' under the IRC, or if required to file an application under the IRC to obtain tax-exempt status, has made application for recognition of such status and is moving toward compliance with the requirements for recognition of tax-exempt status, or (3) is currently operating another Federal program requiring such tax-exempt status. In instances in which an organization's application for tax-exempt status is denied or has not been obtained within 180 days of the effective date of the organization's approval for participation in TEFAP, the State agency or ERA must terminate the organization's participation until such time as recognition of tax-exempt status is actually obtained. However the State agency or ERA may grant a single extension of not to exceed 90 days if the organization can demonstrate, to the State agency's or ERA's satisfaction, that its inability to obtain tax-exempt status within the 180 day period is due to circumstances beyond its control.

In sum, to be eligible to receive TEFAP commodities, organizations must be public or nonprofit organizations providing food assistance to needy persons. If they distribute commodities for household consumption, they must administer a means test to ensure that only needy persons receive TEFAP commodities. If they serve prepared meals, they must demonstrate that they serve predominantly needy persons. State agencies cannot require organizations to conduct a means test of individuals receiving prepared meals. Section 871(b) of Welfare Reform amended the EFAA to require that State agencies set forth the standards of eligibility for ERAs in the State plan. As discussed in detail below, this rule proposes to amend Section 251.6(b) to include this requirement.

This rule also proposes to revise Section 251.5 to address those instances in which the State agency chooses to delegate authority to one or more ERAs to determine which organizations they, in turn, will supply with TEFAP commodities. Section 251.5(a) currently requires State agencies to determine the eligibility of organizations and enter into agreements with such organizations prior to making TEFAP commodities available to them. However, in many instances, State agencies use ERAs to distribute commodities to other ERAs (e.g., a central food bank distributing commodities to one or more food pantries) and depend on those organizations to: (1) Determine the eligibility of organizations requesting TEFAP commodities from them; and (2) to make decisions regarding which organizations will receive TEFAP commodities and the amount of commodities to be provided when quantities are insufficient to support all requests. This rule proposes to revise Section 251.5 to clarify a State agency's authority to delegate such responsibilities to ERAs. If a State chooses to do this, it must require that such ERAs make decisions regarding an organization's eligibility to participate in TEFAP in accordance with the provisions contained in 7 CFR part 251 and the State Plan. However, responsibility for establishing eligibility criteria for recipient agencies may not be delegated to an ERA.

Priority System

While the explicit priority system outlined in Section 110 of the HPA no longer exists, Section 203B(b) of the EFAA requires that, in instances in which the State agency cannot meet all requests for TEFAP commodities, the State agency give priority in the

distribution of such commodities to eligible recipient agencies ''providing nutrition assistance to relieve situations of emergency and distress through the provision of food to needy persons, including low-income and unemployed persons.'' [emphasis supplied] As discussed in detail above, this is the definition of EFO as set forth in the EFAA. Thus, there is a two-tier priority system. The need to effectively describe the priority system is the primary reason for amending the regulatory definition of EFO to conform to the EFAA. The two-tier priority system provides that organizations which relieve situations of emergency and distress through the provision of food to needy persons, i.e., EFOs under the definition discussed above, are of higher priority and other organizations, which serve the needy, but do not relieve situations of emergency and distress and, thus, fall into the lower priority category. A State agency may, within the first priority, set subpriorities so that, for example, EFOs providing household distribution have access to resources before EFOs providing prepared meals, or vice versa. However, the needs of all EFOs must be satisfied before food is made available to a second-tier organization, i.e., an ERA which is not also an EFO. The supply of TEFAP commodities may not be sufficient for States to serve all ERAs. Therefore, some State agencies may be able to serve only EFOs. This rule proposes to revise Section 251.4(h) to reflect the legislatively mandated two-tier priority system.

This rule also proposes to revise Section 251.4(h) to address those instances in which the State agency chooses to delegate to ERAs, with which the State agency has an agreement, the responsibility for choosing ERAs to which they will provide TEFAP commodities. An example of this would be a central food bank distributing commodities to one or more food pantries. In such instances, the ERA is responsible for ensuring that commodities are distributed using the priority system described above. Though improbable, given the limited supplies of TEFAP commodities, there may be instances in which one ERA has sufficient inventories of commodities to serve some second-tier organizations while another ERA does not have sufficient inventories to serve all of its EFOs. The added expense and administrative complexity necessary to prevent this unlikely event would not be justified. Therefore, with regard to delegated authority, both the State agency and any ERA to which this authority has been delegated will be considered to be in compliance with the priority system requirement when the ERA distributes TEFAP commodities in a manner that ensures the needs of EFOs under its jurisdiction have been met prior to making commodities available to non-EFOs under its jurisdiction. The Department would expect State agencies and EFOs to be sufficiently knowledgeable about the organizations to which they distribute food to avoid substantial amounts of commodities being provided to non-EFOs before the needs of all EFOs have been satisfied.

To further assist States in making the best use of TEFAP commodities, Section 871(b) of Welfare Reform amended Section 202A of the EFAA to require the Secretary to encourage States to establish a State advisory board comprised of public and private entities with an interest in the distribution of TEFAP commodities. Such advisory boards can provide valuable guidance on how the State should allocate resources among various eligible outlet types, what areas have the greatest need for food assistance, and other important issues that will help States use their program resources in the most efficient and effective manner possible. This rule proposes to revise Section 251.4(h) to include language encouraging States to establish an advisory board and allowing them to use TEFAP administrative funds for its support. Section 203B(b) of the EFAA, besides establishing the priority of EFOs, requires that ''[e]ach State agency shall encourage distribution of TEFAP commodities in rural areas.'' [emphasis supplied] This encouragement is set forth in Section 251.4(k) of present regulations and would be retained by this proposed rule. State agencies are also reminded that, in accordance with Section 251.4(h) of the current regulations, which reflects the provisions contained in Section 203B(a) of the EFAA, State agencies have the option to give priority to existing food bank networks and other organizations whose ongoing primary function is to facilitate the distribution of food to low-income households. This option is, of course, subject to the two-tier priority system discussed above.

Recipient Eligibility Criteria

Section 251.5(b) of the current regulations requires that State agencies establish criteria for determining the eligibility of households to receive TEFAP commodities for household use. The criteria must include income-based standards and the methods by which households may demonstrate eligibility under such standards. Criteria may include a requirement that the household reside in the State, provided that length of residency is not used as an eligibility criterion. Section 871(a) of Welfare Reform amended Section 202A(b) of the EFAA to require that recipients reside in the ''geographic location served by the distributing agency at the time of applying for assistance.'' Accordingly, this rule proposes to amend Section 251.5(b) to reflect the fact that State agencies must establish a residency requirement for households applying to receive commodities for home consumption. However, State agencies would continue to be prohibited from establishing a length-of-residency requirement. It should be noted that Section 251.4(j) of current regulations permits State agencies to enter into cooperative agreements with other State agencies to provide commodities jointly to, or to transfer commodities to, an organization serving needy persons in a contiguous area which crosses their respective States' borders. Organizations operating under such agreements may continue to serve persons crossing State lines for assistance. Section 203B(d) of the EFAA, which authorizes these cooperative agreements, was unchanged by Welfare Reform. This rule also proposes to amend Section 251.5(c) to clarify that State agencies may not delegate the responsibility for establishing eligibility criteria for program recipients to ERAs.

As was the case under the now defunct SK/FB, individuals seeking food assistance at prepared meal sites would not be subject to a means test under the proposed rule, since such a test would obviously be difficult to implement and regulate, and not at all cost-effective when compared to the value of the benefit provided. A person may attend a soup kitchen on a very irregular basis and receive meals of which TEFAP commodities are only a small part. Rather, as discussed above, organizations which provide prepared meals would be required to demonstrate that they serve predominantly needy persons.

State Agreements With Eligible Recipient Agencies

Section 251.2(c) of the current regulations requires State agencies to enter into an agreement with an EFO receiving TEFAP commodities or administrative funds. The agreement must provide that EFOs agree to operate the program in accordance with the requirements of 7 CFR part 251 and, as applicable, 7 CFR part 250. As discussed above, this rule proposes to amend the definition of the term EFO to conform to the definition contained in

Welfare Reform and require that State agencies enter into agreements with ERAs to which they distribute TEFAP commodities and/or administrative funds; therefore, Section 251.2(c) would be amended under this proposed rule to reflect this change.

The final rule, ''Food Distribution Programs—Reduction of the Paperwork Burden,'' published in the **Federal Register** on October 16, 1997 (62 FR 53727), amended Sections 250.12(c) and 251.2(c) to make agreements between State agencies and ERAs permanent, with amendments to be made as necessary. Although none of those commenting on the rule at its proposed stage expressed concern, it has since come to the Department's attention that, while the authority for State agencies and ERAs to terminate agreements is clearly set forth in Section 250.12(c)(3), no corresponding provision is contained in Section 251.2(c). Therefore, Section 251.2(c) may have been interpreted by some to mean that State agencies could not terminate agreements with TEFAP ERAs. Since this was never the Department's intent, this rule proposes to revise Section 251.2(c) to clarify that agreements must provide State agencies and ERAs the authority to terminate the agreements upon 30 days' written notice.

In addition, this rule proposes to revise Section 251.2 to address those instances in which a State agency delegates responsibility to one or more ERAs to distribute TEFAP commodities and administrative funds to other ERAs (e.g., a central food bank distributing to one or more food pantries on the local level). In an effort to ensure that both the State agency and the ERA are fully cognizant of the responsibilities being delegated to the ERA, this rule proposes to require that the State agency specifically identify each function for which the ERA will be held responsible, and to require that the ERA perform such functions in accordance with the provisions contained in 7 CFR parts 250 and 251. Such functions must be identified in the agreement or through other written documents incorporated by reference in the agreement. In no case may a State agency delegate responsibility for establishing recipient or recipient agency eligibility criteria, or responsibility for ensuring, through State agency reviews, that the program is administered in accordance with Federal requirements. A State has the option to delegate both the authority to determine if organizations meet the State-established criteria for organizations to receive TEFAP commodities and administrative funds, and the authority to establish subpriorities consistent with the legislatively mandated priority system. If the State chooses not to exercise either one of these options, the State must identify the specific organizations which are eligible to receive TEFAP commodities and administrative funds in the agreement or other written documents incorporated by reference in the agreement.

As discussed in detail below, State agencies may choose to allocate administrative funds to ERAs for use in paying specific costs. Since the amount of administrative funds may not be sufficient to cover all costs allowable under TEFAP regulations, State agencies may also restrict ERAs' use of these funds to a narrower list of cost types than is allowed by the regulations. Their reasons for doing so might include the desire to concentrate these funds on the most important program functions, such as transport and warehousing of food, rather than on ancillary expenses, such as office supplies. This rule proposes to amend Section 251.2 to require that, when the State agency imposes on its ERAs a more restrictive use of TEFAP administrative funds than provided in Section 251.8, the restricted list of costs must be identified in the agreement, or provided to ERAs by other written documents incorporated by reference in the agreement.

Agreements Between Eligible Recipient Agencies

As discussed above, current regulations require agreements between States and ERAs to which they provide TEFAP commodities or administrative funds. There is, however, no requirement that ERAs enter into agreements with other ERAs to which they distribute TEFAP commodities or administrative funds on behalf of the State agency. It is extremely difficult to hold recipient agencies accountable for the distribution and use of TEFAP commodities and administrative funds without the existence of an agreement which sets forth the terms and conditions necessary to ensure that TEFAP commodities and administrative funds are distributed and used in accordance with Federal regulations. Therefore, this rule proposes to amend Section 251.2 to require that ERAs distributing TEFAP commodities or administrative funds to other ERAs on behalf of the State agency enter into an agreement with those organizations prior to making TEFAP commodities or administrative funds available. ERAs would have to receive formal written authorization from the State, either in the agreement itself or by other written documents incorporated into the agreement by reference, to enter into agreements with other ERAs for the further distribution of TEFAP commodities or administrative funds. While current regulations do not require that such agreements be entered into, the Department has been advised that this practice is characteristic of the program and will not, therefore, result in an increase in the paperwork burden on ERAs. The Department, in its original calculation of burden hours for part 251, assumed that agreements would be in place whenever TEFAP commodities or administrative funds were transferred between State agencies and EFOs and between EFOs, since ensuring compliance with regulatory requirements would be extremely difficult if not impossible without written agreements at all levels. Therefore, the discussion of changes in burden hours under *Paperwork Reduction Act* above does not address these agreements, as their effect on the calculations has already been taken into consideration.

Distribution Rates

Section 251.4(d)(3) of the current regulations requires that State agencies establish distribution rates for use by EFOs in distributing TEFAP commodities to needy households. This requirement was established when all, or almost all, commodities reached households through mass distributions, and when distributions of non-USDA commodities along with TEFAP commodities occurred infrequently. Increased reliance on food pantries, the growing practice of simultaneously distributing TEFAP and State or privately donated foods, and absorption of SK/FB into TEFAP have rendered mandatory distribution rates inappropriate. Such rates have also become increasingly less useful as the supply of TEFAP commodities to households has become more variable over time. Therefore, this rule proposes to revise Section 251.4(d)(3) to remove this requirement. However, State agencies may choose to develop distribution rates and require their use by all ERAs or specific types of ERAs, such as those that distribute TEFAP commodities only through mass distributions.

TEFAP State Distribution Plan

Section 251.6(b) of the current regulations requires State agencies to submit a TEFAP distribution plan to the appropriate FNS Regional Office on an annual basis. This plan is required to contain: (1) a description of the criteria to be used for determining that applicant households are in need of

food assistance; (2) household rates of distribution for commodities; (3) a description of the program monitoring system, including any factors which may contribute to requests for approval of exceptions to conducting the minimum number of reviews; (4) a description of the State's formula for allocating administrative funds; and (5) a description of the State's contribution toward the matching requirement.

Section 871(b) of Welfare Reform amended Section 202A of the EFAA in a manner that: (1) for the first time codifies the requirement of a TEFAP State Plan; (2) specifies its contents differently than present regulations; and (3) requires submittal of the plan once every four years, instead of the present annual regulatory requirement. Welfare Reform provides that the plan may be amended at any time. Welfare Reform also specifies that plans must: (1) designate the State agency responsible for distributing commodities; (2) set forth a plan of operation and administration to expeditiously distribute TEFAP commodities; (3) set forth standards of eligibility for recipient agencies; and (4) set forth standards of eligibility for individual or household recipients of commodities, which must require that individuals or households be comprised of needy persons, and that they reside in the geographic area served by the distributing agency at the time of applying for assistance.

State agencies were notified of the changes in Welfare Reform regarding the State distribution plan in the January 14, 1997 memorandum, which also indicated that they would not be required to submit a complete plan until Fiscal Year 2001. However, in the interim, State agencies were required to submit, by March 14, 1997, amendments to the plan reflecting any changes in program operations or administration, including those mandated by Welfare Reform. In accordance with the provisions of Welfare Reform, this rule proposes to amend Section 251.6 to require the submission of a State distribution plan once every four years, establishing 2001 as the base year, with amendments to be added as changes occur in aspects of State program administration that are described in the plan, or at the request of FNS.

This rule also proposes to amend Section 251.6 to reflect the provisions contained in Welfare Reform regarding the specific contents of the plan. Following is a detailed description of the information State agencies are required to provide, pursuant to Section 871(b) of Welfare Reform.

Single State Agency—Welfare Reform requires that the plan identify the State agency responsible for administration of the program. Thus, this rule proposes to require States to include the current name and address of the agency authorized to administer TEFAP, and the name of the agency official entrusted with binding signature authority. Where TEFAP and SK/FB were administered by two different State agencies prior to enactment of Welfare Reform, the January 14, 1997 memorandum required States to inform FNS of the Governor's selection of a single State administering agency; otherwise the Department assumed that the State agency administering TEFAP at the time of enactment would administer the consolidated TEFAP. The State agency identified in the plan will be responsible for all aspects of program administration, including reporting and monitoring requirements, submission of the State distribution plan, and commodity ordering, storage, and distribution. The State agency may enter into an agreement with another State agency or private organization to perform some program functions, but FNS will deal only with the designated single State agency, which remains fully responsible for program administration.

Plan of Operation and Administration—Welfare Reform requires that the State agency ''set forth a plan of operation and administration to expeditiously distribute'' TEFAP commodities. Therefore, this rule proposes to reflect the requirement that State agencies include such an element as part of the State plan.

Standards of Eligibility for Recipient Agencies—Under Welfare Reform, State agencies are now required to set forth eligibility standards for recipient agencies in their distribution plan. Within the minimum standards established by 7 CFR part 251, State agencies are afforded broad discretionary authority in establishing their distribution networks. This rule proposes to require State agencies to describe eligibility criteria established by the State agency, including any sub-priorities set within the two-tier priority system, for the receipt of TEFAP commodities and/or administrative funds.

Standards of Eligibility for Individual or Household Recipients—Welfare Reform requires that State agencies set forth standards of eligibility in their State plan which ensure that commodities are provided only to those in need, and that needy persons reside in the geographic location served by the distributing agency at the time of application for assistance. Therefore, this rule proposes to retain the requirement currently found in Section 251.6(a)(1), which requires State agencies to describe the criteria which must be used in determining the eligibility of households to receive TEFAP commodities for household use.

This rule proposes to eliminate the present State plan requirements, with the exception of the neediness criteria of Section 251.6(a)(1), as mentioned above. Also, as discussed in detail above, this rule proposes to remove the requirement of Section 251.4(d)(3) that State agencies develop distribution rates; therefore such rates will not be included in State plans. The other program requirements previously mandated to be addressed in State plans would continue to exist, as they possess an independent regulatory basis, but State agencies would no longer be required to include proposals for meeting them in their State plans. State agencies would continue to be required to comply with the program monitoring provisions contained in Section 251.10(e). They would also be bound by the criteria for allowable uses of administrative funds contained in Section 251.8(d)(1), redesignated by this proposed rule as Section 251.8(e)(1), as discussed below, but would no longer be required to describe the monitoring system or the formula for allocating administrative funds in the State plan. A description of the State's contribution toward the matching requirement contained in Section 251.9(a) would no longer be required. Section 251.9(e), referring to the matching requirement as an element of the State plan, is therefore proposed to be removed. Of course States must still meet their matching requirement and report it as required in Section 251.9(f). Under current regulations, the match is to be reported on form SF–269, Financial Status Report, which has become obsolete. Therefore, this rule would remove references to it and instead refer to form FNS–667, Report of Administrative Costs throughout Section 251.9(f), which is redesignated as Section 251.9(e) under this proposed rule. Elimination of the above plan requirements would reduce the burden associated with the administration of TEFAP at the State level, while not affecting program accountability.

Formula Adjustments

Section 214(a) of the EFAA mandates the allocation of commodities purchased with funds appropriated for TEFAP to States through a formula based 60 percent on the number of persons in the State with incomes below the poverty line, relative to national figures, and 40 percent on the average

monthly number of unemployed persons in the State, again relative to national figures. Section 204(a)(1) of the EFAA, in turn, mandates that TEFAP administrative funds be allocated among the States on the same basis.

Section 251.7 of the regulations implements this legislative mandate for the allocation of all commodities, including surplus USDA commodities, made available for distribution through TEFAP. In accordance with the regulatory provisions, the Department currently makes adjustments to the allocation formula for each State, based on updated unemployment statistics. For surplus commodities, adjustment is to be performed semi-annually, effective January 1 and July 1 of each fiscal year. For purchased commodities and administrative funds, adjustments are to be made annually, effective for the entire fiscal year. In the interest of streamlining program administration, and not subjecting States to disruptive mid-year formula adjustments, this rule proposes to revise Section 251.7 to make annual formula adjustments applicable to all commodities and administrative funds.

Disbursement of Administrative Funds

Disbursement of Funds to States by USDA—Section 251.8(c) provides for the disbursement of administrative funds to State agencies by means of U.S. Treasury checks or letters of credit in accordance with FNS Instruction 407–3 (Grant Award Process). This section currently requires that U.S. Treasury checks or letters of credit be issued pursuant to submission of the SF–270, Request for Advance or Reimbursement, and that State agencies receive funds through a letter of credit if payments are more than $120,000 for the year. Changes in financial management procedures and regulations, mainly attributable to implementation of automated electronic transactions, have rendered these provisions obsolete. It is now the practice of FNS to make funds available to States exclusively by means of letters of credit. Therefore, the above cited references to U.S. Treasury checks and the $120,000 threshold, would be removed by this proposed rule. FNS Instruction 407–3 is also obsolete, and in order to prevent part 251 from becoming outdated whenever financial management instructions change, this reference would be removed and replaced with a general reference to financial procedures established by FNS. Furthermore, as the SF–270 is no longer used, this rule would remove reference to it.

Disbursement of funds to ERAs by States—In the two-tiered priority system discussed in this preamble, not every ERA qualifies as an EFO. Under this system, State agencies and ERAs to which authority has been delegated would be required to ensure that the USDA commodity needs of all first-tier organizations, i.e., EFOs, are met before food is made available to a second-tier ERA. A similar situation exists with respect to documenting compliance with the requirement contained in Section 204(a)(2) of the EFAA that each State agency make available to EFOs not less than 40 percent of the State's share of TEFAP administrative funding. Although State agencies may disburse administrative funds to second-tier ERAs, such funds cannot be counted toward meeting the 40 percent pass-through requirement. This rule proposes to amend Section 251.9 to expressly prohibit State agencies from counting any funds provided by the State agency directly to ERAs that are not EFOs, or used by the State to pay costs on such ERAs' behalf, toward the 40 percent pass-through requirement. However, in instances in which State agencies have agreements with EFO intermediaries such as food banks, which, in turn, may share administrative funds with other EFOs as well as second-tier ERAs, requiring State agencies to account for the disposition of administrative funding to EFOs and second-tier ERAs by the organizations with which they have agreements would create undue expense and administrative complexity to protect against an unlikely event, i.e., that EFOs might receive less than 40 percent of the State's grant. Recent history has shown that administrative funding will probably not be sufficient to serve very many second-tier ERAs. In addition, most State agencies currently pass through to EFOs considerably more than 40 percent of their administrative funds, making it extremely unlikely that a State agency would fall below the minimum threshold. Therefore, this rule proposes to amend Section 251.8 to clarify that, if a State agency passes down to EFOs with which it has an agreement, or expends on behalf of such organizations, at least 40 percent of its administrative grant, the State agency will be deemed to have met its pass-through requirement. State agencies would not be required to account for how these organizations further distribute administrative funding in order to meet their pass-through requirement. For example, if a State passes administrative funds down to, or expends such funds on behalf of, a food bank with which it has an agreement, and which is an EFO, those funds can be counted toward the pass-through requirement. The State need not examine the food bank's records for the purpose of determining if the food bank passed any of the funds on to an organization which is not an EFO. All ERAs would, of course, be subject to audit and are accountable for their use of funds for necessary, reasonable, and allowable costs.

As discussed in detail below, the provisions of Welfare Reform permit State and local agencies to use TEFAP administrative funds for a much broader array of costs associated with the distribution of USDA and non-USDA commodities. This will, of course, intensify competing demands for funds, and require that additional priorities be set. The Department believes that TEFAP administrative funds should be available to leverage the supply of food to the needy, from whatever the source. However, the Department also expects that those funds should be available first to distribute the supply of TEFAP commodities. Only after this need has been fully met should TEFAP administrative funds be used to distribute non-USDA commodities. However, it would be impractical to apportion administrative funds within an organization on the basis of the proportion of USDA and non-USDA commodities it handles, in an attempt to ensure that administrative expenses associated with USDA commodities are covered before funds are used for the distribution of non-USDA commodities. Therefore, this rule proposes to amend Section 251.8(d) to provide only that State agencies and ERAs distributing administrative funds shall ensure that the administrative funding needs of ERAs which receive USDA commodities are met, relative to both USDA commodities and any non-USDA commodities they may receive, before such funding is made available to ERAs which distribute only non-USDA commodities.

Allowable Administrative Costs

Indirect Costs—Over the years, many questions have been raised about whether indirect costs may be charged against TEFAP administrative grants. The definition of ''storage and distribution costs'' in the initial TEFAP regulations issued on April 26, 1983 (48 FR 19004) limited allowable storage and distribution costs to ''direct costs.'' Subsequent revisions of the TEFAP regulations retained this limitation, currently found in Section 251.8(d)(1)(i). However, section 204(a)(2) of the EFAA requires States to make available not less than 40 percent of their grants as necessary to meet the ''direct expenses'' of EFOs. This term is

defined as including ''transporting, storing, handling, repackaging, processing, and distributing commodities * * * costs associated with determinations of eligibility, verification, and documentation; costs of providing information to persons receiving commodities * * * concerning the appropriate storage and preparation of such commodities; and costs of recordkeeping, auditing, and other administrative procedures required for participation in the program under this Act.''

Direct ''expenses'' does not have the same meaning as direct ''costs.'' In fact, many of the items identified in EFAA Section 204(a)(2) as ''direct expenses'' could be charged as either direct or indirect costs depending on the EFO's accounting system (e.g., recordkeeping and auditing costs). To ensure consistency in the treatment of these expenses, this rule would amend Section 251.8 to define ''direct expenses'' to include both direct and indirect costs attributable to TEFAP.

Non-USDA Commodities—Prior to Welfare Reform, States and EFOs were permitted by Section 203D(b) of the EFAA to use TEFAP administrative funds to pay costs associated with the storing, handling, and distributing of non-USDA commodities. In addition, Section 204(a)(2) of the EFAA permitted EFOs to pay costs associated with the repackaging and processing of USDA commodities, as well as the costs of transporting, storing, handling and distributing such commodities. Welfare Reform amended Section 204(a)(1) of the EFAA to expand the allowable uses of TEFAP administrative funds to permit States to use such funds to pay costs associated with the processing of both TEFAP commodities and commodities secured from other sources. However, no corresponding change was made to Section 204(a)(2). Nevertheless, upon further review of the legislative changes made to the EFAA as a result of Welfare Reform, it has been noted that removing the distinction between TEFAP commodities and commodities secured from other sources in Section 204(a)(1) affected Section 204(a)(2) as well. As a result of this amendment, both States and ERAs may use TEFAP funds to pay costs associated with the processing, as well as the transporting, storing, handling, repackaging, and distributing of USDA and non-USDA commodities. This rule proposes to revise Section 251.8(e)(1)(i) to reflect the authority of the State agencies and ERAs to use TEFAP administrative funds to pay such costs.

Interstate Costs—TEFAP regulations have consistently limited ''storage and distribution costs'' to intrastate costs at both the State and local level. This limitation was based on the language contained in Section 204(a)(2) of the EFAA which limits allowable EFO costs of transporting, storing, handling, repackaging, processing and distributing both USDA and non-USDA commodities to those costs incurred ''after [the commodities] are received by the organization.'' However, this restriction fails to recognize the increasing instances of interstate costs associated with the distribution of non-USDA commodities. The HPA first provided for the use of TEFAP administrative funds to pay costs associated with the distribution of non-USDA commodities by ERAs in 1988. Section 871(c) of Welfare Reform extended the authority to use TEFAP administrative funds for this purpose to States. These legislative changes have caused the Department to re-evaluate the prohibition on interstate costs. It has been determined that the phrase ''incurred after they are received by the organization'' does not necessarily mean that the ERA must have physical possession of the commodities. Once a particular commodity has been earmarked for a particular agency and has become its responsibility, the proposal would permit TEFAP funds to be used to pay any associated allowable cost. For example, if a farmer in another State makes potatoes available to an organization for gleaning, TEFAP funds could be used to pay the cost of transporting, processing and storing those potatoes. Therefore, this rule also proposes to amend Section 251.8(e)(1)(i) to allow interstate expenditures by both State and local agencies, with the restriction that for such expenditures to be allowable, the commodities in question must have been earmarked for the particular local agency and become its responsibility.

While the EFAA gives a more exhaustive list of the types of EFO costs that may be counted toward the 40 percent pass-through requirement, the Department considers these costs to be a subset of the full range of costs for which a State and other types of ERAs may use TEFAP funds. Included are typical ''local'' costs such as those associated with determinations of eligibility, verification, and documentation, costs of providing information to persons receiving commodities concerning the appropriate storage and preparation of such commodities, and costs of recordkeeping, auditing, and other administrative procedures required for participation in the program, as they are considered legitimate costs associated with program administration. Therefore, this rule proposes to revise Section 251.8(e)(1) to provide one list of the types of allowable costs for which TEFAP administrative funds can be used at either the State or local level.

This rule also proposes to amend Section 251.8(e)(2) to address those instances in which State agencies limit the use of TEFAP administrative funds to pay specific types of expenses. In most instances, there is not a sufficient amount of TEFAP administrative funds to pay all allowable local level costs. Therefore, some State agencies choose to limit the use of such funds to ensure that funds are utilized in a manner that results in TEFAP commodities being made available to the greatest number of needy possible. As discussed above, if the State agency chooses to limit the use of TEFAP administrative funds, the specific types of expenses for which funds can be used by ERAs must be identified in the agreement or other written documents incorporated by reference in the agreement.

The accompanying chart has been included in this preamble to assist readers in understanding the changes to the allowable administrative cost categories of Section 251.8 set forth in this proposed rule.

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ALLOWABLE ADMINISTRATIVE COSTS IN TEFAP (7 CFR 251.8)		
Types of Costs	**Current State and Local**	**Proposed State and Local**
USDA Commodities Direct costs of: transporting, storing, handling, repackaging, processing and distributing commodities determinations of eligibility, verification and documentation providing information on commodity storage and preparation publishing announcements of distributions recordkeeping, auditing, other administrative procedures	YES after commodities are received by the organization (intrastate cost limitation)	YES (indirect cost and intrastate cost limitation removed; see Indirect Costs and Interstate Costs below)
Non-USDA Commodities Direct costs of: storing, handling and distributing commodities determinations of eligibility, verification and documentation providing information on commodity storage and preparation publishing announcements of distributions recordkeeping, auditing, other administrative procedures Processing	YES, but intrastate cost limitation NO	YES intrastate cost limitation removed; indirect costs allowed; see below) YES
Indirect Costs related to above cost categories for both USDA and non-USDA commodities	NO	YES
Interstate Costs related to above cost categories for both USDA and non-USDA commodities	NO	YES, but commodity must be earmarked for local agency and become its responsibility

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Recordkeeping and Reporting Requirements

Section 251.10(a)(5) currently requires EFOs to retain all records for a period of 3 years from the close of the Federal Fiscal Year to which they pertain. This rule proposes to amend Section 251.10(a)(5), which is redesignated under this proposed rule as Section 251.10(a)(4), to require records to be kept by the ERA, or the State agency on behalf of the ERA, as long as such records are reasonably accessible at all times for purposes of management evaluation reviews, audits or investigations. This change would serve to clearly state the commonly accepted rule that once records become the subject of an audit or investigation, any time limits otherwise permitting their disposal are suspended until the audit or investigation is concluded. The second advantage would be greater flexibility in custodial arrangements for records, e.g., a mass distribution site may not have appropriate record storage space and may wish to ship its records to the State for safekeeping. This provision would be further amended to require records to be kept longer than 3 years if related to an audit or investigation in progress.

Section 251.10(a)(3) of the regulations currently requires each TEFAP distribution site to keep records showing the data and method used to determine the number of eligible households served at that site. Section 251.10(d)(2) of the regulations in turn currently requires States to report, on form FNS–155, the total number of households served in the State under TEFAP. Now that TEFAP and SK/FB have been consolidated, a significant proportion of TEFAP commodities are used for prepared meals. The Department does not intend to require that sites which serve prepared meals report the number of meals served, as in many instances, some meals would not contain TEFAP commodities, and in many other situations, such commodities might comprise a small part of meals. In addition, such a requirement would impose an unreasonable burden on sites which provide prepared meals. Therefore, information relative only to the number of households served through TEFAP is of little value to the Department since it bears no relationship to the total number of needy receiving assistance through TEFAP, and does not account for the disposition of all TEFAP commodities. The Final Rule, ''Food Distribution Programs-Reduction of the Paperwork Burden,'' published at 62 FR 53727, amended Section 250.17(a) to allow the Department to establish the frequency of submission of form FNS–155 and, by implication, the information reported on the form, to conform to program needs. FNS Regional Offices were notified by means of TEFAP Policy Memorandum No. 12–TEFAP Household Participation Data, dated December 23, 1997, that the Department was exercising this authority to eliminate reporting of household data in TEFAP, and that current regulations would be amended to reflect this change. Therefore, this rule proposes to remove Section 251.10(a)(3), as it is oriented toward reporting the number of households served, and to revise Section 251.10(d)(2) to eliminate the requirement that State agencies report the total number of households served. Since it remains necessary, for purposes of accountability, to maintain information specific to each household certified for participation in the program, the requirements contained in Section 251.10(a)(4) are retained in this proposed rule, and redesignated as Section 251.10(a)(3).

Monitoring Requirements

Section 251.10(e)(2)(i) of current regulations requires State agencies to conduct on-site reviews of each participating organization with which the State has an agreement (i.e., EFO as defined by current regulations) at least once every four years, with at least 25 percent of the total number of such institutions reviewed each year. As discussed above, this rulemaking proposes to change the definition of EFO so that it corresponds to the legislative definition. Therefore, this rule proposes to replace the reference to EFO in Section 251.10(e)(2)(i) with ''eligible recipient agency with which the State agency has executed an agreement.'' However, the applicability of the requirement remains unchanged in this proposed rule.

Section 251.10(e)(2)(ii) of current regulations requires that the State agency annually review one-third or 50, whichever is fewer, of all distribution sites within the State, to be conducted, to the maximum extent feasible, simultaneously with actual distribution and/or eligibility determinations. In selecting distribution sites for review, § 251.10(e)(3) of current regulations requires the State agency to rank all the sites according to the number of households participating during the previous Federal fiscal quarter and select for review the first 25 sites, or first one-sixth of all sites, whichever is fewer, which served the greatest number of households.

As indicated above, the 25 percent review requirement is proposed to apply to all ERAs which have an agreement with the State agency. The remaining review requirement, in Section 251.10(e)(2)(ii), is proposed to apply to all other ERAs, that is, to all ERAs which have an agreement with another ERA rather than the State agency. The Department proposes to reduce the frequency of this requirement. Thus, instead of annually reviewing the lesser of one-third or 50 of all distribution sites, the State agency would be required to review the lesser of one-tenth or 20 of all ERAs which have an agreement with another ERA. With the absorption of SK/FB into TEFAP, State agencies must actually expand their monitoring activities to include ERAs which serve prepared meals, so the total number of ERAs will increase. However, the value of available USDA commodities has decreased since the current regulatory requirement was established many years ago, generally reducing the need for oversight. As such, State agencies should have the flexibility to direct limited administrative resources where there is the most need for program oversight and corrective action. This change would decrease the burden associated with administration currently imposed on State agencies while maintaining program accountability.

As indicated above, Section 251.10(e)(3) of current regulations mandates a system for selecting and ranking distribution sites for review based on the number of households they serve. As previously noted, the number of households served is no longer meaningful data since SK/FB has been merged with TEFAP. In addition, it has been determined that States should be granted more flexibility in selecting ERAs for review. Therefore, this rule proposes to remove the current Section 251.10(e)(3) and to amend Section 251.10(e)(2)(ii) to require that State agencies develop a system for reviewing ERAs which have signed an agreement with another ERA for the receipt of TEFAP commodities and/or administrative funds that ensures deficiencies in program administration are detected and resolved in an effective and efficient manner. Examples of criteria States might apply include actual or probable deficiencies in program administration, such as weakness in inventory management, that have been identified through audits, investigations of complaints; deficiencies in, or tardiness of, reports submitted by ERAs; or the dollar value of the TEFAP commodities received in

the previous Federal fiscal quarter. Use of such criteria would yield systematic selection while at the same time providing State agencies the flexibility necessary to direct limited administrative resources where oversight and corrective action are most needed.

FNS Instruction 113–3, ''Civil Rights Compliance and Enforcement—Food Distribution Programs,'' presently includes an on-site review requirement of recipient agencies every five years to ensure compliance with civil rights regulations. In accordance with the change in on-site review requirements for TEFAP proposed above, the Department plans to revise this provision of the instruction. The revised instruction would require that on-site reviews of ERAs to ensure compliance with civil rights provisions be conducted at the frequency established in Section 251.10(e)(2)(i) and (e)(2)(ii) of this proposed rule.

Section 251.10(e)(6) of current regulations requires that the State agency submit a report of review findings to each EFO, including a description of each deficiency found and factors contributing to each, requirements for corrective actions, and a timetable for completion of corrective action. The State agency must then monitor the implementation of corrective actions identified in the report. The Department has determined that this requirement is too prescriptive. State agencies should be given more flexibility to determine the manner in which they will work with ERAs to develop corrective action plans to remedy deficiencies. Therefore, this rule proposes to redesignate Section 251.10(e)(6) as Section 251.10(e)(5) and to amend it to require the State agency to submit a report of review findings to an ERA only if the review discloses deficiencies in program administration. In addition, the specific requirements for the report would be removed. State agencies would, however, continue to be responsible for ensuring that ERAs take corrective action to eliminate the deficiencies identified during the review.

Maintenance of Effort

Section 871(d)(5) of Welfare Reform amended Section 214(d) of the EFAA to allow States greater flexibility in complying with the maintenance-of-effort requirement by removing the mandate that a State agency maintain the amount of State funds made available to support other (non-TEFAP) nutrition programs in the State during each fiscal year. The prohibition against reducing State funding remains only for TEFAP itself, i.e., it applies only to State agencies that use their own funds to provide commodities or services to organizations receiving federal funds or services under TEFAP. This rule proposes to amend Section 251.10(h) accordingly.

In recent years, some States have been supporting TEFAP with significant amounts of their own funds, a development that should be encouraged. Therefore, the maintenance-of-effort requirement should not be construed to require that State spending on TEFAP within the State never fall below the highest level achieved in any year. Such an interpretation would no doubt cause States to become extremely wary of increasing their support for TEFAP, for fear that they would be forced, even if unable, to continue to provide the increased level of contributions in future years. Therefore, in an effort to encourage States to contribute additional resources to the extent feasible in any given year, this rule proposes to amend Section 251.10(h) to define the ''base year'' to be used in determining if States are complying with the maintenance-of-effort requirement as ''the fiscal year when the State first began administering TEFAP, or Fiscal Year 1988, which is the fiscal year in which the maintenance-of-effort requirement became effective, whichever is later.'' The maintenance-of-effort requirement is independent of the State matching requirement for TEFAP administrative funds which States retain for State-level administrative costs, as set forth in Section 251.9.

National School Lunch Program—State Advisory Councils and Consultation Requirement

Section 707(b) of Welfare Reform amended Section 14(e) of the NSLA (42 U.S.C. 1762a(e)) to remove the requirement that State educational agencies-which typically are not involved with decisions relative to the commodity program-establish an advisory council for the purpose of advising the agency on schools' needs relative to the selection and distribution of commodities. Current regulations at 7 CFR 210.28 require State educational agencies to maintain these advisory councils. State agencies were informed via the January 14, 1997 policy memorandum that, effective immediately, State educational agencies need not maintain the formerly required advisory councils. The elimination of this requirement from the regulations is being addressed by FNS's Child Nutrition Division in a separate rulemaking covering the implementation of Welfare Reform relative to child nutrition programs. States should not interpret this change in the law as a requirement to disband their advisory councils. To the extent that they have proved useful, States may wish to retain them. It should be noted that, as mentioned previously, Section 871(b) of Welfare Reform amended Section 202A(c) of the EFAA to require the Secretary to encourage States to establish a State advisory board comprised of public and private entities with an interest in the distribution of TEFAP commodities. As noted above, this rule proposes to revise Section 251.4(h) to include language encouraging States to establish such an advisory board.

Section 707(b) of Welfare Reform also amended section 14(e) of the NSLA (42 U.S.C. 1762a(e)) to require that State agencies responsible for the distribution of commodities consult with representatives of schools in the State that participate in the National School Lunch Program when making decisions regarding the selection and distribution of commodities. Food Distribution Program regulations regarding commodity acceptability reports and information dissemination (Sections 250.13(k) and 250.24(b) respectively) should prove adequate to fulfill this consultation requirement, especially given Congress' decision to eliminate the requirement for advisory councils, and the general need to reduce the burden of program administration. Therefore this rule proposes no new regulations in furtherance of this legislative mandate. The above regulatory provisions do, however, include references (Sections 250.13(k)(2) and 250.24(b)(4)) to the no-longer-required advisory councils, which this rule proposes to eliminate.

Alien Provisions

The provisions of Welfare Reform affecting aliens do not require that States in any way restrict access of aliens to TEFAP. States can continue serving all categories of aliens they served prior to enactment of Welfare Reform. While Welfare Reform does not require discontinuation of benefits to aliens, Section 742 does give States the option to provide, or not provide, program benefits to any individual who is not a citizen or a qualified alien. However, prior to making any changes in program administration based on the alien provisions of Welfare Reform, States are advised to consult with their legal counsel.

States should also be aware that Section 403(a) of Welfare Reform imposes a five-year waiting period after

a qualified alien enters the country before s/he is eligible for any ''Federal means-tested public benefit.'' The Department has determined that FNS's food distribution programs, including TEFAP, are not subject to this provision. Therefore the five-year waiting period does not apply. The Department will publish a separate rulemaking to incorporate the provisions of Welfare Reform regarding eligibility of aliens for TEFAP and other food distribution programs.

Technical Amendments

This rule proposes to amend part 251 to remove the obsolete word ''Temporary'' from Section 251.1 and to correct outdated references.

List of Subjects

7 CFR Part 250

Aged, Agricultural commodities, Business and industry, Food assistance programs, Food donations, Food processing, Grant programs-social programs, Indians, Infants and children, Commodity loan programs, Reporting and recordkeeping requirements, School breakfast and lunch programs, Surplus agricultural commodities.

7 CFR Part 251

Aged, Agricultural commodities, Business and industry, Food assistance programs, Food donations, Grant programs-social programs, Indians, Infants and children, Commodity loan programs, Reporting and recordkeeping requirements, School breakfast and lunch programs, Surplus agricultural commodities.

Accordingly, 7 CFR parts 250 and 251 are 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.

§ 250.3 [Amended]

2. In Section 250.3, the definitions of *Food bank* and *Soup kitchen* are removed.

§ 250.13 [Amended]

3. In § 250.13:

a. Paragraph (a)(1)(iv) is amended by removing the words ''emergency feeding organizations'' wherever they appear and adding the words ''eligible recipient agencies'' in their place.

b. The last sentence of paragraph (k)(2) is amended by removing the words '', including, for example, State Food Distribution Advisory Council Reports''.

§ 250.24 [Amended]

4. In § 250.24, paragraph (b)(4) is removed, and paragraphs (b)(5) and (b)(6) are redesignated as paragraphs (b)(4) and (b)(5), respectively.

§ 250.41 [Amended]

5. In § 250.41, the first sentence of paragraph (a)(1) is amended by removing the words ''With the exception of section 110 commodities, which are to be distributed in accordance with the provisions of § 250.52, the'' and adding in their place ''The''.

§ 250.52 [Removed]

6. Section 250.52 is removed.

PART 251—THE EMERGENCY FOOD ASSISTANCE PROGRAM

1. The authority citation for part 251 continues to read as follows:

Authority: 7 U.S.C. 7501–7516.

§ 251.1 [Amended]

2. In § 251.1, the word ''Temporary'' is removed.

3. In § 251.2:

a. Paragraph (a) is amended by adding the heading ''Food and Nutrition Service.'';

b. Paragraph (b) is amended by adding the heading ''State Agencies.'', by removing the words ''emergency feeding organizations'' and by adding the words ''eligible recipient agencies'' in their place;

c. Paragraph (c) is revised; and

d. Paragraph (d) is added.

The revision and addition read as follows:

§ 251.2 Administration.

* * * * *

(c) *Agreements.* (1) *Agreements between Department and States.* Each State agency that distributes donated foods to eligible recipient agencies or receives payments for storage and distribution costs in accordance with § 251.8 must perform those functions pursuant to an agreement entered into with the Department. This agreement will be considered permanent, with amendments initiated by State agencies, or submitted by them at the Department's request, all of which will be subject to approval by the Department.

(2) *Agreements between State agencies and eligible recipient agencies, and between eligible recipient agencies.* Prior to making donated foods or administrative funds available, State agencies must enter into a written agreement with eligible recipient agencies to which they plan to distribute donated foods and/or administrative funds. State agencies must ensure that eligible recipient agencies in turn enter into a written agreement with any eligible recipient agencies to which they plan to distribute donated foods and/or administrative funds before donated foods or administrative funds are transferred between any two eligible recipient agencies. All agreements entered into must contain the information specified in paragraph (d) of this section, and be considered permanent, with amendments to be made as necessary, except that agreements must specify that they may be terminated by either party upon 30 days' written notice. State agencies must ensure that eligible recipient agencies provide, on a timely basis, by amendment to the agreement, or other written documents incorporated into the agreement by reference if permitted under paragraph (d) of this section, any information on changes in program administration, including any changes resulting from amendments to Federal regulations or policy.

(d) *Contents of agreements between State agencies and eligible recipient agencies and between eligible recipient agencies.* (1) Agreements between State agencies and eligible recipient agencies and between eligible recipient agencies must provide:

(i) That eligible recipient agencies agree to operate the program in accordance with the requirements of this part, and, as applicable, part 250 of this chapter; and

(ii) The name and address of the eligible recipient agency receiving commodities and/or administrative funds under the agreement; and

(iii) The name of the person responsible for administering the program in the receiving eligible recipient agency.

(2) The following information must also be identified, either in the agreement or other written documents incorporated by reference in the agreement:

(i) If the State agency delegates the responsibility for any aspect of the program to an eligible recipient agency, each function for which the eligible recipient agency will be held responsible; *except* that in no case may State agencies delegate responsibility for establishing eligibility criteria for organizations in accordance with

§ 251.5(a), establishing eligibility criteria for recipients in accordance with § 251.5(b), or conducting reviews of eligible recipient agencies in accordance with § 251.10(e);

(ii) If the receiving eligible recipient agency is to be allowed to further distribute TEFAP commodities and/or administrative funds to other eligible recipient agencies, the specific terms and conditions for doing so, including, if applicable, a list of specific organizations or types of organizations eligible to receive commodities or administrative funds;

(iii) If the use of administrative funds is restricted to certain types of expenses pursuant to § 251.8(e)(2), the specific types of administrative expenses eligible recipient agencies are permitted to incur;

(iv) Any other conditions set forth by the State agency.

4. Section 251.3 is revised to read as follows:

§ 251.3 Definitions.

(a) The terms used in this part that are defined in part 250 of this chapter have the meanings ascribed to them therein, unless a different meaning for such a term is defined herein.

(b) *Charitable institution* (which is defined differently in this part than in part 250 of this chapter) means an organization which—

(1) Is public, or

(2) Is private, possessing tax exempt status pursuant to § 251.5(a)(3); and

(3) Is not a penal institution (this exclusion also applies to correctional institutions which conduct rehabilitation programs); and

(4) Provides food assistance to needy persons.

(c) *Distribution site* means a location where the eligible recipient agency actually distributes commodities to needy persons for household consumption or serves prepared meals to needy persons under this part.

(d) *Eligible recipient agency* means an organization which—

(1) Is public, or

(2) Is private, possessing tax exempt status pursuant to § 251.5(a)(3); and

(3) Is not a penal institution; and

(4) Provides food assistance—

(i) Exclusively to needy persons for household consumption, pursuant to a means test established pursuant to § 251.5(b), or

(ii) Predominantly to needy persons in the form of prepared meals pursuant to § 251.5(a)(2); and

(5) Has entered into an agreement with the designated State agency pursuant to § 251.2(c) for the receipt of commodities or administrative funds, or receives commodities or administrative funds under an agreement with another eligible recipient agency which has signed such an agreement with the State agency or another eligible recipient agency within the State pursuant to § 251.2(c); and

(6) Falls into one of the following categories:

(i) Emergency feeding organizations (including food banks, food pantries and soup kitchens);

(ii) Charitable institutions (including hospitals and retirement homes);

(iii) Summer camps for children, or child nutrition programs providing food service;

(iv) Nutrition projects operating under the Older Americans Act of 1965 (Nutrition Program for the Elderly), including projects that operate congregate nutrition sites and projects that provide home-delivered meals; and

(v) Disaster relief programs.

(e) *Emergency feeding organization* means an eligible recipient agency which provides nutrition assistance to relieve situations of emergency and distress through the provision of food to needy persons, including low-income and unemployed persons. Emergency feeding organizations have priority over other eligible recipient agencies in the distribution of TEFAP commodities pursuant to § 251.4(h).

(f) *Food bank* means a public or charitable institution that maintains an established operation involving the provision of food or edible commodities, or the products of food or edible commodities, to food pantries, soup kitchens, hunger relief centers, or other food or feeding centers that, as an integral part of their normal activities, provide meals or food to feed needy persons on a regular basis.

(g) *Food pantry* means a public or private nonprofit organization that distributes food to low-income and unemployed households, including food from sources other than the Department of Agriculture, to relieve situations of emergency and distress.

(h) *Formula* means the formula used by the Department to allocate among States the commodities and funding available under this part. The amount of such commodities and funds to be provided to each State will be based on each State's population of low-income and unemployed persons, as compared to national statistics. Each State's share of commodities and funds shall be based 60 percent on the number of persons in households within the State having incomes below the poverty level and 40 percent on the number of unemployed persons within the State. The surplus commodities will be allocated to States on the basis of their weight (pounds), and the commodities purchased under section 214 of the Emergency Food Assistance Act of 1983 will be allocated on the basis of their value (dollars). In instances in which a State determines that it will not accept the full amount of its allocation of commodities purchased under section 214 of the Emergency Food Assistance Act of 1983, the Department will reallocate the commodities to other States on the basis of the same formula used for the initial allocation.

(i) *State agency* means the State government unit designated by the Governor or other appropriate State executive authority which has entered into an agreement with the United States Department of Agriculture under § 251.2(c).

(j) *Soup kitchen* means a public or charitable institution that, as an integral part of the normal activities of the institution, maintains an established feeding operation to provide food to needy homeless persons on a regular basis.

(k) *Value of commodities distributed* means the Department's cost of acquiring commodities for distribution under this part.

5. In § 251.4:

a. The words ''emergency feeding organization'', ''emergency feeding organizations'' and ''emergency feeding organization's'' are removed wherever they appear in the section, and the words ''eligible recipient agency'', ''eligible recipient agencies'' and ''eligible recipient agency's'' respectively are added in their place;

b. Paragraph (c)(1) is amended by removing the reference to ''§ 251.3(d)''and adding a reference to ''§ 251.3(h)'' in its place;

c. Paragraph (d)(3) is removed;

d. Paragraph (f)(5) is amended by removing the reference ''§ 250.15'' and adding in its place the reference ''§ 250.30'';

e. Paragraphs (g) and (h) are revised;

f. Paragraph (j) is amended by adding the words ''that has signed an agreement with the respective State agencies'' after the words ''eligible recipient agency'';

The revisions read as follows:

§ 251.4 Availability of commodities.

* * * * *

(g) *Availability and control of donated commodities.* Donated commodities will be made available to State agencies only for distribution and use in accordance with this part. Except as otherwise provided in paragraph (f) of this section, donated commodities not so distributed or used for any reason may not be sold, exchanged, or otherwise disposed of

without the approval of the Department. However, donated commodities made available under section 32 of Pub. L. 74–320 (7 U.S.C. 612c) may be transferred by eligible recipient agencies receiving commodities under this part, or recipient agencies, as defined in § 250.3 of this chapter, to any other eligible recipient agency or recipient agency which agrees to use such donated foods to provide without cost or waste, nutrition assistance to individuals in low-income groups. Such transfers will be effected only with prior authorization by the appropriate State agency and must be documented. Such documentation shall be maintained in accordance with § 251.10(a) of this part and § 250.16 of this chapter by the distributing agency and the State agency responsible for administering TEFAP and made available for review upon request.

(h) *Distribution to eligible recipient agencies-priority system and advisory boards.*—(1) State agencies must distribute commodities made available under this part to eligible recipient agencies in accordance with the following priorities:

(i) *First priority*. When a State agency cannot meet all eligible recipient agencies' requests for TEFAP commodities, the State agency must give priority in the distribution of such commodities to emergency feeding organizations as defined under § 251.3(e). A State agency may, at its discretion, concentrate commodity resources upon a certain type or types of such organizations, to the exclusion of others.

(ii) *Second priority*. After a State agency has distributed TEFAP commodities sufficient to meet the needs of all emergency feeding organizations, the State agency must distribute any remaining program commodities to other eligible recipient agencies which serve needy people, but do not relieve situations of emergency and distress. A State agency may, at its discretion, concentrate commodity resources upon a certain type or types of such organizations, to the exclusion of others.

(2) *Delegation*. When a State agency has delegated to an eligible recipient agency the authority to select other eligible recipient agencies, the eligible recipient agency exercising this authority must ensure that any TEFAP commodities are distributed in accordance with the priority system set forth in paragraphs (h)(1)(i) and (h)(1)(ii) of this section. State agencies and eligible recipient agencies will be deemed to be in compliance with the priority system when eligible recipient agencies distribute TEFAP commodities to meet the needs of all emergency feeding organizations under their jurisdiction prior to making commodities available to eligible recipient agencies which are not emergency feeding organizations.

(3) *Existing networks*. Subject to the constraints of paragraphs (h)(1)(i) and (h)(1)(ii) of this section, State agencies may give priority in the distribution of TEFAP commodities to existing food bank networks and other organizations whose ongoing primary function is to facilitate the distribution of food to low-income households, including food from sources other than the Department.

(4) *State advisory boards*. Each State agency receiving TEFAP commodities is encouraged to establish a State advisory board representing all types of entities in the State, both public and private, interested in the distribution of such commodities. Such advisory boards can provide valuable advice on how resources should be allocated among various eligible outlet types, what areas have the greatest need for food assistance, and other important issues that will help States to use their program resources in the most efficient and effective manner possible. A State agency may expend TEFAP administrative funds to support the activities of an advisory board in accordance with § 251.8 of this part.

* * * * *

6. Section 251.5 is revised to read as follows:

§ 251.5 Eligibility determinations.

(a) *Criteria for determining eligibility of organizations*. Prior to making commodities available, State agencies or eligible recipient agencies to which the State agency has delegated responsibility for the distribution of TEFAP commodities, must ensure that an organization applying for participation in the program meets the definition of an ''eligible recipient agency'' under § 251.3(d). In addition, applicant organizations must meet the following criteria:

(1) *Agencies distributing to households*. Organizations distributing commodities to households for home consumption must limit the distribution of commodities provided under this part to those households which meet the eligibility criteria established by the State agency in accordance with paragraph (b) of this section.

(2) *Agencies providing prepared meals*. Organizations providing prepared meals must demonstrate, to the satisfaction of the State agency or eligible recipient agency to which they have applied for the receipt of commodities, that they serve predominantly needy persons. State agencies may establish a higher standard than ''predominantly'' and may determine whether organizations meet the applicable standard by considering socioeconomic data of the area in which the organization is located, or from which it draws its clientele. State agencies may not, however, require organizations to employ a means test to determine that recipients are needy, or to keep records solely for the purpose of demonstrating that its recipients are needy.

(3) *Tax-exempt status*. Private organizations must—

(i) Be currently operating another Federal program requiring tax-exempt status under the Internal Revenue Code (IRC), or

(ii) Possess documentation from the Internal Revenue Service (IRS) recognizing tax-exempt status under the IRC, or

(iii) If not in possession of such documentation, be automatically tax exempt as ''organized or operated exclusively for religious purposes'' under the IRC, or

(iv) If not in possession of such documentation, but required to file an application under the IRC to obtain tax-exempt status, have made application for recognition of such status and be moving toward compliance with the requirements for recognition of tax-exempt status. If the IRS denies a participating organization's application for recognition of tax-exempt status, the organization must immediately notify the State agency or the eligible recipient agency, whichever is appropriate, of such denial, and that agency will terminate the organization's agreement and participation immediately upon receipt of such notification. If documentation of IRS recognition of tax-exempt status has not been obtained and forwarded to the appropriate agency within 180 days of the effective date of the organization's approval for participation in TEFAP, the State agency or eligible recipient agency must terminate the organization's participation until such time as recognition of tax-exempt status is actually obtained, except that the State agency or eligible recipient agency may grant a single extension of not to exceed 90 days if the organization can demonstrate, to the State agency's or eligible recipient agency's satisfaction, that its inability to obtain tax-exempt status within the 180 day period is due to circumstances beyond its control. It is the responsibility of the organization to document that it has complied with all IRS requirements and has provided all

information requested by IRS in a timely manner.

(b) *Criteria for determining recipient eligibility.* Each State agency must establish uniform Statewide criteria for determining the eligibility of households to receive commodities provided under this part for home consumption. The criteria must:

(1) Enable the State agency to ensure that only households which are in need of food assistance because of inadequate household income receive TEFAP commodities;

(2) Include income-based standards and the methods by which households may demonstrate eligibility under such standards; and

(3) Include a requirement that the household reside in the geographic location served by the State agency at the time of applying for assistance, but length of residency shall not be used as an eligibility criterion.

(c) *Delegation of authority.* A State agency may delegate to one or more eligible recipient agencies with which the State agency enters into an agreement the responsibility for the distribution of commodities and administrative funds made available under this part. State agencies may also delegate the authority for selecting eligible recipient agencies and for determining the eligibility of such organizations to receive commodities and administrative funds. However, responsibility for establishing eligibility criteria for organizations in accordance with paragraph (a) of this section, and for establishing recipient eligibility criteria in accordance with paragraph (b) of this section, may not be delegated. In instances in which State agencies delegate authority to eligible recipient agencies to determine the eligibility of organizations to receive commodities and administrative funds, eligibility must be determined in accordance with the provisions contained in this part and the State plan. State agencies will remain responsible for ensuring that commodities and administrative funds are distributed in accordance with the provisions contained in this part.

7. Section 251.6 is revised to read as follows:

§ 251.6 Distribution plan.

(a) *Contents of the plan.* The State agency must submit for approval by the appropriate FNS Regional Office a plan which contains:

(1) A designation of the State agency responsible for distributing commodities and administrative funds provided under this part, the address of such agency, and the name of the agency official entrusted with binding signature authority;

(2) A plan of operation and administration to expeditiously distribute commodities received under this part;

(3) A description of the standards of eligibility for recipient agencies, including any subpriorities within the two-tier priority system; and

(4) A description of the criteria established in accordance with § 251.5(b) which must be used by eligible recipient agencies in determining the eligibility of households to receive TEFAP commodities for home consumption.

(b) *Plan submission.* A complete plan will be required for Fiscal Year 2001, to be submitted no later than August 15, 2000. Thereafter, a complete plan must be submitted every 4 years, due no later than August 15 of the fiscal year prior to the end of the 4 year cycle.

(c) *Amendments.* State agencies must submit amendments to the distribution plan to the extent that such amendments are necessary to reflect any changes in program operations or administration as described in the plan, or at the request of FNS, to the appropriate FNS Regional Office.

8. Section 251.7 is revised to read as follows:

§ 251.7 Formula adjustments.

(a) *Commodity adjustments.* The Department will make annual adjustments to the commodity allocation for each State, based on updated unemployment statistics. These adjusted allocations will be effective for the entire fiscal year, subject to reallocation or transfer in accordance with this part.

(b) *Funds adjustments.* The Department will make annual adjustments of the funds allocation for each State based on updated unemployment statistics. These adjusted allocations will be effective for the entire fiscal year unless funds are recovered, withheld, or reallocated by FNS in accordance with § 251.8(f).

9. In § 251.8:

a. Paragraph (a) is amended by removing the reference ''§ 251.3(d)'' and adding in its place the reference ''§ 251.3(h)'';

b. Paragraph (b) is amended by removing the reference ''part 3015'' and adding in its place the reference ''part 3016 or part 3019, as applicable.'';

c. Paragraph (c)(1) is amended by removing the words ''U.S. Treasury Department checks or'';

d. Paragraph (c)(2) is amended by:

1. removing the words ''FNS Instruction 407–3 (Grant Award Process)'' and adding in their place the words ''procedures established by FNS'';

2. removing from the first sentence the words ''either'' and ''or a U.S. Treasury check pursuant to submission of the SF–270, Request for Advance or Reimbursement'';

3. removing the second sentence; and

4. removing reference to ''§ 251.8(e)'' and in its place adding reference to ''§ 251.8(f)'';

e. Paragraphs (d) and (e) are redesignated as paragraphs (e) and (f), and new paragraph (d) is added; and

f. Newly redesignated paragraph (e) is revised.

The addition and revision read as follows:

§ 251.8 Payment of funds for administrative costs.

* * * * *

(d) *Priority for eligible recipient agencies distributing USDA commodities.* State agencies and eligible recipient agencies distributing administrative funds must ensure that the administrative funding needs of eligible recipient agencies which receive USDA commodities are met, relative to both USDA commodities and any non-USDA commodities they may receive, before such funding is made available to organizations which distribute only non-USDA commodities.

(e) *Use of funds.* (1) *Allowable administrative costs.* State agencies and eligible recipient agencies may use funds made available under this part to pay the direct expenses associated with the distribution of USDA commodities and commodities secured from other sources to the extent that the commodities are ultimately distributed by eligible recipient agencies which have entered into agreements in accordance with § 251.2. Direct expenses include the following, regardless of whether they are charged to TEFAP as direct or indirect costs:

(i) The intrastate and interstate transport, storing, handling, repackaging, processing, and distribution of commodities; except that for interstate expenditures to be allowable, the commodities must have been specifically earmarked for the particular State or eligible recipient agency which incurs the cost;

(ii) Costs associated with determinations of eligibility, verification, and documentation;

(iii) Costs of providing information to persons receiving USDA commodities concerning the appropriate storage and preparation of such commodities;

(iv) Costs involved in publishing announcements of times and locations of distribution; and

(v) Costs of recordkeeping, auditing, and other administrative procedures required for program participation.

(2) *State restriction of administrative costs.* A State agency may restrict the use of TEFAP administrative funds by eligible recipient agencies by disallowing one or more types of expenses expressly allowed in paragraph (e)(1) of this section. If a State agency so restricts the use of administrative funds, the specific types of expenses the State will allow eligible recipient agencies to incur must be identified in the State agency's agreements with its eligible recipient agencies, or set forth by other written notification, incorporated into such agreements by reference.

(3) *Agreements.* In order to be eligible for funds under paragraph (e)(1) of this section, eligible recipient agencies must have entered into an agreement with the State agency or another eligible recipient agency pursuant to § 251.2(c).

(4) *Pass-through requirement-local support to emergency feeding organizations.* (i) Not less than 40 percent of the Federal Emergency Food Assistance Program administrative funds allocated to the State agency in accordance with paragraph (a) of this section must be:

(A) Provided by the State agency to emergency feeding organizations that have signed an agreement with the State agency as either reimbursement or advance payment for administrative costs incurred by emergency feeding organizations in accordance with paragraph (e)(1) of this section, except that such emergency feeding organizations may retain advance payments only to the extent that they actually incur such costs; or

(B) Directly expended by the State agency to cover administrative costs incurred by, or on behalf of, emergency feeding organizations in accordance with paragraph (e)(1) of this section.

(ii) Any funds allocated to or expended by the State agency to cover costs incurred by eligible recipient agencies which are not emergency feeding organizations shall not count toward meeting the pass-through requirement.

(iii) State agencies must not charge for commodities made available under this part to eligible recipient agencies.

* * * * *

10. In § 251.9:

a. The words ''emergency feeding organization'' and ''emergency feeding organizations'' are removed wherever they appear in the section, and added in their place are the words ''eligible recipient agency'' and ''eligible recipient agencies'' respectively;

b. Paragraph (a) is revised;

c. In paragraph (c) introductory text, the reference ''3016.24(b)(1)'' is removed, and in paragraph (c)(2)(i) the reference ''3016.24(c) through 3016.24(f)'' is removed, and the reference ''part 3016 or 3019, as applicable'' is added in both places.

d. Paragraph (e) is removed, and paragraphs (f) and (g) are redesignated as paragraphs (e) and (f), respectively;

e. Newly redesignated paragraph (e) is amended by removing the words ''SF–269, Financial Status Report,'' and adding the words ''FNS–667, Report of TEFAP Administrative Costs,'' in their place.

f. Newly redesignated paragraph (f) is amended by removing the reference ''SF–269'' wherever it appears and adding the reference ''FNS–667'' in its place.

The revision reads as follows:

§ 251.9 Matching of funds.

(a) *State matching requirement.* The State must provide a cash or in-kind contribution equal to the amount of TEFAP administrative funds received under § 251.8 and retained by the State agency for State-level costs or made available by the State agency directly to eligible recipient agencies that are not emergency feeding organizations as defined in § 251.3(e). The State agency will not be required to match any portion of the Federal grant passed through for administrative costs incurred by emergency feeding organizations or directly expended by the State agency for such costs in accordance with § 251.8(e)(4) of this part.

* * * * *

11. In § 251.10:

a. Paragraph (a) is revised;

b. Paragraph (b) is amended by adding the words ''commodities distributed for home consumption and meals prepared from'' after the word ''law,'';

c. Paragraph (c) is amended by adding the words ''for home consumption or availability of meals prepared from commodities'' after the word ''foods''.

d. Paragraphs (d) and (e) are revised;

e. Paragraph (f) is amended by:

1. removing the words ''emergency feeding organizations and distribution sites'', ''emergency feeding organization or distribution site'' and ''emergency feeding organization's or distribution site's'' wherever they appear, and adding in their place the words ''eligible recipient agencies'', ''eligible recipient agency'' and ''eligible recipient agency's'' respectively;

2. adding the words ''or meal service'' after the word ''foods'' in paragraph (f)(1) introductory text;

3. adding the words ''for home consumption or prepared meals containing TEFAP commodities'' after the word ''commodities'' in paragraph (f)(1)(ii);

4. adding the words ''or meal service'' at the end of paragraph (f)(1)(iii);

5. adding the words ''or meal service'' after the word ''foods'' in paragraph (f)(2); and

6. removing the words ''the distribution of commodities by'' in paragraph (f)(4);

f. Paragraph (g) is amended by removing the words ''emergency feeding organizations'' and adding in their place ''eligible recipient agencies'';

g. Paragraph (h) is revised.

The revisions read as follows:

§ 251.10 Miscellaneous provisions.

(a) *Records.* (1) *Commodities.* State agencies must maintain records to document the receipt, disposal, and inventory of commodities received under this part in accordance with requirements of § 250.16 of this chapter. State agencies must also ensure that eligible recipient agencies maintain such records.

(2) *Administrative funds.* In addition to maintaining financial records in accordance with 7 CFR part 3016, State agencies must maintain records to document the amount of funds received under this part and paid to eligible recipient agencies for allowable administrative costs incurred by such eligible recipient agencies. State agencies must also ensure that eligible recipient agencies maintain such records.

(3) *Household information.* Each distribution site must collect and maintain on record for each household receiving TEFAP commodities for home consumption, the name of the household member receiving commodities, the address of the household (to the extent practicable), the number of persons in the household, and the basis for determining that the household is eligible to receive commodities for home consumption.

(4) *Record retention.* All records required by this section must be retained for a period of 3 years from the close of the Federal Fiscal Year to which they pertain, or longer if related to an audit or investigation in progress. State agencies may take physical possession of such records on behalf of their eligible recipient agencies. However, such records must be reasonably accessible at all times for use during management evaluation reviews, audits or investigations.

* * * * *

(d) *Reports.* (1) *Submission of Form FNS–667.* Designated State agencies must identify funds obligated and disbursed to cover the costs associated with the program at the State and local level. State and local costs must be identified separately. The data must be identified on Form FNS–667, Report of Administrative Costs (TEFAP) and submitted to the appropriate FNS Regional Office on a quarterly basis. The quarterly report must be submitted no later than 30 calendar days after the end of the quarter to which it pertains. The final report must be submitted no later than 90 calendar days after the end of the fiscal year to which it pertains.

(2) *Reports of excessive inventory.* Each State agency must complete and submit to the FNS Regional Office reports to ensure that excessive inventories of donated foods are not maintained, in accordance with the requirements of § 250.17(a) of this chapter.

(e) *State monitoring system.* (1) Each State agency must monitor the operation of the program to ensure that it is being administered in accordance with Federal and State requirements.

(2) Unless specific exceptions are approved in writing by FNS, the State agency monitoring system must include:

(i) An annual review of at least 25 percent of all eligible recipient agencies which have signed an agreement with the State agency pursuant to § 251.2(c), provided that each such agency must be reviewed no less frequently than once every four years; and

(ii) An annual review of one-tenth or 20, whichever is fewer, of all eligible recipient agencies which receive TEFAP commodities and/or administrative funds pursuant to an agreement with another eligible recipient agency. Reviews must be conducted, to the maximum extent feasible, simultaneously with actual distribution of commodities and/or meal service, and eligibility determinations, if applicable. State agencies must develop a system for selecting eligible recipient agencies for review that ensures deficiencies in program administration are detected and resolved in an effective and efficient manner.

(3) Each review must encompass, as applicable, eligibility determinations, food ordering procedures, storage and warehousing practices, inventory controls, approval of distribution sites, and reporting and recordkeeping requirements.

(4) Upon concurrence by FNS, reviews of eligible recipient agencies which have been conducted by FNS Regional Office personnel may be incorporated into the minimum coverage required by paragraph (e)(2) of this section.

(5) If deficiencies are disclosed through the review of an eligible recipient agency, the State agency must submit a report of the review findings to the eligible recipient agency and ensure that corrective action is taken to eliminate the deficiencies identified.

* * * * *

(h) *Maintenance of effort.* The State may not reduce the expenditure of its own funds to provide commodities or services to organizations receiving funds or services under the Emergency Food Assistance Act of 1983 below the level of such expenditure existing in the fiscal year when the State first began administering TEFAP, or Fiscal Year 1988, which is the fiscal year in which the maintenance-of-effort requirement became effective, whichever is later.

Dated: June 24, 1999.

Samuel Chambers, Jr.,

Administrator.

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