

Rules and Regulations

Federal Register

Vol. 67, No. 205

Wednesday, October 23, 2002

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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 250

RIN 0584-AD08

Codification of Poultry Substitution and Modification of Commodity Inventory Controls for Recipient Agencies

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This rule amends USDA's Food Distribution Program regulations. The rule has two distinct parts. The first part of the rule allows limited poultry substitution and full substitution of all other commodities except for beef and pork. The second part of the rule reduces current commodity recordkeeping and reporting requirements for some local level recipient agencies, such as schools.

The Department has operated a demonstration project program since Feb. 1, 1996, which has allowed commercial poultry to be substituted for commodity poultry in processing. Substitution of most donated foods with commercial foods has always been permitted under current regulations. Current regulations provide a list of 16 commodities that may be substituted without the prior approval of the Food and Nutrition Service (FNS). Any other commodity, except for meat and poultry, may be substituted with the prior written approval of FNS under 7 CFR § 250.30(f)(4) of the current regulations. Required Certified Public Accountant (CPA) audits have not shown any significant problems with these substitution options. No substitution of inferior or non-domestic product has been identified. Therefore, this rule amends the regulations to allow limited poultry substitution, with

a substitution plan approved by both FNS and Agriculture Marketing Service (AMS) grading; and full substitution for all other commodities except for beef and pork, on a permanent basis, without prior written approval from FNS.

Secondly, because of changes in the commercial market and the food donation programs, USDA has tested the effects of allowing vendors to use commercial labels on some commodity products purchased for schools. Commercial labeling had already been introduced in other USDA food donation programs with good results. However, commercial labels complicate the current inventory procedures that require commodity inventories to be kept separate from purchased inventories. Therefore, FNS is amending the current inventory requirements for USDA's Child Nutrition Programs in order to accommodate the use of commercial labels on some commodity products.

EFFECTIVE DATE: This rule is effective November 22, 2002.

FOR FURTHER INFORMATION CONTACT: Suzanne Rigby, Chief, Schools and Institutions Branch, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Alexandria, Virginia 22302-1594, or telephone (703) 305-2644.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This final 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 rule 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 has certified that this action will not have a significant impact on a substantial number of small entities. State agencies, school food authorities and schools choosing to utilize this new method of inventory control will be affected. However, the majority of entities participating in the Food Distribution Programs will not be affected.

Public Law 104-4

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, the Food and Nutrition Service 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 the Food and Nutrition Service 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 rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

The program addressed in this action is listed in the Catalog of Federal Domestic Assistance under No. 10.550, and is 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).

Paperwork Reduction Act

Information collection requirements associated with the commodity processing program are approved under 0584-0293. This rule deletes the requirement for schools to maintain a dual inventory control system. Although the current inventory control requirements represent a burden on schools, estimated at 1.8 million hours annually for recipient agencies, this burden was not identified or approved by the Office of Management and Budget. Therefore, deleting the

burden requires no change to 0584–0293.

Allowing the limited substitution of donated poultry with commercial poultry significantly streamlines the manufacturing process for processors and allows recipients to receive end products on a timely basis. However, this rule does not relieve the processor from any of the current reporting or record keeping requirements contained in the regulations. Therefore, no changes are required to the current burden hours shown in 0584–0293.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. The 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. There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this rule or the applications of its provisions.

Background

The Food Distribution Program regulations (hereinafter all references to regulations in this rulemaking are to regulations in Title 7 of the Code of Federal Regulations unless indicated otherwise), beginning at § 250.3 and continuing through § 250.30, set forth the terms and conditions under which distributing agencies, subdistributing agencies, and recipient agencies may enter into contracts with commercial firms for the further processing of donated foods.

On February 21, 2002, the Department published a proposed rule in the **Federal Register** (67 FR 7977) that would (1) Amend the Food Distribution regulations to allow limited substitution of poultry products consistent with the demonstration project in effect since 1996; (2) make fruits, vegetables, and eggs eligible to be substituted under the 100 percent yield concept without prior approval from FNS; and (3) eliminate the requirement for recipient agencies to maintain inventory records for USDA purchased commodities separate from other food inventory. The proposed rule provided a 60-day comment period. This final rule implements these provisions while incorporating some of the changes suggested in the public comments on the proposed rule.

Analysis of Comments

The Department received written comment from 82 different entities

consisting of distributing agencies, recipient agencies, processors, consultants, and various interest groups. Forty-three commenters generally supported the proposed changes to the regulations. Thirty-three commenters generally opposed the proposed changes to the regulations. Six commenters only offered suggestions to improve the final rule.

a. Poultry Substitution

Fifteen commenters on poultry substitution, all participants in the demonstration project in either processing or distributing, cited their ability to have end products delivered “just in time” for use in the meal service as a positive reason to support the proposed regulations. Thirteen commenters saw savings in the costs associated with storing commodities. Five commenters believe poultry substitution made inventory procedures at commercial distributors more manageable. Four commenters believe that competition increased among poultry processors. Two recipient agency commenters cited increased participation in the school lunch program because they could now show consistency between commodity and commercial end products.

Of the 33 commenters opposed to the proposed changes to the regulation, 19 opposed specific proposed changes regarding poultry substitution. However, not one commenter opposed the general concept of poultry substitution. Ten commenters believe that the proposed changes were too vague. They also believe that the Department did not furnish sufficient poultry substitution guidelines in the proposed rule. Four commenters on this provision believe that the proposed regulations lack clarity. The Department has considered the suggestions made by these commenters and has provided further detail for poultry substitution in both the preamble and regulatory text of this final rule.

Seven commenters regarding poultry substitution believe that the Department had dropped the requirement that any commercial food item substituted for commodity product be of U.S. origin. Three commenters stated that the “Buy American” provisions of § 250.23 are addressed in the Child Nutrition Program (CNP) regulations at § 210.21(d) and do not need to be a part of the part 250 regulations. The Department became aware of the purported omission of a U.S. origin requirement in the proposed rule during the comment period and publicly indicated on the Food Distribution website that this requirement still applies. The

applicability of this requirement for substitution is reemphasized in this final regulation. Although “Buy American” is discussed in the CNP regulations, those regulations specifically address only school food authorities. Numerous other types of recipient agencies rely on the part 250 regulations for their guidance. Therefore, this rule amends the proposed language of § 250.23 to make clear the Department’s intent to have all recipient agencies “Buy American” whenever possible.

Five commenters suggested that the Department clarify the definitions of “full substitution” and “limited substitution.” The Department agrees with these commenters and has included definitions of these terms in § 250.3, Definitions, as subparagraphs under the definition of “substitution.”

Three commenters believe that the Department should include detailed penalties for processors who fail to comply with the regulation. The Department believes that sufficient penalties are already described in the regulations.

Five commenters regarding poultry substitution believe the Department should publish data to support its assertion that the poultry demonstration projects merit a regulatory amendment to make this practice permanent. The public has been on notice for the last six years regarding the demonstration project to explore poultry substitution. During that period, prior to the publishing of the proposed rule to make the poultry substitution option permanent, the Department did not receive any written comment either for or against poultry substitution as defined in the demonstration project. However, during numerous public meetings over the same six years, the Department was continually encouraged by recipient agencies, processors, and State distributing agencies to make the poultry substitution option permanent. The Department does acknowledge that some of its pilot projects in more recent years have caused some reporting problems for both the processor and the recipients. These issues will be addressed as processors file the final substitution plans required under this rule change with FNS and AMS. The pilot programs were designed to test different ways of doing business in the commodity program and are a separate issue from poultry substitution.

b. Inventory Recordkeeping Changes

The Department received thirty-seven comments specifically addressing the changes to the proposed commodity inventory and recordkeeping

requirements. Seventeen of the commenters indicated that the proposed changes would reduce paperwork for recipient agencies so that they could keep only one inventory record rather than one record for commodity foods and one record for purchased or commercial foods.

Twenty commenters opposed the proposed changes to the inventory recordkeeping regulations. However, the Department believes that the discussion of a commercial labels demonstration project in the preamble of the proposed rule may have confused those commenters. It appears that all 20 of the negative commenters were expressing opposition to the use of commercial labels rather than the proposed regulation change. Of the 20, 11 represent recipient agencies that were opposed to the commercial labels because of the visual difficulty in separating them from purchased items. It is assumed that this opposition would not exist once the commenters understood that the proposed regulation would eliminate the need for recipients to keep separate inventory records. Three comments expressed concerns that distributors might substitute commodity products with commercially labeled products of lesser quality. However, the Department believes that the disincentives for substituting inferior product far outweigh any possible perceived financial gain from such a substitution. Three commenters expressed concerns about identifying commodity foods to be used in Presidentially declared disasters when the commodities are not recorded separate from purchased foods. Three commenters expressed concerns about tracking commodities with commercial labels in a recall situation or when registering a product complaint. FNS has already issued guidance for both supplying foods to disaster situations and for handling commodities in a recall or complaint situation.

Some commenters suggested that the Department provide guidance to recipient agencies for implementing any new procedures resulting from the change in inventory requirements. The Department intends to provide additional guidance and technical assistance as needed.

One commenter suggested that the Department identify specific types of recipient agencies for which the change is intended. The provisions contained in this rule relative to inventory and recordkeeping requirements are applicable to local-level recipient agencies participating in the National School Lunch Program, Child and Adult Care Food Program, the Nutrition

Services Incentive Program, the Summer Food Service Program for Children, and other recipient agencies, such as charitable institutions and summer camps, that receive commodities outside of specifically authorized programs. They are not applicable to recipient agencies participating in the Emergency Food Assistance Program (TEFAP) under part 251, Food Distribution Program on Indian Reservations (FDPIR) under parts 253 and 254, or the Commodity Supplemental Food Program (CSFP) under part 247. Local level organizations involved in the administration of these programs are, by definition, subdistributing agencies and, therefore, remain subject to the inventory and recordkeeping requirements contained in part 250, except where the provisions in part 250 are inconsistent with the provisions contained in regulations specific to these programs. For example, recordkeeping requirements have been relaxed for food pantries and soup kitchens under part 251, the Emergency Food Assistance Program (TEFAP) regulations. However, since food packages containing specific types of commodities must be distributed monthly to eligible households participating in CSFP and FDPIR, and the amount of financial resources available to purchase such commodities are limited, inventory and recordkeeping requirements have not been relaxed for these programs. In addition, inventory and recordkeeping requirements have not been relaxed for TEFAP recipient agencies that distribute commodities to other local-level recipient agencies. At this time, FNS is of the opinion that maintaining current inventory and recordkeeping requirements at this level is a necessary means of maintaining program integrity given the manner in which such requirements have been relaxed at the food pantry and soup kitchen level. The definition of "subdistributing agency" in § 250.3 has been revised to clarify that TEFAP, CSFP, and FDPIR recipient agencies are subdistributing agencies.

While the provisions contained in this rule are not intended to affect the administration of TEFAP, CSFP, or FDPIR recipient agencies, FNS will continue to examine current inventory and recordkeeping requirements imposed on these agencies, and where appropriate, revise them.

Changes in the Substitution Regulations

Substitution of donated foods with commercial foods has always been permitted under current regulations. However, current regulations at

§ 250.30(f)(1)(i) provide a list of 16 commodities that could be substituted without the prior approval of FNS. Any other commodity, except for meat and poultry, could be substituted with the prior written approval of FNS under § 250.30(f)(4) of the current regulations. The Department is amending the regulations at § 250.30(f) to allow full substitution in the further processing of all commodities except for beef, pork, and poultry without prior written approval from FNS. Any substitution of fully substitutable commodities is subject to a 100-percent yield requirement. As requested by commenters on the proposed rule, a description of "full substitution" has been added to § 250.3, as a subparagraph under the definition of "substitution". Under the 100-percent yield concept, the processor is responsible for all manufacturing losses. The processor must return to the contracting agency the same number of pounds of the commodity in finished end product that were delivered to the processor for further processing. Any commercial product substituted for donated commodity must be of U.S. origin and of equal or better quality than the donated commodity. Substitution remains an option available to processors.

The Department is also amending the regulations at § 250.30(f) to allow the limited substitution of commercial bulk pack poultry and poultry parts for USDA donated bulk pack poultry and poultry parts on a permanent basis. Limited substitution means that a processor can substitute commercial product for donated commodity product with some restrictions. Restrictions include, but are not limited to, the prohibition against substituting for backhauled commodity product. FNS may also prohibit substitution of certain types of the same generic commodity. (For example, FNS may decide to permit substitution for bulk chicken but not for canned chicken.) As requested by commenters on the proposed rule, a description of "limited substitution" has been added to § 250.3, as a subparagraph under the definition of "substitution". Substitution is an option available to the processor, not a mandatory practice. Any substitution of commercial poultry or poultry parts for commodity poultry or poultry parts must be performed using poultry of U.S. origin that is equal or superior in every particular to the USDA specification for commodity poultry.

Processors will need to submit a poultry substitution plan to FNS and AMS for approval. Once approved, the plan will be permanent. Any proposed

changes to the procedures that are addressed in the plan would require submission of a revised plan and approval by USDA before implementation.

The following general conditions apply to all poultry substitution plans: Only bulk pack chicken, chicken parts, and bulk pack turkey delivered by USDA vendors to the processor will be eligible for substitution. No backhauled product will be eligible. (Backhauled product is typically cut-up frozen poultry parts delivered to schools that may be turned over to processors for further processing at a later time.) Substitution of commercial poultry for donated poultry may occur in advance of the actual receipt of the donated poultry by the processor. Should a processor choose to use the substitution option prior to the commodity being purchased by the USDA, the processor assumes all risks. Any variation between the amount of commercial poultry substituted and the amount of donated poultry received by the processor will be adjusted according to guidelines furnished by USDA.

Any donated poultry not used in end products because of substitution can only be used by the processor at one of its facilities in other commercial processed products. It cannot be sold as an intact unit. In lieu of processing the donated poultry, however, the processor may use the product to fulfill other USDA contracts awarded for delivery to another processor provided all terms of the other contract are met. The substitution plan must contain (1) A step-by-step description of how production will be monitored; (2) a complete description of the records that will be maintained for (a) the commercial poultry substituted for the donated poultry, and (b) the disposition of the donated poultry delivered; and (3) how the substitution will be tracked for the purpose of monthly reporting to the State distributing agencies. As with the processing of donated poultry into end products, AMS graders must monitor the processing of any substituted commercial poultry to ensure that program integrity is maintained.

Changes in the Inventory Control Regulations

Beginning in 1996, the Department piloted the use of commercial labels in place of USDA labels on commodities supplied to the Emergency Temporary Assistance Program. The use of commercial labels was also permitted on some price-support products that are provided to the National School Lunch Program. The pilot has demonstrated excellent benefits for recipient agencies

including reduced delivery delays, increased competition, and reduced program costs. In addition, the project has helped eliminate a perceived stigma implied by the “generic” USDA labels.

However, using commercial labels has made it difficult for recipients to distinguish between donated commodities and commercially purchased items in order to comply with the current regulatory requirement to inventory donated commodities separately. These Federal requirements for inventory of donated commodities have always been more stringent than the Federal requirements for foods that have been purchased using Federal reimbursement dollars from the National School Lunch Program. It is recognized that schools currently must use generally accepted inventory and business management practices in order to safeguard commercially purchased products and maintain the financial integrity of their child nutrition operations. Therefore, during the period November 2000 to June 2001, the Department tested a procedure in two States that allowed schools to inventory commodity foods along with purchased foods. Anecdotal evidence from these States suggests that this procedure was well received and beneficial.

For these reasons, the Department has determined that requirements in part 250 for separate inventory maintenance of donated commodities by recipient agencies are redundant and more onerous than necessary to safeguard the value of commodities received by schools. Therefore, the Department is amending the regulations at § 250.13(a) to require that recipient agencies use specific guidance to be provided by the Food and Nutrition Service to value commodities for the purpose of OMB Circular A-133, and at § 250.14(b), § 250.14(e), and § 250.14(f)(1) and (f)(2) to remove the requirement that “recipient agencies” inventory USDA donated food separately. A technical amendment has also been made in § 250.14(c) to improve sentence structure. Section 250.14(e) is revised to reduce physical inventory requirements for recipient agencies in this section. State warehouses, State contracted commercial warehouses, and subdistributing agencies continue to be required to maintain separate inventories of donated commodities. They also are required to continue to perform annual physical inventories and reconciliation of donated commodities.

List of Subjects in 7 CFR Part 250

Administrative practice and procedure, Food assistance programs,

Grant programs, Social programs, Indians, Reporting and record keeping requirements, Surplus agricultural commodities.

Accordingly, 7 CFR part 250 is amended to read as follows:

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

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

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

- 2. In § 250.3:
 - a. Revise the definition of *Subdistributing agency*; and
 - b. In the definition for *Substitution*, remove “; or” at the end of paragraph (a) and add in its place a period and add new paragraphs (c) and (d).

The revision and additions read as follows:

§ 250.3 Definitions.

* * * * *

Subdistributing agency means an agency performing one or more distribution functions for a distributing agency other than, or in addition to, functions normally performed by common carriers or warehousemen. A subdistributing agency may also be a recipient agency. State and local agencies, and Indian Tribal Organizations administering the Emergency Food Assistance Program, the Food Distribution Program on Indian Reservations, or the Commodity Supplemental Food Program, are subdistributing agencies subject to all provisions relative to subdistributing agencies contained in this part, unless specifically exempt under part 251, part 253, part 254, or part 247 of this chapter.

* * * * *

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

(d) A processor can substitute commercial product for donated commodity product, as described in paragraph (a) of this section, with some

restrictions under limited substitution. Restrictions include, but are not limited to, the prohibition against substituting for backhauled poultry commodity product. FNS may also prohibit substitution of certain types of the same generic commodity. (For example, FNS may decide to permit substitution for bulk chicken but not for canned chicken.)

* * * * *

3. In § 250.13 add a new sentence at the end of paragraph (a)(5) to read as follows:

§ 250.13 Distribution and control of donated foods.

(a) * * *

(5) * * * For purposes of complying with OMB Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations on inventory valuation, recipient agencies shall comply with guidance provided by the Food and Nutrition Service. (For availability of OMB Circulars referenced in this paragraph (a), see 5 CFR 1310.3.)

* * * * *

4. In § 250.14:

a. Remove the word "Stock" at the beginning of paragraph (b)(4) and add in its place the words "Excepting recipient agencies, stock";

b. Remove the word "Conduct" from the beginning of the third sentence in paragraph (c) and add in its place the word "conduct", and remove the period at the end of the second sentence;

c. Revise paragraph (e);

d. Remove the words "or recipient agency's" in paragraph (f)(1) introductory text and add in its place the word "agency's"; and

e. Remove the words "and recipient agencies" in the second sentence of paragraph (f)(2).

The revision reads as follows:

§ 250.14 Warehousing, distributing and storage of donated foods.

* * * * *

(e) *Physical inventory.* During the annual review required by paragraph (c) of this section, distributing agencies and subdistributing agencies shall take a physical inventory of their storage facilities. The physical inventory shall be reconciled with each storage facility's book inventory. The reconciliation records shall be maintained by the agency that contracted for or maintained the storage facility. Food items that have been lost, stolen, or found to be out of condition, shall be identified and recorded. Potential excessive inventory, as described in paragraph (f) of this section, shall be reported by the subdistributing agency to the

distributing agency. Corrective action on each deficiency noted during these inventories shall be initiated immediately, and a written report of those corrective actions shall be forwarded to the distributing agency. Where applicable, the distributing agency shall pursue claims in accordance with § 250.15(c).

* * * * *

5. In § 250.16, revise paragraph (a)(2) to read as follows:

§ 250.16 Maintenance of records.

(a) * * *

(2) Distributing agencies shall require all subdistributing agencies to maintain accurate and complete records with respect to the receipt, distribution/disposal, and inventory of donated foods, including end products processed from donated foods. Subdistributing agencies and recipient agencies must document any funds that arise from the operation of the distribution program, including refunds made to recipient agencies by a processor in accordance with § 250.30(k). Further, these documents should allow an independent determination of the specific accounts that benefit from these funds.

* * * * *

6. In § 250.23, revise paragraph (a)(2) to read as follows:

§ 250.23 Buy American.

(a) * * *

(2) A food product manufactured in the U.S. primarily using food grown in the U.S.

* * * * *

7. In § 250.30:

a. Revise paragraph (f)(1) introductory text;

b. Remove paragraph (f)(1)(i) and redesignate paragraph (f)(1)(ii) as paragraph (f)(1)(i); add a new paragraph (f)(1)(ii);

c. Revise newly redesignated paragraph (f)(1)(i);

d. Remove the words "specifically listed in paragraph (f)(1)(i) of this section" in the second sentence of paragraph (f)(2);

e. Remove the words "by the Agricultural Stabilization and Conservation Service (ASCS) in the original inspection of donated foods" in the fourth sentence of paragraph (f)(2) and add in their place the words "in the original USDA procurement specification";

f. Remove paragraph (f)(4) and redesignate paragraph (f)(5) as paragraph (f)(4); and

g. Amend the introductory text of paragraph (g) by adding a sentence after the second sentence.

The revisions and additions read as follows:

§ 250.30 State processing of donated foods.

* * * * *

(f) * * * (1) The processing contract may provide for substitution of donated foods as defined in § 250.3 except that donated beef and donated pork shall not be substitutable. Any substitution of commercial product for commodities other than beef, pork, or poultry is subject to a 100-percent yield requirement. Under the 100-percent yield requirement, the processor is responsible for any manufacturing losses.

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

(ii) Poultry shall be eligible for limited substitution. Any processors that wish to substitute poultry must have a plan approved by both FNS and AMS. Only bulk pack chicken, chicken parts, and bulk pack turkey delivered by USDA vendors to the processor are eligible for substitution. No backhauled poultry product may be substituted.

(Backhauled product is typically cut-up frozen poultry parts delivered to schools that may be turned over to processors for further processing at a later time.) Should a processor want to amend its approved plan, it shall submit any amendments to USDA for approval prior to implementing such amendments.

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

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

* * * * *

(g) * * * As with the processing of donated poultry into end products, AMS graders must monitor the processing of any substituted commercial poultry to ensure that program integrity is maintained. * * *

* * * * *

Dated: October 16, 2002.

Roberto Salazar,

Administrator, Food and Nutrition Service.

[FR Doc. 02-26874 Filed 10-22-02; 8:45 am]

BILLING CODE 3410-30-P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Parts 305 and 319

[Docket No. 98-030-4]

RIN 0579-AA97

Irradiation Phytosanitary Treatment of Imported Fruits and Vegetables

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are establishing regulations providing for use of irradiation as a phytosanitary treatment for fruits and vegetables imported into the United States. The irradiation treatment provides protection against fruit flies and the mango seed weevil. This action provides an alternative to

other currently approved treatments (various fumigation, cold, and heat treatments, and systems approaches employing techniques such as greenhouse growing) against fruit flies and the mango seed weevil in fruits and vegetables.

EFFECTIVE DATE: October 23, 2002.

FOR FURTHER INFORMATION CONTACT: Dr. Inder P. Gadh, Import Specialist, Phytosanitary Issues Management, PPQ, APHIS, 4700 River Road Unit 140, Riverdale MD 20737-1236; (301) 734-5210.

SUPPLEMENTARY INFORMATION:

Background

In response to growing commercial interest in the use of irradiation as a treatment for agricultural products, the Animal and Plant Health Inspection Service (APHIS) has been developing policies for evaluating irradiation methods and evaluating research on the efficacy of irradiation.

To set a framework for developing APHIS' irradiation policy, we published a notice entitled "The Application of Irradiation to Phytosanitary Problems" in the **Federal Register** on May 15, 1996 (61 FR 24433-24439, Docket No. 95-088-1). Among other things, the notice discussed how APHIS, in collaboration with the Agricultural Research Service (ARS), would evaluate scientific research to determine the minimum irradiation doses necessary to kill or render sterile particular pests associated with particular articles. The notice emphasized that minimum dose levels are important and necessary, but that dose levels by themselves do not constitute a complete treatment schedule or an adequate regulatory framework. Treatment schedules, in addition to specifying minimum doses, may employ irradiation as a single treatment, as part of a multiple treatment, or as a component of a systems approach combined with other pest mitigation measures. The regulatory framework for employing irradiation treatments must also address system integrity or quality control issues, including methods to ensure that the irradiation is properly conducted so that the specified dose is achieved, and must address matters such as packaging or safeguarding of the treated articles to prevent reinfestation.

In a proposed rule published in the **Federal Register** on May 26, 2000 (65 FR 34113-34125, Docket No. 98-030-1), we proposed a framework for the use of phytosanitary irradiation treatments for imported fruits and vegetables, and proposed specific standards for an

irradiation treatment for fruit flies and the mango seed weevil (*Sternochetus mangiferae* (Fabricus), formerly known as *Cryptorhynchus mangiferae*) in imported fruits and vegetables. We solicited comments concerning our proposed rule for a period of 60 days, ending July 25, 2000. On August 4, 2000, we published a **Federal Register** notice that reopened and extended the comment period until August 21, 2000 (65 FR 47908, Docket No. 98-030-2). By the end of this comment period we received 2,212 comments, including many form letters and form postcards.

The various issues raised in these comments are discussed below by topic.

Comments Outside the Scope of APHIS' Authority

Approximately 2,000 of the comments we received on the proposed rule were a form letter, or slight variations of the form letter. In addition to comments addressing the proposed rule, discussed below, these form letters raised several issues that concern matters under the regulatory authority of other Federal and State agencies, not APHIS. We do not intend to reopen debate over matters that have been resolved through rulemaking by other agencies that have primary authority in these areas.

For example, one concern expressed is that irradiation will make foods unsafe to eat. The Food and Drug Administration (FDA) has primary regulatory responsibility for ensuring that approved irradiation doses do not render foods unsafe to eat. FDA regulations (21 CFR 179.26) establish a limit of 1.0 kilogray for disinfestation of arthropod pests in food. None of the irradiation doses contained in our rule exceed one quarter of this approved safe dose limit. A similar concern is whether irradiation could generate harmful chemicals from the cartons in which fruits and vegetables are irradiated. FDA has addressed safe packaging materials in 21 CFR 179.26, where it specifically allows wax-coated paperboard, the common carton type for fruits and vegetables.

Other comments suggested that irradiation facilities are inherently unsafe, and that workers and the public may be exposed to dangerous levels of radiation as the result of accidents at the plants or during transport of radioisotopes to and from plants. The Nuclear Regulatory Commission, the Occupational Safety and Health Administration, and the United States Department of Transportation have the primary regulatory responsibility for issues including irradiation facility construction, operation, employee and public safety, and transportation of