

**DEPARTMENT OF AGRICULTURE****Food and Nutrition Service****7 CFR Parts 250 and 251**

RIN 0584–AE29

**Requirements for the Distribution and Control of Donated Foods****AGENCY:** Food and Nutrition Service, USDA.**ACTION:** Proposed rule.

**SUMMARY:** This rule proposes to revise and clarify requirements to ensure that USDA donated foods are distributed, stored, and managed in the safest, most efficient, and cost-effective manner, at State and recipient agency levels. The rule would also reduce administrative and reporting requirements for State distributing agencies, revise or clarify regulatory provisions relating to accountability for donated foods, and rewrite much of the regulations in a more user-friendly, “plain language,” format. Lastly, the rule proposes to revise and clarify specific requirements to conform more closely to related requirements elsewhere in the Code of Federal Regulations. In formulating the proposals, the Food and Nutrition Service (FNS) has utilized input received from program administrators, industry representatives, and other organizations at national conferences and other meetings, and through email or other routine communications with such parties.

**DATES:** To be assured of consideration, comments must be received on or before January 20, 2015.

**ADDRESSES:** The Food and Nutrition Service invites interested persons to submit comments on this proposed rule. You may submit comments, identified by RIN number 0584–AE29, by any of the following methods:

*Email:* Send written comments to [Dana.Rasmussen@fns.usda.gov](mailto:Dana.Rasmussen@fns.usda.gov). Include RIN number 0584–AE29 in the subject line of the message.

*Mail:* Send written comments to Dana Rasmussen, Branch Chief, Policy Branch, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, Room 500, 3101 Park Center Drive, Alexandria, Virginia 22302–1594.

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

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

Further information on the submission of comments or the review

of comments submitted may be found under Part III, Procedural Matters, under **SUPPLEMENTARY INFORMATION.**

**FOR FURTHER INFORMATION CONTACT:** Dana Rasmussen at the above address or telephone (703) 305–2662, or by email at [Dana.Rasmussen@fns.usda.gov](mailto:Dana.Rasmussen@fns.usda.gov).

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

The Department of Agriculture’s (the Department or USDA) Food and Nutrition Service (FNS) provides food to State distributing agencies for use in food assistance programs as authorized in the Richard B. Russell National School Lunch Act (42 U.S.C. 1751 et seq.), the Emergency Food Assistance Act of 1983 (7 U.S.C. 7501, et seq.), the Food and Nutrition Act of 2008 (7 U.S.C. 2011, et seq.), the Agriculture and Consumer Protection Act of 1973 (7 U.S.C. 612c note), the Older Americans Act of 1965 (42 U.S.C. 3001, et seq.), and the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121, et seq.). State distributing agencies, in turn, distribute the donated foods (which are also referred to as USDA Foods) to recipient agencies (such as school food authorities, food banks, and food pantries) which provide assistance to eligible persons or households in specific food assistance programs, to needy persons served by charitable institutions, or to persons victimized by a disaster or situation of distress. The general regulations for the storage, distribution, and control of donated foods by State distributing agencies and recipient agencies are included in 7 CFR part 250. Other Federal regulations include requirements specific to particular food assistance programs that receive donated foods—e.g., 7 CFR part 251 for The Emergency Food Assistance Program (TEFAP) and 7 CFR part 210 for the National School Lunch Program (NSLP).

Following the enactment of the Commodity Distribution Reform Act and WIC Amendments of 1987, (7 U.S.C. 612c note), hereinafter referred to as the Commodity Distribution Reform Act, a final rule was issued in October 1989 amending 7 CFR part 250 to require State distributing agencies to evaluate the efficiency and cost-effectiveness of their method of distribution of donated foods to recipient agencies (54 FR 42476). The amended regulations required distributing agencies to utilize a commercial storage and distribution system, if such system was determined to be more cost-effective. As a result, most State distributing agencies

currently procure the services of commercial storage facilities to store donated foods and distribute them to recipient agencies, or permit direct shipments from vendors of donated foods to recipient agencies, the contracted commercial storage facilities of such agencies, or to processors for processing of donated foods into end products. However, for donated foods distributed in NSLP, most school food authorities must pay a charge to help meet storage and distribution costs for donated foods. The charge imposed on school food authorities varies widely from State to State. This rule proposes to revise current requirements in 7 CFR part 250 to ensure that State distribution systems provide the most efficient and cost-effective service for school food authorities in provision of donated foods, while reducing the administrative burden on distributing agencies in providing such service.

In 2002, the Department, in collaboration with State agencies and school food authorities, developed procedures and instructions for responding to donated foods subject to a food recall. Such procedures and instructions ensure that donated foods subject to a food recall are isolated, inspected, and recovered in an expeditious manner. This rule proposes to include a section on donated food safety and disposition, and to require that State distributing agency agreements and contracts include provisions to ensure compliance with all applicable Federal, State or local requirements relating to food safety and food recalls.

In October 2002, 7 CFR part 250 was amended to permit school food authorities in NSLP, as well as other recipient agencies that use donated foods, to provide meals to recipients, store donated foods together with commercially purchased foods, and maintain a single inventory record of the donated and purchased foods (67 FR 65015). The single inventory management option reduced the workload for school food authorities in control and monitoring of their food inventories. In August 2008, 7 CFR part 250 was amended to further clarify the single inventory management option for school food authorities, and to revise other requirements to ensure that such entities receive the full benefit of the donated foods provided in NSLP (73 FR 46189). However, some confusion still exists regarding the application of the single inventory management option. This rule proposes to further clarify storage and inventory management requirements at the distributing and recipient agency levels.

In order to ensure compliance with requirements for the processing of donated foods, the State distributing agency must currently conduct an on-site review of in-State processors at least once every two years. This rule proposes to remove this requirement, which is burdensome and costly for distributing agencies, and to require instead that in-State processors obtain independent Certified Public Accountant (CPA) audits, as currently required of multi-State processors. The rule would also remove requirements for the distributing agency in verification of sales of processed end products, and in reporting acceptability of donated foods to FNS.

The Department has developed instructions and guidance in areas of donated food distribution related to food recalls, the use of donated foods in disaster situations, ensuring that restitution is made for donated food losses, shipment and receipt of donated foods, and options in the processing of donated foods. This rule proposes to include references to these materials to help the reader better understand standards and procedures relating to specific aspects of the distribution and control of donated foods. This rule also proposes to provide references to other applicable Federal regulations to help the reader identify Federal requirements affecting the distribution and control of donated foods that are beyond the scope of this proposed rule. Lastly, the rule proposes to rewrite and restructure much of 7 CFR part 250 in a more user-friendly, “plain language,” format. Specific proposals for change or clarification are discussed more fully in the next section of the preamble.

## II. Discussion of the Rule’s Provisions

### 7 CFR Part 250

#### A. Subpart A—General Purpose and Administration

We propose to completely revise current Subpart A of 7 CFR part 250 to more clearly present the general purpose and use of donated foods, the definitions applicable to 7 CFR part 250, the responsible administrative agencies in the distribution and control of donated foods at Federal and State levels, and civil rights requirements. Some of these requirements are located in current Subpart B. Accordingly, we propose to change the heading of Subpart A to *General Purpose and Administration, with new sections as described in the following paragraphs.*

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

In § 250.1, we propose to describe the purpose of donated foods, the general requirements for their use, and the legislative sanctions that apply in the event that they are used improperly. In § 250.1(a), we indicate that the Department purchases foods for donation in specific food assistance programs or to provide assistance to needy persons, in accordance with legislation authorizing such assistance in specific programs or providing for removal of market surpluses and support of food prices.

In § 250.1(b), we propose to include the stipulation, in current § 250.13(a)(1), that donated foods must be distributed and used in accordance with the requirements of 7 CFR part 250. We propose to indicate that other Federal regulations also apply to specific programs (e.g., 7 CFR part 251 includes requirements for donated foods provided in TEFAP). We propose to include the provision, in current § 250.13(a)(7), that permits donated foods to be used in activities designed to test their effective use in specific programs (e.g., in nutrition classes or cooking demonstrations). However, we propose to remove the need for prior approval to permit such use.

In accordance with current § 250.13(a)(1)(ii), donated foods may not be sold, exchanged, or otherwise disposed of without prior approval of the Department. And, in accordance with current § 250.15(a)(3), recipients may not be required to make any payments, or perform any services, in connection with the receipt of donated foods. We propose to include these requirements in § 250.1(b) of this proposed rule, with some clarification. We propose to prohibit the sale, exchange, or other disposition of donated foods, or their use to require recipients to make any payments, or perform any services, except as specifically permitted in 7 CFR part 250, or in other Federal regulations. We also propose to include the requirement, in current § 250.15(a)(3), that donated foods may not be used to solicit voluntary contributions, except for donated foods provided in the Nutrition Services Incentive Program (NSIP), which was formerly called the Nutrition Program for the Elderly.

In § 250.1(c), we propose to include, in streamlined form, the sanctions established under the Richard B. Russell National School Lunch Act (42 U.S.C. 1760) and the Agriculture and Consumer Protection Act of 1973 (7 U.S.C. 612c note) for persons who

embezzle, willfully misapply, steal, or obtain by fraud, donated foods, or funds deriving from donated foods. These sanctions are included in current § 250.13(i).

#### 2. Definitions, § 250.2

In § 250.2, we propose to include the definitions applicable to 7 CFR part 250, which are included in current § 250.3. Although most of the definitions are included without change, we have chosen to set out all definitions in this rule, in the interest of clarity. However, this preamble addresses only those current definitions that we are proposing to remove or revise and the definitions that we are proposing to add.

We propose to remove the definitions of “Commodities”, “Disaster victims”, “Discount system”, “FNSRO”, “Nonprofit school food service account”, “Refund application”, “Refund system”, “School”, “Secretary”, “State and United States”, “Substituted food”, and “Welfare agency”. The term “commodities” is no longer commonly used, as it has been replaced by “donated foods” or “USDA Foods,” both of which are included in § 250.2 of this proposed rule. The Federal Emergency Management Agency (FEMA) now commonly refers to survivors of a disaster or emergency, rather than to disaster victims, and we propose to use the same reference in 7 CFR part 250. In this proposed rule, we refer simply to FNS actions or requirements, without specifying FNSRO (i.e., FNS Regional Offices) or FNS Headquarters. FNS guidance indicates which FNS office is responsible for specific procedures. The definitions of “Discount system”, “Refund”, “Refund application”, “Refund system”, and “Substituted food”, are unnecessary, as their meaning is clear in current Subpart C of 7 CFR part 250, which includes requirements in the processing of donated foods. The definition of “Nonprofit school food service account” is included in 7 CFR part 210, and we propose to include references to that part, as appropriate, rather than repeat the definition in 7 CFR part 250. Similarly, the definition of “School” is included in § 210.2, and we refer invariably to the school food authority, rather than to individual schools, in 7 CFR part 250. In this proposed rule, we refer to the Department or USDA, rather than to the Secretary. The term “Welfare agency” is no longer in use, and such agencies would fall under the term “Recipient agencies” in this proposed rule. The current definition of “State and United States” would be replaced by a new definition of “State”.

We propose to revise current definitions of “Adult care institution”, “CACFP”, “Charitable institutions”, “Department”, “Disaster”, “Disaster organizations”, “Distributing agency”, “Donated foods”, “Elderly nutrition project”, “Household”, “In-kind replacement”, “Multi-State processor”, “National per-meal value”, “Needy persons”, “NSLP”, “NSLP”, “Recipient agencies”, “SBP”, “Section 4(a)”, “Section 6”, “Section 14”, “Section 32”, “Section 311”, “Section 416”, “Section 709”, “SFSP”, “Similar replacement”, “Situation of distress”, “Storage facility”, “State Agency on Aging”, and “Subdistributing agency”.

The proposed revisions of “Adult care institution”, “CACFP”, “Charitable institutions”, “Department”, “Donated foods”, “Elderly nutrition project”, “Multi-State processor”, “National per-meal value”, “Needy persons”, “NSLP”, “NSLP”, “SBP”, “Section 4(a)”, “Section 6”, “Section 14”, “Section 32”, “Section 311”, “Section 416”, “Section 709”, “SFSP”, “State Agency on Aging”, and “Storage facility” would simply streamline the current definitions.

The proposed revision of “Disaster” would also streamline the current definition, and would include the Presidential declaration of a disaster or emergency (e.g., a pandemic), as either event would trigger the provision of donated foods, in accordance with section 413 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (42 U.S.C. 5180). The proposed revision of “Situation of distress” would simply indicate that it is a natural catastrophe or other event that does not meet the definition of disaster, but that, in the determination of the distributing agency or FNS, warrants the use of donated foods to assist persons in need of food assistance as a result of such catastrophe or event. Further explanation relating to contingencies for the provision of donated food assistance in such an event is included in § 250.70 of this proposed rule. The proposed revision of “Disaster organizations” would include reference to such organizations authorized to provide assistance to survivors of a disaster or a situation of distress, rather than to disaster victims.

The proposed revision of “Distributing agency” would clarify the current definition by indicating that it is a State agency selected by the appropriate authorities in the State to distribute donated foods in the State, in accordance with 7 CFR part 250 and other Federal regulations, as applicable. We also propose to clarify that Indian Tribal Organizations may act as

distributing agencies in the administration of the Food Distribution Program on Indian Reservations (FDPIR) or other programs on, or near, Indian reservations, as currently provided for in Federal regulations. We propose to remove the inclusion of a Federal agency or private agency under the definition. A Federal agency may distribute donated foods in a State, but would not do so as a distributing agency subject to the requirements in this part. A private nonprofit agency may distribute donated foods in the State, but only as a subdistributing agency, under an agreement with the distributing agency. A private for-profit entity (i.e., commercial enterprise) may also distribute donated foods in the State, but only under contract with the distributing agency (or subdistributing agency), and subject to Federal procurement requirements. The proposed revision of “Recipient agencies” would clarify their function in providing assistance directly to needy persons. It would also clarify that local agencies in the Commodity Supplemental Food Program (CSFP), and Indian Tribal Organizations distributing donated foods to needy persons through FDPIR in a State in which the State government administers FDPIR, are considered recipient agencies in 7 CFR part 250.

The proposed revision of “Subdistributing agency” would clarify that it is a State agency, public agency, or a nonprofit organization selected by the distributing agency to perform one or more donated food activities required of the distributing agency. It would remove the current designation of State agencies, local agencies, and Indian Tribal Organizations that administer TEFAP, FDPIR, or CSFP as subdistributing agencies. State agencies and Indian Tribal Organizations administering such programs meet the definition of distributing agency. Local agencies in CSFP may function as subdistributing agencies if they receive donated foods for further distribution to other recipient agencies. However, in most cases, they function only as recipient agencies in that they provide assistance directly to needy persons.

The proposed revisions of “In-kind replacement” and “Similar replacement” would clarify that such replacement must be with the same (i.e., in-kind) or similar foods of a quality and value at least equal to the lost donated foods. The proposed revision of “Similar replacement” also clarifies that the replacement food must be from the same food category (e.g., meat, vegetable, grains) as the lost donated food. The proposed revision of

“Household” clarifies the individuals or the groups of individuals which may be considered a household in this part.

We propose to add definitions of “7 CFR Part 3052”, “Administering agency”, “Carrier”, “Consignee”, “CSFP”, “Distribution charge”, “FDPIR”, “Food recall”, “Household programs”, “In-State processor”, “Multi-food shipment”, “Out-of-condition donated foods”, “SAE funds”, “Section 27”, “SNAP”, “Split shipment”, “State”, “TEFAP”, “USDA foods”, and “Vendor”.

The addition of “Administering agency” would clarify its function in the overall administration of a food assistance program in the State, rather than just the distribution of donated foods, which is the function of the distributing agency. While the administering agency may also be the distributing agency in a State, that is not always the case. The addition of “CSFP”, “FDPIR”, “Household programs”, “SNAP”, and “TEFAP” would help the reader identify food assistance programs referred to in 7 CFR part 250. The addition of “7 CFR Part 3052” would alert the reader to the Departmental regulations relating to audits of public and nonprofit agencies receiving Federal grants. The additions of “Carrier” and “Consignee” would identify entities that transport donated foods from one location to another, and that receive shipments of donated foods, respectively. The addition of “Distribution charge” would identify the total charge or fee that the distributing agency may impose on recipient agencies in child nutrition programs to help defray costs of storing and distributing donated foods, and associated administrative costs. The addition of “Multi-food shipment” would identify shipments of donated foods from a Federal storage facility, rather than directly from a vendor.

The addition of “Food recall” would identify an action necessary to protect public health, which is further addressed in § 250.15(c) of this proposed rule. The addition of “In-State processor” would help the reader distinguish such an entity from a multi-State processor. The addition of “Out-of-condition donated foods” would identify those donated foods that are no longer fit for human consumption. The addition of “SAE funds” would identify the Federal funds provided to State agencies to pay for administrative expenses in NSLP and other child nutrition programs, in accordance with 7 CFR part 235. The addition of “Section 27” would identify the section of the Food and Nutrition Act of 2008 that authorizes funds for food purchases

in TEFAP. The addition of “Split shipment” would identify a shipment of donated food that is divided among two or more distributing or recipient agencies. The addition of “State” would streamline the current definition of “State and United States”, which we are proposing to remove. It would also exclude the Trust Territory of the Pacific Islands, which is no longer a recipient of donated foods. The addition of “USDA Foods” would alert the reader to another commonly-used term for donated foods. The addition of “Vendor” would identify a commercial enterprise from which the Department purchases food for donation.

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

In § 250.3, we propose to include the actions that may be undertaken by FNS, as the Federal administering agency for USDA food assistance programs, in ensuring the effective distribution and control of donated foods. In § 250.3(a), we propose to describe the role of FNS in administering USDA food assistance programs at the Federal level, including the distribution of donated foods to State distributing agencies for further distribution and use, in accordance with the requirements in this part.

In § 250.3(b), we propose to include the authority, in current § 250.18(a), for the Department, Comptroller General, or any of their authorized representatives, to conduct audits or inspections of any agency, or contracted commercial entity, in order to determine compliance with the requirements of this part, or with other applicable Federal regulations.

In § 250.3(c), we propose to include FNS's authority, in current § 250.20, to terminate the distribution of donated foods, or the provision of administrative funds, to a distributing agency for its failure to comply with the requirements of 7 CFR part 250, or with other applicable Federal regulations. However, we propose to clarify that FNS may also choose to suspend such activities, rather than terminate them, as provided for in 7 CFR 3016.43. We also propose to clarify that FNS must provide written notification to the distributing agency of such termination or suspension of assistance, and that such action is subject to an appeal if recourse to an appeal is provided for in Federal regulations applicable to specific programs (e.g., as provided for in FDPIR, in accordance with 7 CFR part 253). Lastly, we include the stipulation that FNS may also take other actions, as appropriate, including prosecution under applicable Federal statutes.

### 4. Administration at the State Level, § 250.4

In § 250.4, we propose to include the responsibility of the distributing agency in administering the distribution of donated foods at the State level. In § 250.4(a), we propose to require the distributing agency to ensure compliance with requirements in 7 CFR part 250, and in other Federal regulations referenced in this part. We propose to include the requirement, in current § 250.12(a), that the distributing agency enter into a written agreement with FNS (i.e., the Federal-State agreement) to receive, store, and distribute donated foods in the State. We propose to retain the current provision that makes the agreement permanent, but to permit it to be amended or terminated with the concurrence of both parties. We also indicate that FNS may terminate the Federal-State agreement for the distributing agency's failure to ensure compliance with requirements. Lastly, we propose to retain the provision, in current § 250.2(b), that the distributing agency may impose additional requirements relating to the distribution and control of donated foods in the State, as long as such requirements are not inconsistent with the requirements of 7 CFR part 250 or other Federal regulations referenced in this part. We propose to remove the provision, in current § 250.2(c), that the distributing agency must provide adequate personnel to administer the program, as the need to comply with requirements for effective administration would necessitate the employment of adequate personnel to do so.

In § 250.4(b), we propose to include the option, in current §§ 250.3 and 250.12(b), for the distributing agency to select a subdistributing agency (as defined in this proposed rule) to perform specific activities relating to donated foods for which the distributing agency is responsible, in accordance with a written agreement between the parties. We propose to retain the provision, in current § 250.10(c), that prohibits the distributing agency from delegating its overall responsibility to ensure compliance with requirements in 7 CFR part 250 to a subdistributing agency or to any other organization. We also propose to prohibit the distributing agency from delegating its responsibility to ensure compliance with the performance standards included in § 250.22 of this proposed rule.

In § 250.4(c), we propose to include the requirement, in current §§ 250.11(b) and 250.13(d)(1), that the distributing agency select recipient agencies to

receive donated foods for distribution to needy persons, or for inclusion in meals provided to needy persons. We propose to clarify that such selection must be in accordance with eligibility criteria applicable to specific programs or outlets. We also propose to retain the requirement, in current § 250.12(b), that the distributing agency enter into a written agreement with a recipient agency prior to distribution of donated foods to it. We propose to clarify that, for child nutrition programs, the distributing agency must enter into agreements with recipient agencies selected by the State administering agency (which may be different from the distributing agency) for participation in such programs, before distribution of donated foods to such recipient agencies. The distributing agency must verify such recipient agencies' participation in child nutrition programs with the State administering agency. We propose to include the requirement in current § 250.11(b) that the distributing agency consider past performance in selecting recipient agencies to receive donated foods, but specify that this requirement only applies to household programs. We propose to remove the current provision that the distributing agency ensure that welfare agencies determine the eligibility of program participants. Requirements relating to the determination by recipient agencies of participant eligibility are included in regulations appropriate to specific programs or outlets.

We also propose to include the required provisions of agreements with recipient agencies and subdistributing agencies in § 250.4(c) of this proposed rule. We propose to retain the provision, in current § 250.12(b)(1), that ensures compliance with the requirements of 7 CFR part 250, and propose to also include assurance of compliance with other Federal regulations, as referenced in 7 CFR part 250 and with the distributing agency's written agreement with FNS. We propose to include a provision for compliance with all Federal, State or local requirements relating to food safety and food recalls. In § 250.15(c) of this proposed rule, we are proposing to require distributing and recipient agencies to follow all applicable Federal, State or local requirements for donated foods subject to a food recall. As discussed in Section I of this proposed rule, in 2002, the Department, in collaboration with State agencies and school food authorities, developed procedures and instructions for responding to donated foods subject to a food recall. These procedures and

instructions are provided to assist distributing and recipient agencies in ensuring that donated foods subject to a food recall are isolated, inspected, and recovered in an expeditious manner.

In accordance with current § 250.12(c), distributing agency agreements with recipient agencies are permanent, with amendments to be made as necessary. However, the distributing agency's agreement with a subdistributing agency is limited to one year, and may be extended for two additional one-year periods. We propose to require that the duration of agreements with recipient agencies and subdistributing agencies be included in provisions of such agreements, but propose to remove the current durational requirements in order to allow distributing agencies to determine the duration that will best meet the needs of the program. The distributing agency may choose to enter into permanent agreements with recipient agencies or subdistributing agencies, unless other regulations applicable to specific programs limit such duration. In accordance with current § 250.12(c)(3), agreements may be terminated for cause by either party upon 30 days notice. We propose to revise this provision to permit termination of the agreement by the distributing agency for noncompliance with its provisions or with other applicable requirements, upon written notification to the applicable party, but without specifying a notification period. This will permit the distributing agency to take immediate action in the event that noncompliance on the part of a recipient agency or subdistributing agency would result in interruption of services to program participants or other serious program disruptions. We also propose to include a provision that permits termination of the agreement by either party, upon written notification to the other party at least 60 days prior to the effective date of termination. This change will allow distributing agencies the time needed to secure new contracts, alter distribution schedules, and move existing inventories, as necessary, without negatively impacting program operations.

We propose to remove agreement provisions in current § 250.12(b) that specifically address the responsibility for donated food losses and claims against other parties. Responsibility of each party in such instance is provided for in 7 CFR part 250 and FNS instructions and guidance, and the agreement must provide for adherence to all such requirements. Lastly, we propose to remove the requirement, in current § 250.11(a), that the distributing

agency verify registration of recipient agencies to participate in the National Commodity Processing Program, as this program is no longer active.

Recipients of Federal grants must ensure compliance with Departmental procurement requirements in 7 CFR parts 3016 or 3019, as applicable, in obtaining the services of a commercial enterprise to conduct activities under the grant. In § 250.4(d), we propose to clarify that such procurement requirements are applicable to distributing and recipient agencies in obtaining such services. We also propose to indicate that such procurement must also ensure compliance with other applicable Departmental requirements—e.g., a school food authority must ensure compliance with requirements in 7 CFR part 210, and in Subpart D of 7 CFR part 250, in obtaining the services of a food service management company to manage the school food service.

#### 5. Civil Rights, § 250.5

In § 250.5, we propose to include civil rights requirements. In accordance with current § 250.21, distributing, subdistributing, and recipient agencies must comply with the Department's regulations pertaining to nondiscrimination, as well as with FNS civil rights instructions. Such regulations and instructions ensure that no person is discriminated against in the receipt or distribution of donated foods. We propose to include such requirements in § 250.5.

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

We propose to completely revise current Subpart B of 7 CFR part 250 to more clearly present the specific requirements in the ordering and delivery of donated foods, the distribution of donated foods to recipient agencies, and the control of donated foods at the distributing and recipient agency levels. To this end, we propose to restructure this subpart into 13 new sections, and to change the heading to *Delivery, Distribution, and Control of Donated Foods, with new sections as described in the following paragraphs*.

#### 1. Availability and Ordering of Donated Foods, § 250.10

In § 250.10, we propose to include requirements to ensure that recipient agencies may order donated foods that are most useful to them, and that may be utilized efficiently and without waste. We also propose to assure that recipient agencies have the information necessary to order and utilize such

foods effectively. FNS offers a wide variety of donated foods and continually updates the foods offered to ensure that distributing and recipient agencies are able to order the products which will best meet the needs of their programs. As new foods become available, and as needs of an individual program or recipient agency change, it is important that distributing agencies facilitate ordering and use of the foods which will be most advantageous to recipient agencies. In § 250.10(a), we propose to require the distributing agency to utilize a request-driven ordering system in submitting orders for donated foods to FNS, which must provide recipient agencies the opportunity to provide input at least annually in determining the donated foods from the full list that are made available to them for ordering. We propose to require that the distributing agency use the input provided to ensure that the types and forms of donated foods that recipient agencies may best utilize are made available to them for ordering. FNS has developed guidance to assist distributing agencies in implementing a request-driven ordering system that meets the requirements of this section. Lastly, we propose to include the requirement, in current § 250.13(a), that the distributing agency ensure donated foods are ordered and distributed in quantities that may be utilized efficiently and without waste. However, we propose to remove the specific stipulation, in current § 250.13(d)(2), that Section 416 bonus foods may not be distributed to recipient agencies if normal food expenditures would be reduced. The provision of donated foods is meant, in part, to assist recipient agencies in meeting their food assistance needs in a cost-effective manner.

In § 250.10(b), we propose to require the distributing agency to ensure that recipient agencies have information on the types and quantities of donated foods that may be ordered, donated food specifications and nutritional value, and procedures for the disposition of donated foods that are out-of-condition or that are subject to a food recall.

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

In § 250.11, we propose to include requirements for the receipt of donated food shipments from USDA vendors or from a Federal storage facility, and the conditions for the replacement of donated foods that have been delivered unsafe or out-of-condition by such entities. In § 250.11(a), we propose to indicate that the Department arranges for the delivery of donated foods from

vendors or Federal storage facilities to distributing or recipient agencies or other entities designated by such agencies (i.e., the consignee). However, we propose to remove the provision, in current § 250.13(a), that refers to the Department's responsibility to conform to scheduled delivery periods. While the Department strives to ensure timely deliveries to distributing and recipient agencies, such deliveries are subject to vendor and storage facility contracts and performance.

In § 250.11(b), we propose to require that the distributing or recipient agency, or other consignee, comply with all applicable Federal requirements in the receipt of donated food shipments. Procedures are contained in FNS Instruction 709–5, *Shipment and Receipt of Donated Foods*, which include those for donated foods that have been delivered out-of-condition. We also propose to require that the distributing or recipient agency, or other consignee, provide notification of receipt of donated food shipments to FNS through electronic means, and retain an electronic record of receipt of all donated food shipments. Implementation of an electronic donated foods ordering system has allowed distributing or recipient agencies to notify FNS of receipt of donated foods more efficiently than through previous ordering systems, resulting in faster payment for vendors, and more efficient tracking of donated foods, which is important in the event of food recalls or product complaint investigations.

In § 250.11(c), we propose to include requirements for the replacement of donated foods that are delivered out-of-condition by the vendor. In accordance with current § 250.13(g), the Department arranges for vendor replacement of donated foods that are delivered out-of-condition. Vendor responsibility for replacement of such foods may extend up to six months after their delivery, if there is documentation indicating that the foods were out-of-condition at the time of delivery. We propose to retain the current requirement for vendor replacement of donated foods that are delivered out-of-condition. However, we propose to require that vendor responsibility for such replacement extend up until the time of expiration of the product use-by or best-if-used-by date or, if no such date is included on the product label, until expiration of the vendor warranty period. The warranty period is the minimum acceptable shelf life established in the USDA contract with the vendor. In all cases, responsibility for such replacement is contingent on determination that the

foods were out-of-condition at the time of delivery. The proposed time periods would be more practical than the current ones, as they bear a closer relationship to the actual shelf life of the foods.

In accordance with current § 250.13(g)(3), the vendor must provide for in-kind replacement of donated foods, unless FNS approves replacement with another type of food in the same food category (i.e., similar replacement). We propose to retain this requirement, and to indicate that the terms in-kind and similar replacement are defined in § 250.2 of this proposed rule. In accordance with current § 250.13(g), if physical replacement of donated foods would not be cost-effective or efficient, FNS may approve payment by the vendor to the distributing or recipient agency, or may credit the distributing agency's entitlement or assistance level. We propose to retain these options in § 250.11(c).

In § 250.11(d), we propose to include the information, in current § 250.13(b), that the Department is responsible for payment of the cost of delivering donated foods from vendors or Federal storage facilities to consignees, as well as any processing or handling costs incurred up to the time of delivery, as is deemed in the best interest of the Department. In accordance with current § 250.15(d), the distributing agency is responsible for payment of any charges accruing as a result of a delay in unloading a donated food shipment after arrival at the designated location, unless the Department is responsible for such delay. We propose to retain such obligation, but to clarify that the distributing agency, recipient agency, or other consignee, as appropriate, is responsible for the payment of any delivery charges that accrue as a result of such consignee's failure to comply with procedures in FNS instructions. We propose to include the failure to provide for the unloading of a shipment of donated foods within a designated time period as an example of such noncompliance.

In § 250.11(e), we propose to include the provisions, in current § 250.13(c), relating to transfer of title to donated foods. However, we propose to clarify that title transfers to the distributing or recipient agency, as appropriate (i.e., whichever agency receives the donated food shipment). We also propose to clarify that, notwithstanding transfer of title, distributing and recipient agencies must ensure compliance with the requirements of 7 CFR part 250 in the control and use of donated foods.

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

In § 250.12, we propose to describe the requirements for the storage and management of donated food inventories at storage facilities used by the distributing agency or subdistributing agency, which may include commercial storage facilities under contract with either the distributing or the subdistributing agency. In § 250.12(a), we propose to essentially retain the requirements in current § 250.14(b), which require that distributing agency facilities for the storage and control of donated foods protect against theft, spoilage, damage, or other loss, and obtain the required Federal, State, or local health inspections. However, we propose to revise this latter provision to require that the distributing agency ensure that storage facilities comply with all Federal, State, or local requirements relating to food safety and health, as applicable, and obtain all required health inspections.

In § 250.12(b), we propose to include the requirement, in current § 250.14(b), that the distributing agency ensure that donated foods at any storage facility used by the distributing or subdistributing agency are stored in a manner that permits them to be distinguished from other foods, and must ensure that a separate inventory record of such donated foods is maintained. Such requirements ensure distribution of donated foods to the appropriate recipient agencies. We also propose to require that the distributing agency's system of inventory management ensure that donated foods are distributed in a timely manner and in optimal condition. FNS offers guidance that includes further direction on effective inventory management practices and the need to consider product dates in distribution of donated foods. We propose to retain the requirement, in current § 250.14(e), that the distributing agency conduct a physical review of such donated food inventories, and reconcile physical and book inventories, on an annual basis. We propose to include the requirement in current § 250.15(c) that the distributing agency report donated food losses to FNS, and ensure restitution for such losses. FNS provides guidance for complying with these requirements in FNS Instruction 410–1, *Claims for Losses of Donated Foods and Related Administrative Losses—Procedures for the State Distributing Agency*, and in FNS Instruction 420–1, *Managing Agency Debts*.

In § 250.12(c), we propose to include the limitations on the amount of donated food inventories on-hand. In accordance with current § 250.14(f)(2), donated food inventories at the distributing agency level may not exceed a six-month supply, unless justification is submitted, and FNS approval obtained, to maintain larger inventories. The inventory amount must be based on the amount of food that the distributing agency can reasonably utilize for the six-month period. We propose to retain the current inventory limitation for donated foods received in NSLP or other child nutrition programs, and in TEFAP. However, for donated foods received in CSFP or FDPIR, which offer defined food packages, we propose to limit inventory on-hand for each food category to an amount needed for a three-month period. The more restrictive inventory amounts would allow for more efficient use of limited program resources, and permit FNS to provide, to the greatest extent practical within available resources, a full variety of foods needed to meet monthly food package benefit levels in CSFP and FDPIR. In addition, implementation of more frequent deliveries in recent years has allowed distributing agencies in CSFP and FDPIR to more effectively manage donated food inventories. We propose to retain the option for the distributing agency to request FNS approval to maintain donated food inventories in excess of the established limits.

In § 250.12(d), we propose to require that the distributing agency obtain insurance to protect the value of donated food inventories at its storage facilities. Many distributing agencies currently have such protection, which better ensures that restitution can be made for donated food losses, in the event of a disaster or management error, and that recipients continue to receive program benefits. We also propose to require the distributing agency to ensure that subdistributing agencies, and recipient agencies in household programs that have agreements with the distributing agency or subdistributing agency, obtain such insurance for donated foods at their storage facilities. Lastly, we propose to require the distributing agency to ensure that commercial storage facilities under contract with the distributing agency, the subdistributing agency, or with the recipient agencies cited above, obtain insurance to protect the value of donated food inventories. We propose to require that, in all cases, the amount of the required insurance be at least equal to the average monthly value of donated

food inventories at such facilities in the previous fiscal year. These minimum insurance requirements will help ensure that distributing agencies and recipient agencies receive the full benefit of the donated foods entitled to them in the event that donated foods are lost or damaged. The above entities are those that are most likely to have large inventories of donated foods, as well as the means to obtain protection for such foods. Smaller recipient agencies that do not have direct agreements with a distributing or subdistributing agency, but provide food packages directly to recipients, such as food pantries or community action agencies, would not be required to obtain insurance.

In § 250.12(e), we propose to include requirements for the transfer of donated foods from the distributing agency to another distributing agency or to another program. In accordance with current § 250.13(h), the distributing agency must request FNS approval to “redonate” donated foods that it cannot efficiently utilize. Additionally, current § 250.13(a)(1) includes requirements for the “transfer” of donated foods from one recipient agency to another. In practice, the terms “redonation” and “transfer” are often used interchangeably. To clarify, we propose to use the term “transfer” to refer to any redistribution of donated foods from one agency to another, or from one program to another, at the distributing or recipient agency level, and to cease using the term “redonation”. We propose to clarify that the distributing agency may transfer donated foods from its inventories to another distributing agency or to another program, in order to ensure that such foods may be utilized in a timely manner and while in optimal condition. We propose to permit the distributing agency to transfer donated foods to another agency within the same program without FNS approval. However, we propose to require that the distributing agency request FNS approval to transfer donated foods from one program to another—e.g., from NSLP to TEFAP—whether the transfer is in the same or a different State, as these foods would be used in a program other than the program for which they were originally intended. We propose to stipulate that FNS may also require a distributing agency to transfer donated foods at the distributing agency’s storage facilities or at a processor’s facility, if inventories of donated foods are excessive or may not be efficiently utilized, so that such foods may be used to the benefit of recipients receiving donated foods through another agency or program.

We propose to require the distributing agency to obtain an inspection of donated foods by State or local health officials before transferring them, if there is a question of food safety, or at the direction of FNS, to ensure that only foods that are still safe and not out-of-condition are transferred. We also propose to retain the requirement in current § 250.15(e) that the distributing agency is responsible for meeting any transportation or inspection costs in transferring donated foods, unless the transfer is clearly not the result of negligence or improper action of the distributing agency. Lastly, we propose to require that the distributing agency maintain a record of all transfers and inspections of donated foods from its inventories. Transfer of donated foods at the recipient agency level is discussed in section II.B.5, *Storage and Inventory Management at the Recipient Agency Level*, § 250.14, of this preamble.

In § 250.12(f), we propose to indicate that the distributing agency may obtain the services of a commercial storage facility to store and distribute donated foods, or a carrier to transport such foods, but must ensure compliance with Departmental procurement requirements in 7 CFR part 3016. We propose to retain the requirement, in current § 250.14(d), that the distributing agency also enter into a written contract with such commercial storage facility, and that such contract not exceed five years in duration, including option years for extension or renewal. Because carriers assume similar responsibility for donated foods under their control, we propose to include the same requirements in contracting with a carrier. We also propose to retain the required contract provisions in current § 250.14(d) relating to safe and secure storage conditions, inventory management, insurance, reviews, contract duration and extension, and termination for noncompliance. We propose to add provisions to assure compliance with Federal, State or local requirements relative to food safety and health. We also propose to add a provision to assure that donated foods will be distributed to eligible recipient agencies in a timely manner and in optimal condition, and in amounts for which such recipient agencies are eligible. Lastly, we propose to revise the current provision providing for termination of the contract by either party (except as a result of noncompliance with regulatory provisions) by requiring notification of such termination at least 60 days in advance, rather than the current 30 days. This change will allow

distributing agencies the time needed to secure new contracts, alter distribution schedules, and move existing inventories, as necessary, without negatively impacting program operations. We propose to require the same provisions in a contract with a carrier, as such provisions are necessary to ensure the safe and effective transport of foods from one location to another.

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

In § 250.13, we propose to include requirements to ensure the distribution of donated foods to recipient agencies in the most efficient and cost-effective manner. In § 250.13(a), we propose to retain the requirements, in current §§ 250.14(a) and 250.24(e), that the distributing agency distribute donated foods to recipient agencies in the most efficient and cost-effective manner, and that such distribution is responsive to the needs of recipient agencies, as feasible. In meeting this requirement, we propose to require the distributing agency, to the extent practical, to provide for shipment of donated foods directly from the USDA vendor to the recipient agency, or (at the recipient agency's request) directly to a processor for processing into end products. We also propose to require that the distributing agency provide for split shipments between two or more recipient agencies, if such agencies are unable to accept a full truckload. Split shipments allow recipient agencies, particularly small recipient agencies, to receive donated foods in the forms and quantities that are most useful to them and on a schedule that will permit them to store and distribute the foods in the most efficient and cost-effective manner possible.

In § 250.13(b), we propose to require that, if the distributing agency determines that direct shipments are impractical (even after taking into account split shipments), it must provide for storage of donated foods at the distributing agency level, and subsequent distribution to recipient agencies. Such storage and distribution must be provided in the most efficient and cost-effective manner possible in order to minimize the cost to the recipient agency of receiving donated foods. We propose to clarify that the distributing agency must use State Administrative Expense (SAE) funds, as available, to meet costs of storing and distributing donated foods, or related administrative costs, for school food authorities or other recipient agencies in child nutrition programs, or must use other Federal or State administrative funds received for such purpose. SAE

funds are provided to State agencies administering NSLP or other child nutrition programs, in accordance with 7 CFR part 235, and distributing agencies receive SAE funds specifically to cover the costs of storing and distributing donated foods and related administrative costs for such programs. However, as SAE funds, or State funds, are limited, distributing agencies may also assess fees on school food authorities to help defray such costs. Under 7 CFR part 250, such fees are included under the term "Distribution charge".

We propose to retain the provision, in current § 250.15(a)(1), that permits the distributing agency to impose a distribution charge on school food authorities, but with the clarification that such charge may be imposed only if SAE funds, or other funds available from State or local sources, are insufficient to fully meet the costs of storing donated foods and distributing them to such agencies, and of administrative costs relating to such activities. We also propose to clarify that the distribution charge may cover only allowable costs, in accordance with 7 CFR part 3016 and with OMB guidance. The Departmental and OMB guidance provide for allowable costs for Federal grant expenditures. Lastly, we propose to require that the distributing agency maintain a record of costs incurred in storing and distributing donated foods and related administrative costs, and the source of funds used to pay such costs.

We propose to retain the requirement in current § 250.14 that the distributing agency use a commercial storage facility to store and distribute donated foods, in accordance with requirements in § 250.12(f) of this proposed rule, if a commercial system is determined to be the most efficient and cost-effective. However, we propose to remove the requirement, in current § 250.14(a)(2), that a distributing agency utilizing a noncommercial system of storage and distribution evaluate such system by comparing its costs with the cost of obtaining a commercial system, at 3-year intervals, and submit such cost evaluation to FNS. State distributing agencies performed such an evaluation and cost comparison, as directed in the Commodity Distribution Reform Act and, as a result, either changed to a commercially contracted distribution system, or determined that other storage and distribution options were more cost-effective. Subsequent periodic evaluations have been required, however, only through the regulations. We have determined that the use of such evaluations is no longer necessary

for Program integrity. Consequently, we also propose to remove the requirement, in current § 250.14(a)(5), that the distributing agency request a waiver to continue using a noncommercial system.

In § 250.13(c), we propose to retain the requirement, in current § 250.14(a)(7), that the distributing agency obtain FNS approval to increase the distribution charge beyond normal inflationary adjustments or to change the level of service provided under a distribution charge. We also propose to require FNS approval of the amount of a newly established distribution charge (some States do not currently impose a distribution charge on school food authorities). We propose to clarify that such requirement also applies to any charge imposed on school food authorities by a distributing agency's commercially contracted storage facility. We propose to retain the current requirement that such request be submitted for approval at least 90 days in advance of its projected implementation. We also propose to retain the requirement, in current § 250.15(a)(1), that the request include justification for the new or increased amount, and the specific costs to be covered by the distribution charge. However, we propose to add a requirement that the request include justification for any change in the level of service provided under an existing distribution charge. Distributing agencies may use SAE funds to meet the costs of storing and distributing donated foods, and other Federal or State funds may also be available for this purpose. The use of such funds should allow distributing agencies to provide for storage and distribution costs of donated foods with minimal, if any, charge to recipient agencies. Therefore, any new or increased charge, or change in the level of services associated with a charge, must be necessary to provide recipient agencies with donated foods in the most efficient and cost-effective manner possible, as determined by FNS.

In § 250.13(d), we propose to indicate that FNS may disapprove the distributing agency's proposed new distribution charge or changes to an existing distribution charge, if FNS determines that such amount would not provide for the most cost-effective distribution of donated foods, or would otherwise impact recipient agencies negatively. We propose to clarify that, in such case, the distributing agency would be required to adjust the distribution charge or the level of service provided under the distribution charge, or to consider other storage and distribution options. We also propose to

retain the provision, in current § 250.14(a)(6)(ii), that FNS may, at any time, require the distributing agency to submit documentation to justify the cost-effectiveness of its distribution system, and to re-evaluate such system, if it is determined to be out of compliance with the requirements in this section, as proposed. We propose to remove the requirement, in current § 250.15(a), that the distributing agency submit to FNS a description of its system for assessing its distribution charge every three years. However, FNS may require the distributing agency to submit information relating to its assessment of the distribution charge, or to any other aspect of its distribution system, in accordance with § 250.18(d) of this proposed rule.

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

In § 250.14, we propose to include requirements for the storage and management of donated foods at the recipient agency level, including commercial storage facilities or other entities under contract with the recipient agency. In § 250.14(a), we propose to require recipient agencies to meet the same requirements for food safety and health at their storage facilities as those proposed for the distributing agency in § 250.12(a) of this rule.

In § 250.14(b), we propose to require that recipient agencies in household programs store donated foods in a manner that permits them to be distinguished from other foods at their storage facilities, and to maintain a separate inventory record of donated foods. Recipient agencies in household programs are currently subject to the requirement to maintain storage and inventories of donated foods separately from other foods in accordance with their designation as “subdistributing agencies”, in current § 250.3. However, as described in section II.A.2 of the preamble, we are proposing to remove the current designation of such recipient agencies as subdistributing agencies. We also propose to require that such recipient agencies’ system of inventory management ensure that donated foods are distributed to recipients in a timely manner that permits use of such foods while still in optimal condition. Lastly, we propose to clarify that recipient agencies in household programs must notify the distributing agency of any donated food losses, and take further actions with respect to such donated foods, as directed by the distributing agency.

In § 250.14(c), we propose to clarify the requirement in current § 250.59(c)

that recipient agencies in child nutrition programs, and those receiving donated foods as charitable institutions (in accordance with current § 250.67), are not required to store donated foods in a manner that distinguishes them from purchased foods or other foods, or to maintain a separate inventory record of donated foods. Such recipient agencies may utilize single inventory management, in which donated foods are commingled with purchased foods or other foods in storage, and a single inventory record is maintained. Under single inventory management, all foods are subject to the same safeguards regarding food safety and health. As a result, we propose to clarify that all recipient agencies in child nutrition programs, and those receiving donated foods as charitable institutions, are not required to separately monitor and report donated food use, distribution, or loss to the distributing agency, unless there is evidence indicating that donated food loss has occurred as a result of theft or fraud. This is true regardless of the inventory management system actually utilized by such recipient agencies.

In § 250.14(d), we propose to include requirements in current § 250.13(a)(1)(iii) for the transfer of donated foods from one recipient agency to another recipient agency and to clarify the types of transfers to which these requirements apply. We propose to clarify that a recipient agency operating a household program request approval from the distributing agency to transfer donated foods to another recipient agency in the same program. We propose to clarify that transfer of donated foods from such recipient agency to a recipient agency in another program receive FNS approval (i.e., through the distributing agency). We propose to indicate that a recipient agency operating a child nutrition program, or one receiving donated foods as a charitable institution (in accordance with current § 250.67), may transfer donated foods to another recipient agency or charitable organization without prior approval from the distributing agency or FNS. This is in accordance with single inventory management, in which donated foods are commingled with other foods, and often may not be distinguished from them.

In § 250.14(e), we propose to indicate that recipient agencies may obtain the services of a commercial storage facility to store and distribute donated foods, but must ensure compliance with Departmental procurement requirements in 7 CFR parts 3016 or 3019, as applicable. We also propose to

clarify that recipient agencies must ensure that such commercial storage facilities comply with the applicable requirements in 7 CFR part 250 for the storage and inventory management of donated foods.

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

In § 250.15, we propose to include requirements for the disposition of donated foods that are out-of-condition, or that are subject to a food recall, and requirements for the resolution of recipient complaints relating to donated foods. In § 250.15(a), we propose to require the distributing agency to ensure that out-of-condition donated foods at its storage facilities are destroyed, or otherwise disposed of, in accordance with State or local requirements pertaining to food safety and health. We propose to retain the contingency for sale of out-of-condition donated foods (e.g., to a salvage company) in accordance with current § 250.13(f), if such sale is permitted by State laws or regulations, rather than contingent on FNS approval. We also propose to require the distributing agency to obtain an inspection of donated foods by State or local health authorities to determine their safety and condition, as necessary, or as directed by FNS.

In § 250.15(b), we propose to require that recipient agencies in household programs report out-of-condition donated foods at their storage facilities to the distributing agency, and ensure that such donated foods are destroyed, or otherwise disposed of, in accordance with State or local requirements pertaining to food safety and health. We propose to require the distributing agency to ensure that such recipient agencies obtain an inspection of donated foods by State or local health authorities to determine their safety and condition, as necessary, or as directed by FNS. We propose to indicate that, for recipient agencies in child nutrition programs, and those receiving donated foods as charitable institutions (in accordance with § 250.67), donated foods must be treated as other foods when safety is in question. Consequently, such recipient agencies must comply with State or local requirements in determining the safety of donated foods and other foods, and in their destruction or other disposition, but are not required to report such actions to the distributing agency.

In § 250.15(c), we propose to require that the distributing agency or recipient agency, as appropriate, follow all applicable Federal, State or local requirements for donated foods subject to a food recall. Departmental guidance

is also provided to assist distributing and recipient agencies in ensuring that donated foods subject to a food recall are isolated, inspected, and recovered in an expeditious manner, and that the appropriate parties are reimbursed for costs associated with such actions.

In § 250.15(d), we propose to indicate that the distributing agency must inform recipient agencies of the preferred method for receiving donated food complaints and resolve complaints received from recipients, recipient agencies, or other entities relating to donated foods in an expeditious manner, and in accordance with applicable requirements in 7 CFR part 250. We propose to require the distributing agency to submit any complaints regarding product quality or specifications, or suggested products improvements, to FNS through the established FNS donated foods complaint system for tracking and evaluation purposes. If resolution of the complaint at the State level is not feasible, we propose to indicate that the distributing agency must provide information regarding the complaint to FNS for resolution. Guidance on meeting these requirements is included on the FNS Web site. We also propose to prohibit the distributing agency from disposing of any donated food that is the subject of a complaint prior to guidance and authorization from FNS. Lastly, we propose to include the requirement, in current § 250.22, that the distributing agency maintain a record of its investigations and other actions with respect to any complaints relating to donated foods. Resolving and tracking product complaints, either at the Federal or State level, is critical to ensuring that recipient agencies are receiving replacement products, as appropriate, and that donated foods meet the standards established by the Department.

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

In § 250.16, we propose to include requirements to ensure that restitution is made for donated food losses, including claims against parties responsible for such losses. In § 250.16(a), we propose to require that the distributing agency ensure that restitution is made for donated food losses, and for the loss or improper use of funds provided for, or obtained incidental to donated food distribution (e.g., in salvage of donated foods or sale of pallets). We propose to clarify that, in making restitution for losses, the distributing agency must identify, and seek restitution from, parties responsible for the loss, and implement

corrective actions to prevent future losses. Guidance for distributing agencies is included in FNS Instruction 410–1, *Claims for Losses of Donated Foods and Related Administrative Losses—Procedures for the State Distributing Agency*.

We propose to remove the actions required of the distributing agency in making restitution for donated food losses in current § 250.15(c). We also propose to remove the provision, in current § 250.15(c)(2), that inventory loss of a donated food that does not exceed one percent of the total inventory of that food may, under certain conditions, be exempt from recovery through claims. Although some losses that meet such conditions may be exempted with FNS approval, as indicated above, a blanket exemption for inventory loss does not encourage efficient inventory management. Current provisions in § 250.15(c)(2) also exempt losses in amounts that do not exceed thresholds established in State laws or regulations. We propose to remove this exemption as well, as all distributing agencies should be held to the same standards with respect to accountability for Federal resources provided.

In § 250.16(b), we propose to clarify that FNS may initiate and pursue a claim against the distributing agency or other entities for the loss of donated foods, and for the loss or improper use of funds provided, or obtained incidental to donated food distribution. We also propose to clarify that FNS may initiate and pursue a claim if the distributing agency fails to take required claim actions against other parties. These requirements incorporate requirements in current § 250.15(c). FNS guidance on taking action on a claim is included in FNS Instruction 420–1, *Managing Agency Debts*. Lastly, we propose to clarify that FNS may, on behalf of the Department, compromise, forgive, suspend, or waive a claim. Such actions would also be taken in accordance with FNS Instruction 420–1.

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

In § 250.17, we propose to include requirements for the use of funds obtained incidental to donated food distribution—e.g., through the distribution charge, the salvage of out-of-condition donated foods, the sale of pallets used for donated foods, or rebates from processors for the value of donated foods processed into end products. In § 250.17(a), we propose to clarify requirements in current § 250.15(f)(2) relating to the use of funds obtained from the distribution charge imposed on recipient agencies in child

nutrition programs, in accordance with § 250.13(b) of this proposed rule. We propose to require that such funds be used to meet costs of storing and distributing donated foods or related administrative costs, consistent with limitations on the use of Federal grant funds in 7 CFR part 3016, and with OMB guidance. We also propose to specifically prohibit the use of such funds to purchase foods to replace donated food losses or to pay claims resulting from donated food losses.

We also propose to include in § 250.17(a) the requirement, in current § 250.15(f)(3), that the distributing agency maintain funds obtained from the distribution charge in an operating account, separate from other funds, as well as the current limitation on the amount of funds that may be maintained in such account. We also propose to retain the current requirement that, unless FNS approval is requested and granted, funds in excess of this amount must be used to reduce the distribution charge imposed on recipient agencies, or to provide appropriate reimbursement to such agencies. However, we propose to remove the contingency in current § 250.15(f)(2) that such funds be returned to the Department.

In § 250.17(b), we propose to require that school food authorities use funds obtained from processors in the processing of donated foods into end products (e.g., through rebates for the value of such processed donated foods, in accordance with Subpart C of 7 CFR part 250), or from food service management companies in crediting for the value of donated foods (in accordance with Subpart D of 7 CFR part 250), in support of the nonprofit school food service. This aligns 7 CFR part 250 with § 210.14 which provides that school food authorities must use revenues received in the operation of the nonprofit school food service, as defined in § 210.2 and in § 250.2 of this proposed rule, only for that food service. We propose to require that other recipient agencies use such funds to meet the costs of storing and distributing donated foods or related administrative costs, as proposed in § 250.17(c) of this rule.

In § 250.17(c), we propose to clarify requirements in current §§ 250.15(f)(1) and (f)(2) relating to funds collected in claims for donated food losses, and funds obtained from other sources incidental to donated food distribution. Donated foods are made available to distributing agencies to support the participants of each respective program. Any loss of donated foods means fewer foods will be available through the

affected program unless replacement foods are purchased. Therefore, we propose to require that funds collected in payment of claims for donated food losses be used to purchase replacement foods for use in the program in which the losses occurred unless the distributing agencies receives FNS approval to use the funds for other program purposes. Guidance for use of funds collected in payment of a claim are included in FNS Instruction 410–1, *Claims for Losses of Donated Foods and Related Administrative Losses—Procedures for the State Distributing Agency*, and in FNS Instruction 420–1, *Managing Agency Debts*. We propose to require that funds obtained from other sources, except as otherwise indicated in this section, be used to pay administrative costs of storing and distributing donated foods, consistent with the limitations on the use of funds provided under a Federal grant in 7 CFR parts 3016 or 3019, as applicable, and OMB guidance, as applicable. Using such funds in this manner will permit distributing agencies to reduce or eliminate the charges imposed on recipient agencies for storage, distribution and administration related to donated foods. Sources of such funds may include, for example, the sale of donated food containers or pallets, the salvage of out-of-condition donated foods, or payments by processors for failure to meet processing yields. The Departmental and OMB regulations provide guidance for allowable costs in Federal grant expenditures for State and local government entities, and for private nonprofit organizations. We propose to remove the contingency, in current § 250.15(f)(2), that such funds be returned to the Department.

We propose to retain the requirement, in current § 250.15(f)(3), that the distributing agency maintain funds obtained from claims or other sources indicated in this section in a separate salvage account. However, we propose to rename this account the “donated food account.” We also propose to revise upward the threshold for which deposits into, and expenditures from, such account must receive FNS approval. We propose to require that the distributing agency receive FNS approval for a deposit into, or expenditure from, the donated food account in excess of \$25,000, instead of the \$2,500 threshold in current § 250.15(f)(4). Regardless, such funds must be used in accordance with the requirements in proposed 250.17(c). Lastly, we propose to require that the distributing or recipient agency maintain a record of all funds obtained

and expended in accordance with this proposed § 250.17(c).

In § 250.17(d), we propose to clarify that the distributing agency is prohibited from using funds obtained incidental to donated food distribution to meet State matching requirements for other Federal grants received—e.g., for FDPIR or TEFAP. We also propose to clarify that such funds may not be used in place of State Administrative Expense (SAE) funds available to meet costs relating to storage and distribution of donated foods.

In § 250.17(e), we propose to clarify the “Buy American” requirement, in current § 250.23, for the purchase of foods with funds obtained incidental to donated food distribution. In accordance with the current requirement, recipient agencies must use Federal funds to purchase only foods that are produced, or processed, in the United States, with certain exceptions. We propose to clarify that, when funds obtained in accordance with this section, as proposed, are used to purchase foods in the commercial market, a distributing or recipient agency in the continental United States, and in Hawaii, must, to the maximum extent practical, purchase only domestic foods or food products. This clarification of the “Buy American” requirement is consistent with the requirement for school food authority purchases in § 210.21(d), and in Section 12(n) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1760). We also propose to include the definition of domestic foods or food products used in § 210.21(d). Lastly, we propose to clarify that the “Buy American” requirement is also applicable to the cash-in-lieu-of-donated foods provided to school food authorities in NSLP and to child and adult care institutions in CACFP, in accordance with §§ 250.56(e) and 250.61(c), respectively.

#### 9. Reporting Requirements, § 250.18

In § 250.18, we propose to include requirements for submission of reports relating to the distribution and control of donated foods. In § 250.18(a), we propose to retain the requirement, in current § 250.17(a), that the distributing agency submit form FNS–152, *Monthly Distribution of Donated Foods to Family Units*, to report donated food inventories and distribution in FDPIR. However, we propose to remove reference to form FNS–153, *Monthly Report of the Commodity Supplemental Food Program and Quarterly Administrative Financial Status Report*, as the requirement for submission of this report is included in 7 CFR part 247. We propose instead to indicate that

the distributing agency must submit reports included in regulations for specific food assistance programs. We also propose to indicate that such reports must be submitted in accordance with the timeframes established for each respective report, rather than include specific timeframes for submission in 7 CFR part 250.

We propose to retain the requirement, in current § 250.17(a), that the distributing agency report excessive donated food inventories in TEFAP, NSLP, and other child nutrition programs to FNS, on a semiannual basis, utilizing form FNS–155, the *Inventory Management Register*. We propose to remove the requirement, in current §§ 250.13(k) and 250.17(d), that the distributing agency report commodity acceptability information to FNS, utilizing information collected from recipient agencies in NSLP, CACFP, NSIP, CSFP, and FDPIR, and submitted on form FNS–663, the *Commodity Acceptability Report*. Technological advances, including the evolution of request-driven ordering systems, over the last several years have made the collection and reporting of such information by the distributing agency unnecessary. FNS now receives information on donated food acceptability from diverse parties on a routine basis, through electronic communication, national conferences and other meetings with program operators, as well as through periodic reviews of its donated food offerings.

In § 250.18(b), we propose to include the requirement, in current § 250.30(m), that processors submit monthly performance reports to the distributing agency to report donated food inventories, processing of donated foods, and sale and delivery of end products. However, we propose to remove the requirement that the distributing agency submit a report of processors’ inventories to the FNS Regional Office, in current § 250.17(b). Processors are required to submit monthly performance reports to FNS, eliminating the need for distributing agencies to submit such information to FNS.

In § 250.18(c), we propose to include the requirement, in §§ 250.69(f) and 250.70(f) of this proposed rule, that the distributing agency submit to FNS a report of the amounts of donated foods used in disasters and situations of distress, utilizing electronic form FNS–292A, *Report of Commodity Distribution for Disaster Relief*. This form is also used to request replacement of donated foods used in disasters and situations of distress.

In § 250.18(d), we propose to retain the requirement, in current § 250.17(e), that the distributing agency submit other information relating to the distribution of donated foods that may be requested by FNS on a periodic basis. For example, FNS may require that the distributing agency provide information relating to the distribution charge, or to support the efficiency and cost-effectiveness of its storage and distribution system, in accordance with § 250.13 of this proposed rule.

#### 10. Recordkeeping Requirements, § 250.19

In § 250.19, we propose to include recordkeeping requirements relating to the distribution and control of donated foods. In § 250.19(a), we propose to require that distributing and recipient agencies, and other entities, maintain records of agreements and contracts, reports, audits, and claim actions, funds obtained incidental to donated food distribution, and other records required in this part or in other Departmental regulations, as applicable. In addition to these requirements, we propose to require distributing agencies to keep a record of the value of donated foods received by each of its school food authorities in order to assist in monitoring distributing agency compliance with the requirement that school food authorities in NSLP are offered, at a minimum, the commodity offer value of donated foods, in accordance with § 250.58; and records to demonstrate compliance with the professional standards for State directors of distributing agencies in § 235.11(g) of the proposed rule Professional Standards for State and Local School Nutrition Programs Personnel as Required by the Healthy, Hunger-Free Kids Act of 2010 (79 FR 6503 (Feb. 4, 2014)). We also propose to require that processors maintain records documenting the sale of end products to recipient agencies, including the sale of such end products by distributors. Specific recordkeeping requirements relating to the use of donated foods in contracts with food service management companies are included in § 250.54. Lastly, we propose to include the provision, in current § 250.16(a)(6), that failure to maintain required records must be considered prima facie evidence of improper distribution or loss of donated foods and may result in a claim against the responsible party for the loss of donated foods, or may result in other sanctions or corrective actions.

We propose to remove the requirement, in current § 250.16(a)(3), that the distributing agency maintain records of refusal of donated foods by

school food authorities. In accordance with a final rule published in the **Federal Register** on August 8, 2008 at 73 FR 46169, the “offer and refusal” system of ordering donated foods was removed. We also propose to remove the requirement, in current § 250.16(a)(5), that recipient agencies maintain records of the data and method used to determine the number of eligible persons served. Recordkeeping requirements relating to the determination of eligibility, or the number of eligible persons served, are included in regulations applicable to specific programs (e.g., 7 CFR part 247 for CSFP).

In § 250.19(b), we propose to retain, without change, requirements in current § 250.16(b) relating to the length of time that records must be retained.

#### 11. Audit Requirements, § 250.20

In § 250.20, we propose to include reference to Federal audit requirements for distributing and recipient agencies, and audit requirements for processors. In § 250.20(a), we propose to reference audit requirements in 7 CFR part 3052 for State or local government agencies and nonprofit organizations that receive Federal grants, as such requirements apply to distributing and recipient agencies. In accordance with such requirements, the value of Federal grants or awards expended in a fiscal year determine if the distributing or recipient agency must obtain an audit in that year. We propose to clarify that the value of donated foods must be considered as part of the total value of the Federal grant, and to reference FNS guidance in valuing donated foods for audit purposes, and in determining if an audit is required.

In § 250.20(b), we propose to include requirements for processors to obtain an independent CPA audit to determine compliance with processing requirements for donated foods. In accordance with current § 250.18(b), multi-State processors must obtain an independent CPA audit at a frequency determined by the value of the donated foods they receive for processing in a year. Currently, a multi-State processor must obtain an independent CPA audit for any year in which it receives more than \$250,000 in donated foods; every two years, if it receives \$75,000 to \$250,000 in donated foods each year; and every three years, if it receives less than \$75,000 in donated foods each year. Such audits must be paid for by the processor.

We propose to amend the current audit requirement for multi-State processors by requiring that a multi-State processor obtain an independent

CPA audit in each of the first two years that it receives donated foods for processing, regardless of the value of donated foods received, to ensure that new processors receive appropriate oversight as they establish their processing programs. After the first two years, we propose to require a multi-State processor to obtain such an audit at a frequency determined by the average value of donated foods received for processing per year, as currently required. However, we propose to revise upward the current thresholds for determining the required frequency of such audits to reflect the much larger volume of donated foods provided to such processors for processing over the last several years. Hence, we propose to require a multi-State processor to obtain an independent CPA audit:

(1) Annually, if it receives, on average, more than \$5,000,000 in donated foods for processing per year;

(2) Every two years, if it receives, on average, between \$1,000,000 and \$5,000,000 in donated foods for processing per year; and

(3) Every three years, if it receives, on average, less than \$1,000,000 in donated foods for processing per year.

In-State processors are not currently required to obtain an independent CPA audit. In order to ensure compliance with program requirements, the distributing agency must conduct an on-site review of in-State processors at least once every two years, in accordance with current § 250.19(b)(1)(iii). However, the performance of on-site reviews is a costly and time-consuming exercise for distributing agencies, and we are proposing to remove this requirement, as discussed in section II.B.13 of the preamble. We propose, instead, to require that an in-State processor obtain an independent CPA audit to determine compliance with processing requirements for donated foods in the first year that it receives donated foods for processing. After the first year, we propose to require an in-State processor to obtain such an audit at a frequency determined by the average value of donated foods received for processing per year, using the same thresholds for determining such frequency as we are proposing for multi-State processors. Due to the lower volume of donated foods received by in-State processors, we expect that, after the first year, in-State processors would be subject to the audit requirement every three years. As currently required for multi-State processors, we propose to require that in-State processors pay the cost of the audit.

We propose to require that the donated food value utilized must be the contract value of the donated foods, as

defined in § 250.2 of this proposed rule. We also propose to clarify that audits must determine processor compliance with the requirements in this part, and must be conducted in accordance with the FNS Audit Guide for Processors. However, we propose to remove the current stipulation that FNS may require auditors to attend training sessions conducted by the Department. Although training may still be provided, FNS provides written guidance and technical assistance for auditors on an ongoing basis.

In § 250.20(c), we propose to include the actions required of processors resulting from the audits. We propose to require that in-State processors submit a copy of the audit to the distributing agency for review by December 31 of each year in which an audit is required. We propose to require the distributing agency to ensure that in-State processors provide a corrective action plan with timelines for correcting deficiencies identified in the audit, and that such deficiencies are corrected. We propose to include the requirement in current § 250.18(b) that multi-State processors submit a copy of the audit, and a corrective action plan with timelines to correct deficiencies identified in the audit, as appropriate, to FNS for review by December 31 of each year in which an audit is required. This will permit FNS and distributing agencies to review audit findings, follow up on required corrective actions, and monitor noncompliance issues for the purpose of identifying trends and implementing program improvements.

In § 250.20(d), we propose to indicate that a distributing or recipient agency is subject to sanctions for failure to obtain the required audit, or for failure to correct deficiencies identified in audits. Such sanctions may include the withholding, suspension, or termination of a Federal award. We propose to indicate that, if a processor fails to obtain the required audit, or to correct deficiencies identified in audits, a distributing or recipient agency may terminate the processing contract or agreement, and may not extend or renew such a contract or agreement. We also propose to include the stipulation, in current § 250.18(b)(5), that FNS may prohibit the further distribution of donated foods to a processor for its failure to comply with audit requirements.

#### 12. Distributing Agency Reviews, § 250.21

In § 250.21, we propose to include the requirements for the distributing agency to review subdistributing agencies, recipient agencies, and other entities to

ensure compliance with requirements relating to the distribution and control of donated foods. In § 250.21(a), we propose to clarify and streamline review requirements in current § 250.19. We propose to require that the distributing agency ensure compliance with requirements in 7 CFR part 250, and in other Federal regulations as applicable, through its review of required reports, and through on-site reviews of the recipient agencies and other entities indicated in § 250.21(b) of this proposed rule. The required reports for review may include audit reports, processors' monthly performance reports, and inventory reports submitted in CSFP and FDPIR. We also propose to clarify that the distributing agency is not required to review school food authorities and other recipient agencies in child nutrition programs. The State administering agency (which may be different from the distributing agency) is responsible for the review of such recipient agencies in accordance with review requirements of Part 210. Lastly, we propose to remove specific review procedures included in current § 250.19(b)(1), such as the review of recipient agency eligibility and civil rights requirements, as they do not apply to all programs, and are included in Federal regulations for specific programs in which they do apply.

We propose to include current on-site review requirements of charitable institutions, and of storage facilities at the distributing agency level, in § 250.21(b), and to add a reference to the distributing agency's requirement to perform on-site reviews of subdistributing and recipient agencies in CSFP, TEFAP, and FDPIR, in accordance with 7 CFR parts 247, 251, and 253, respectively. However, we propose to remove the requirement, in current § 250.19(b)(1)(iii), that the distributing agency perform on-site reviews of in-State processors. The on-site review would be replaced by review of the audits required of such processors, in accordance with § 250.20 of this proposed rule.

We propose to remove the requirement in current § 250.19(b)(2), that the distributing agency develop a system to verify sales of end products when a processor delivers end products to a distributor for sale to recipient agencies under a discount method of sales. Processors receive notification of such end product sales from the distributor, usually by electronic means, and the processor must maintain records of such sales, in accordance with current § 250.30(k)(2), and with § 250.19(a) of this proposed rule. Such records would be reviewed by auditors,

in conducting the audits required in accordance with § 250.20(b) of this proposed rule. Consequently, all end product sales may be verified through the review of audit reports, as well as through the distributing agency's review of the processor's monthly performance reports. The distributing agency may also require, at its option, that the processor submit documentation to support information included in the processor's performance report, including sales of end products to recipient agencies. The State administering agency may also review school food authorities' records, in order to ensure receipt of the requisite quantity of end products, in accordance with the administrative review required in 7 CFR part 210.

In § 250.21(c), we propose to include the requirement, in current § 250.19(b)(3) and (b)(4), that the distributing agency report deficiencies identified in its review to recipient agencies or other entities, recommend corrective actions, and ensure that such actions are completed. We propose to remove the requirement in current § 250.19(b)(6) that the distributing agency require that subdistributing agencies monitor and review their own operations. Such responsibility must reside with the distributing agency, in accordance with § 250.4(a) of this proposed rule.

#### 13. Distributing Agency Performance Standards, § 250.22

In § 250.22, we propose to include the performance standards that the distributing agency must meet, most of which are included in current § 250.24. Performance standards are meant to highlight the most important areas of oversight for distributing agencies relating to donated foods; however, the current standards cover a wide area. In § 250.22(a), we propose to revise the performance standards to include only those relating to oversight of requirements in the ordering, distribution, processing, and control of donated foods, as such requirements are proposed in this rule. We propose to revise the performance standard relating to the provision for processing of donated foods to clarify that the distributing agency must provide for such processing, at the request of school food authorities, in accordance with the processing requirements in Subpart C of 7 CFR part 250. Most distributing agencies already provide for processing of donated foods into end products, which permit school food authorities to more easily prepare and serve meals in NSLP. We propose to include clarification that some performance

standards are applicable only to distributing agencies that distribute donated foods in NSLP or other child nutrition programs. We propose an additional performance standard, ensuring distributing agencies provide recipient agencies information regarding the preferred method for the submission of donated food complaints to the distributing agency and that distributing agencies act expeditiously to resolve submitted complaints. Lastly, we propose to clarify that the identification of specific performance standards does not relieve the distributing agency of the responsibility to meet other requirements in 7 CFR part 250.

In § 250.22(b), we propose to include the requirement, in current § 250.19(c), that the distributing agency submit a corrective action plan to FNS if it is found to be substantially out of compliance with the performance standards. We propose to retain the current requirements that the plan identify the corrective actions to be taken, the timeframe for completion of such actions, and that the distributing agency must submit the plan to FNS within 60 days after receiving notification of a deficiency. Failure of a distributing agency to submit a timely corrective action plan to FNS may be considered a violation of this part, and therefore subject to suspension or termination under § 250.3(c).

In § 250.22(c), we propose to include the provision, in current § 250.20, that FNS may terminate the distributing agency's participation in the distribution of donated foods, or in a food distribution program, for failure to comply with requirements in 7 CFR part 250, with other applicable Federal regulations, or with its written agreement with FNS. We propose to indicate that FNS may also choose to suspend, rather than terminate, such participation, or may terminate or suspend some, but not all, activities. In certain situations, suspending all or part of a program rather than terminating the program in its entirety will allow FNS to continue serving program participants while pursuing corrective actions. Lastly, we propose to include the stipulation, in current § 250.20, that FNS may also take other actions, as appropriate, including prosecution under applicable Federal statutes.

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

We propose to amend current Subpart C of 7 CFR part 250 to reduce reporting requirements relating to the processing of donated foods, and to remove the requirement that the processor make a payment to the distributing agency for

the value of excessive donated food inventories at the annual reconciliation. We also propose to update regulatory references to conform to other changes proposed in this rule, and to replace reference to “FNSRO” with “FNS Regional Office” given that the rule proposes to remove the definition of “FNSRO” from the definitions section of the rule, in proposed § 250.2.

We propose to remove the requirement, in current § 250.30(k)(3), that the processor submit copies of requests for refunds and refund payments to the distributing agency. We also propose to remove the requirements, in current § 250.30(n)(4) and § 250.30(o), that the distributing agency submit monthly performance reports, or information from such reports, to FNS on a periodic basis.

In accordance with the proposal to remove the requirement that the distributing agency develop a sales verification system for end product sales, as described in section II.B.12 of the preamble, we propose to remove the requirement, in current § 250.30(m)(1)(viii), that the processor report sales verification findings to the distributing agency. We also propose to remove current § 250.30(m)(1)(vii), which is reserved. Accordingly, we propose to redesignate § 250.30(m)(1)(ix) as § 250.30(m)(1)(vii).

In accordance with current § 250.30(n)(3), as part of the annual reconciliation, a processor that has contracted with the distributing agency for the following year must first reduce any excessive donated food inventories by paying the distributing agency for the value of such donated foods. While such cash-out of donated food inventories may be the best option in certain instances, in other cases a transfer of such inventories to another distributing agency or processor may be the better option. Therefore, we propose to revise current § 250.30(n)(3) to instead require such processor to reduce excessive donated food inventories. Policy Memorandum FD-064, *Management of Donated Food Inventories at Processors*, which was implemented in revised form on March 20, 2012, provides several options for reduction of excessive donated food inventories at processors.

We propose to remove requirements in current § 250.30(q) that the FNS Regional Office review processing contracts and inventory reports, and in current § 250.30(r), which indicates that FNS will provide copies of contracts upon request. Such contracts and inventory reports are currently reviewed by FNS Headquarters staff. In accordance with the removal of paragraphs (o), (q), and (r) of this

section, paragraphs (p), (s), and (t) would be redesignated as paragraphs (o), (p), and (q) of this section, respectively.

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

We propose to amend current Subpart D of 7 CFR part 250 to clarify requirements in the storage, control, and use of donated foods in contracts with food service management companies. In current § 250.50(a), we propose to clarify that the food service management company must use all donated foods received in the recipient agency's food service, or must use commercial substitutes in place of such donated foods only as permitted in § 250.51(d). We propose to revise current § 250.52(a) to clarify that the food service management company must meet the requirements in § 250.14(a) of this proposed rule for the safe storage and control of donated foods.

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

We propose to amend current Subpart E of 7 CFR part 250 to ensure that school food authorities are able to order and receive the donated foods that they may best utilize in the school food service, and to clarify requirements for school food authorities in the storage, inventory management, and use of donated foods. In order to accomplish this, we propose to revise current paragraphs § 250.58(a) and (e), and to consolidate current §§ 250.59 and 250.60 into a revised § 250.59. Current §§ 250.61 and 250.62 would be redesignated as §§ 250.60 and 250.61, respectively.

In § 250.58(a), we propose to remove reference to the Electronic Commodity Ordering System (ECOS), as donated food orders are now placed through a new FNS electronic donated foods ordering system, currently named Web Based Supply Chain Management (WBSCM). Although all distributing agencies currently submit orders and other information to FNS through the FNS electronic donated foods ordering system, not all States have rolled down such system to their school food authorities. Nevertheless, we propose to require that the distributing agency ensure that all school food authorities are able to submit orders for donated foods through the FNS electronic donated foods ordering system, or through a comparable electronic ordering system. Direct submission of orders by school food authorities better ensures that they receive the preferred

types and forms of donated foods, and at a time when they may best utilize such foods in the school food service. We propose to require that the distributing agency ensure that all school food authorities have the opportunity to provide input on at least an annual basis in determining which donated foods, from the full list of donated foods, will be made available to them for ordering electronically through the FNS electronic donated foods ordering system or another system. Providing school food authorities with the opportunity to order the types and forms of foods that they have expressed a preference for will help them to maximize their use of donated foods to meet the nutrition standards in the National School Lunch Program and to prevent waste. Lastly, we propose to require that the distributing agency ensure distribution to school food authorities of all such ordered donated foods that may be distributed to them in a cost-effective manner (including the use of split shipments, as necessary), and that they may efficiently utilize so as to minimize the cost to school food authorities of receiving donated foods.

In § 250.58(e), we propose to require that the distributing agency use either the donated food cost-per-pound prices posted annually by USDA or the most recently published cost-per-pound in the USDA donated foods catalog in offering the school food authority the commodity offer value of donated foods, as required in § 250.58(b). In crediting the school food authority's donated food assistance level, currently the distributing agency may choose among three options in valuing donated foods, including the commodity file cost as of a specified date and the estimated cost-per-pound data included in commodity survey memoranda. Instead, we propose that the distributing agency use the USDA purchase price (cost-per-pound) in crediting the school food authority's donated food assistance level, and that the distributing agency update this price at least semi-annually to reflect the most recent purchase price. This will better reflect the actual benefit received by the school food authority.

In § 250.59(a), we propose to reference the storage and inventory requirements in Subpart B of 7 CFR part 250 applicable to distributing agencies to ensure the safe and effective storage and control of donated foods. We propose to indicate that the school food authority must ensure the safe and sanitary storage, inventory management, and use of donated foods and purchased foods, in accordance with requirements in current § 210.13. In accordance with § 250.14(c) of this proposed rule, the

school food authority may commingle donated foods and purchased foods in a single inventory management system. We propose to remove the current provision that permits the distributing agency to determine if the school food authority may exercise the single inventory option, or must continue to maintain and track donated food inventories separately from its purchased foods. Separate inventory tracking of donated foods would be an unnecessary burden for school food authorities, and it is important that single inventory management be implemented consistently in all States.

In § 250.59(b), we propose to include the requirements in current § 250.60(a) for the use of donated foods in the nonprofit school food service, with only minor clarifications. In § 250.59(c), we propose to include contingencies and requirements in current § 250.60(b) for the use of donated foods outside of the nonprofit school food service, again with only minor clarifications. In § 250.59(d), we propose to include requirements in current § 250.60(c) for donated foods in contracts with food service management companies in a more streamlined form, but without substantive changes.

In § 250.59(e), we propose to clarify requirements for two or more school food authorities acting as a collective unit in conducting activities relating to donated foods. School food authorities often perform activities in a collaborative manner through school co-ops or consortia, in order to minimize costs and improve efficiency of operations. We propose to clarify that the school collective unit is subject to the same requirements pertaining to such donated food activities as a single school food authority. For example, the school collective unit may commingle donated foods and purchased foods in a single inventory management system.

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

We propose to revise current Subpart F to streamline and clarify current descriptions of, and requirements for, the distribution of donated foods in CSFP and FDPIR, and to include such information for TEFAP. We propose to remove reference to the Food Distribution Program in the Trust Territory of the Pacific Islands, as all distribution of donated foods in this program has been cashed out. We also propose to remove reference to the Special Supplemental Nutrition Program for Women, Infants, and Children (i.e., the WIC Program), as donated food distribution in that program was discontinued several years ago. Accordingly, we propose to include

the following new sections in the revised Subpart F.

#### 1. Commodity Supplemental Food Program (CSFP), § 250.63

In § 250.63(a), we propose to clarify that the Department distributes donated foods in CSFP to the distributing agency for further distribution in the State, in accordance with 7 CFR part 247. We also propose to clarify that State and recipient agencies must comply with the requirements of 7 CFR part 250 in the distribution, control, and use of donated foods in CSFP, to the extent that such requirements are not inconsistent with the requirements in 7 CFR part 247. In § 250.63(b), we propose to clarify the types of donated foods distributed in CSFP, in accordance with the legislation authorizing the purchase of such foods.

#### 2. The Emergency Food Assistance Program (TEFAP), § 250.64

In § 250.64, we propose to include a description of the distribution of donated foods in TEFAP. In § 250.64(a), we propose to clarify that the Department distributes donated foods in TEFAP to the distributing agency for further distribution in the State, in accordance with 7 CFR part 251. We also propose to clarify that State and recipient agencies must comply with the requirements of 7 CFR part 250 in the distribution, control, and use of donated foods in TEFAP, to the extent that such requirements are not inconsistent with the requirements in 7 CFR part 251. In § 250.64(b), we propose to clarify the types of donated foods distributed in TEFAP, in accordance with the legislation authorizing the purchase of such foods.

#### 3. Food Distribution Program on Indian Reservations (FDPIR), § 250.65

In § 250.65(a), we propose to clarify that the Department distributes donated foods in FDPIR to the distributing agency for further distribution, in accordance with 7 CFR parts 253 and 254. We also propose to clarify that the distributing agency may be a State agency or Indian Tribal Organization, and must comply with the requirements of 7 CFR part 250 in the distribution, control, and use of donated foods in FDPIR, to the extent that such requirements are not inconsistent with the requirements in 7 CFR parts 253 and 254. In § 250.65(b), we propose to clarify the types of donated foods distributed in FDPIR, in accordance with the legislation authorizing the purchase of such foods.

### G. Subpart G—Additional Provisions

We propose to amend current Subpart G of 7 CFR part 250 by revising the Subpart heading to read *Additional Provisions*, by clarifying requirements for the distribution of donated foods in disasters and situations of distress, and by adding a provision which identifies the OMB assigned information collection and recordkeeping control numbers. In order to accomplish this, we propose to revise the heading of Subpart G, as well as current §§ 250.69 and 250.70, and we propose to add § 250.71.

#### 1. Disasters, § 250.69

We propose to revise current § 250.69 to clarify requirements for the distribution and use of donated foods in a disaster, contingencies for replacement of such foods, and reporting requirements. In accordance with § 250.2 of this proposed rule, the term “disaster” includes a Presidentially declared disaster or emergency (e.g., a pandemic); therefore, we refer simply to a disaster in this section. In § 250.69(a), we propose to retain the current provision that the distributing agency may provide donated foods from current inventories, at the distributing or recipient agency level, to approved disaster organizations for use in providing congregate meal assistance to persons in need of food assistance as a result of a disaster. We propose to retain the current authority for the distributing agency to provide such assistance without FNS approval. However, we propose to clarify that the distributing agency must notify FNS that donated foods will be provided, and the period of time that they are expected to be needed. If such period of time is extended, the distributing agency must notify FNS of the extension.

In § 250.69(b), we propose to retain the current provision that the distributing agency may provide donated foods to disaster organizations for distribution to households in need of food assistance once FNS approval has been obtained for such distribution. We propose to clarify that such assistance may continue for the period of time that FNS determines necessary to meet the needs of such households. We propose to retain the prohibition for households to simultaneously receive disaster Supplemental Nutrition Assistance Program (D–SNAP) benefits (formerly disaster food stamps) and donated food assistance.

In § 250.69(c), we propose to retain the current requirement that the distributing agency review and approve

a disaster organization’s application to provide donated food disaster assistance, before distributing donated foods to such organization. We also propose to retain the current requirement that, for distribution of donated foods to households, the application must also be forwarded to FNS for approval. We propose to retain the current required elements of such applications, including those additional elements required for distribution of donated foods to households.

In § 250.69(d), we propose to include the current requirement that disaster organizations collect information from households receiving donated foods, if issuance of D–SNAP benefits has also been approved, in order to ensure that households receiving D–SNAP benefits do not also receive donated foods. We propose to retain the current information that must be collected from such households. We also propose to include the current requirements that such household information be reported to the distributing agency, and that the distributing agency maintain a record of such information.

In § 250.69(e), we propose to include the provision, in current § 250.13(d)(1), that permits disaster relief workers to receive meals containing donated foods as an incident of their service to eligible recipients. However, we propose to clarify that any emergency relief workers at the congregate feeding site who are directly engaged in providing relief assistance may be served congregate meals containing donated foods.

In § 250.69(f), we propose to include the current requirement that the distributing agency report to FNS the number and location of sites where donated foods are used in congregate meals or household distribution, as these sites are established. We also propose to retain the requirement that the distributing agency provide a report of the types and amounts of donated foods used in disaster assistance. However, we propose to require this information to be reported electronically, utilizing form FNS–292A, *Report of Commodity Distribution for Disaster Relief*.

In § 250.69(g), we propose to include the current provision for FNS replacement of donated foods used in disasters, as requested by the distributing agency. However, we propose to require that such information must be reported within 45 days of termination of disaster assistance, rather than the current 30 day period. Also, we propose to require that such replacement be requested electronically, utilizing form FNS–292A, *Report of*

*Commodity Distribution for Disaster Relief*, along with the report of the donated foods used in the disaster. Lastly, we propose to clarify that, for food diverted from inventories of recipient agencies in child nutrition programs, FNS will replace such food if the recipient agency received the same types of donated food during the year preceding the onset of the disaster assistance. Such recipient agencies may commingle donated foods and commercially purchased foods in a single inventory management system, which makes it difficult to ascertain which foods are actually used. We propose to clarify that such replacement will be in the amount of food used, but not to exceed the amount of like donated food received during the preceding year.

In § 250.69(h), we propose to indicate that FNS will, upon receiving a distributing agency request via public voucher, reimburse the distributing agency for any costs incurred in transporting donated foods within the State, or from one State to another, for use in disasters.

#### 2. Situations of Distress, § 250.70

We propose to revise current § 250.70 to clarify requirements for the distribution and use of donated foods in a situation of distress (as defined in § 250.2 of this proposed rule), contingencies for replacement of such foods, and reporting requirements. As in a disaster, donated foods may be used to provide assistance in a situation of distress, but requirements for the use of such foods, and conditions for their replacement, are somewhat different. In § 250.70(a), we propose to retain the current conditions for the distributing agency to provide donated foods to approved disaster organizations for use in providing congregate meals to persons in need of food assistance as a result of a situation of distress. In accordance with current requirements, FNS approval is not required for such use if the situation of distress is the result of a natural event—e.g., a hurricane, flood, or snowstorm—and if its duration will not exceed 30 days. However, we propose to clarify that the distributing agency must notify FNS that donated food assistance is to be provided. FNS approval is required to permit such donated food assistance for a period exceeding 30 days. We propose to clarify that FNS approval is required to permit donated food assistance in providing congregate meals in a situation of distress that is not the result of a natural event (e.g., an explosion), for any period of time. As with disasters, the distributing agency may

use donated foods from current inventories at the distributing or recipient agency level.

In § 250.70(b), we propose to retain the current requirement that the distributing agency obtain FNS approval to provide donated foods to approved disaster organizations for distribution to households in a situation of distress. We propose to clarify that such assistance may continue for the period of time that FNS determines necessary to meet the needs of such households. In accordance with current restrictions, households receiving D-SNAP benefits are not eligible to also receive donated foods.

In § 250.70(c), we propose to retain the current requirement that the disaster organization submit an application to the distributing agency, for its review and approval, to receive donated foods to provide assistance in a situation of distress. For distribution of donated foods in a situation of distress that is not the result of a natural event, or for any distribution of donated foods to households, we propose to clarify that, once the distributing agency approves the application, it must submit the application to FNS for approval. We propose to require the same elements for all such applications as we propose to be included for applications in a disaster, in accordance with § 250.69(c) of this proposed rule.

In § 250.70(d), we propose to retain the current requirement that disaster organizations collect specific information from households receiving donated foods in a situation of distress, if issuance of D-SNAP benefits has also been approved. We propose to include the same information that is required to be collected from households in a disaster, to require that such information be reported to the distributing agency, and that the distributing agency maintain a record of such information. In § 250.70(e), we propose to clarify that emergency relief workers may receive meals containing donated foods at a congregate feeding site in a situation of distress in accordance with the same conditions that apply in a disaster in § 250.69(e) of this proposed rule.

In § 250.70(f), we propose to include the current requirement that the distributing agency report to FNS the number and location of sites where donated foods are used in congregate meals or household distribution, as these sites are established. We also propose to require the distributing agency to report the types and amounts of donated foods used in the situation of distress electronically, utilizing form FNS-292A, *Report of Commodity*

*Distribution for Disaster Relief*, within the same 45-day time period as required for disasters.

In § 250.70(g), we propose to include the current contingencies for the replacement of donated foods used in situations of distress. FNS will replace such foods to the extent that funds are available to purchase replacement foods, and if the distributing agency requests such replacement within 45 days following the termination of such assistance. This is longer than the 30 days that distributing agencies currently have to request replacement of these foods. However, we propose to require that such replacement be requested electronically, utilizing form FNS-292A, *Report of Commodity Distribution for Disaster Relief*, along with the report of the donated foods used in the situation of distress. We also propose to clarify that, subject to the above conditions, FNS will replace foods diverted from inventories of recipient agencies in child nutrition programs if the recipient agency received the same types of donated food during the year preceding the onset of the assistance. Such replacement will be in the amount of food used, but not to exceed the amount of like donated food received during the preceding year.

In § 250.70(h), we propose to indicate that FNS will, upon receiving a distributing agency request via public voucher, reimburse the distributing agency, to the extent that funds are available, for any costs incurred in transporting donated foods within the State, or from one State to another, for use in a situation of distress.

In § 250.71 we propose to add a provision providing the current OMB assigned control numbers for the information collection and recordkeeping provisions in 7 CFR part 250.

### 7 CFR Part 251

We propose to amend 7 CFR part 251 to conform certain requirements for distribution of donated foods in TEFAP to requirements for such distribution in other programs, or with changes to 7 CFR part 250 proposed in this rule. We propose to remove current § 251.4(f)(4), which requires that the external shipping containers and product labels of processed end products distributed in TEFAP identify them as USDA donated food products. The removal of this requirement would conform to requirements for unprocessed donated foods distributed in TEFAP, as well as other programs, which do not require such identification. In accordance with this proposal, we propose to redesignate current § 251.4(f)(5) as § 251.4(f)(4).

We propose to revise current § 251.4(g) to require TEFAP donated foods to be distributed and used in accordance with the requirements in 7 CFR part 251, and with the requirements in 7 CFR part 250, to the extent that such requirements are not inconsistent with the requirements in 7 CFR part 251. We propose to align requirements in the transfer of TEFAP foods, and in ensuring restitution for losses of TEFAP foods, with such requirements for other donated foods, as proposed in this rule.

We propose to require that transfers of TEFAP donated foods comply with requirements in §§ 250.12(d) and 250.14(d) of this proposed rule, as applicable. We propose to clarify that the State agency must ensure that restitution is made for the loss of TEFAP donated foods, or for the loss or improper use of funds provided for, or obtained as an incident of, the distribution of such foods, in accordance with § 250.16 of this proposed rule. Lastly, we propose to indicate that the State agency is subject to claims for such losses for which it is responsible, as well as for its failure to initiate or pursue claims against other parties responsible for such losses. We propose to remove current § 251.4(l), as the requirements for ensuring restitution for losses of donated foods are included in proposed § 250.16.

## III. Procedural Matters

### A. Public Comment Procedures

Your written comments on this proposed rule should be specific, confined to issues pertinent to the proposed rule, and should explain your reasons for any change recommended. Where possible, you should reference the specific section or paragraph of the proposal you are addressing. Comments received after the close of the comment period (see **DATES**) will not be considered or included in the Administrative Record for the final rule.

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

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

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

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

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

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

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

#### *B. Executive Order 12866 and 13563*

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This proposed rule has been determined to be not significant and was not reviewed by the Office of Management and Budget (OMB) under Executive Order 12866.

#### *C. Regulatory Flexibility Act*

This proposed rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). Pursuant to that review, it has been certified that this action will not have a significant impact on a substantial number of small entities. Although the rule would require specific procedures for distributing and recipient agencies to follow in the distribution and control of donated foods, USDA does not expect them to have a significant impact on such entities.

#### *D. Public Law 104–4, Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, FNS generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, or

Tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, and Tribal governments or the private sector of \$100 million or more in any one year. This rule is, therefore, not subject to the requirements of sections 202 and 205 of the UMRA.

#### *E. Executive Order 12372*

The donation of foods in USDA food distribution and child nutrition programs is included in the Catalog of Federal Domestic Assistance under 10.555, 10.558, 10.559, 10.565, 10.567, and 10.569. For the reasons set forth in the final rule in 7 CFR part 3015, Subpart V and related Notice (48 FR 29115, June 24, 1983), the donation of foods in such programs is included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

#### *F. Executive Order 13132*

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

##### 1. Prior Consultation With State Officials

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

representation, and the School Nutrition Association, as well as other conferences.

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

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

##### 3. Extent to Which We Meet Those Concerns

FNS has considered the impact of the proposed rule on State and local agencies. The overall effect of this rule is to ensure that such agencies are able to utilize and distribute donated foods safely and efficiently, with a minimal reporting and recordkeeping burden. FNS is not aware of any case in which the provisions of the rule would preempt State law.

#### *G. Executive Order 12988*

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

#### *H. Civil Rights Impact Analysis*

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

#### *I. Paperwork Reduction Act*

In accordance with the Paperwork Reduction Act of 1995, this notice

invites the general public and other public agencies to comment on this proposed information collection. This collection is a revision of a currently approved collection, OMB#0584-0293.

Written comments must be received on or before January 20, 2015. 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 shall 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 that were 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 use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to Dana Rasmussen, at the address listed in the ADDRESSES section of this preamble. Comments may also be submitted via email to [Dana.Rasmussen@fns.usda.gov](mailto:Dana.Rasmussen@fns.usda.gov). Comments will also be accepted through the Federal eRulemaking Portal. Go to <http://www.regulations.gov>, and follow

the online instructions for submitting comments electronically. Commenters are asked to separate their comments on the information collection requirements from their comments on the remainder of the proposed rule.

*Title:* Food Distribution Forms.

*OMB Number:* 0584-0293.

*Expiration Date:* 09/30/2016.

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

*Abstract:* This is a revision of an existing information collection based on a proposed rule titled *Proposed Changes to the Requirements for the Distribution and Control of Donated Foods*, which substantially re-writes 7 CFR part 250. The rule proposes to revise and clarify requirements in 7 CFR part 250 to ensure that USDA donated foods are distributed, stored, and managed in the safest, most efficient, and cost-effective manner, at State and recipient agency levels. The rule would also reduce administrative and reporting requirements for State distributing agencies, revise or clarify regulatory provisions relating to accountability for donated foods, and rewrite much of 7 CFR part 250 in a more user-friendly, "plain language," format. Lastly, the rule proposes to revise and clarify specific requirements in 7 CFR part 251 to conform more closely to related requirements in 7 CFR part 250. This

revision also includes provisions inadvertently omitted in the currently approved information collection, substantially revises other provisions which were inaccurate, and updates all relevant aspects of information collection requirements in the package.

*Affected Public:* Respondent groups include: (1) Individuals and households; (2) businesses or other for-profit agencies; (3) not for profit organizations; and (4) State, local, and Tribal governments.

*Estimated Number of Respondents:* The total estimated number of respondents is 636,478. This includes 611,200 individuals and households, 2,812 businesses and other for-profit companies, 1,600 private not-for-profit organizations, and 20,866 State, Local, and Tribal governments.

*Estimated Number of Responses per Respondent:* The total estimated average number of responses is 6.10 per respondent.

*Estimated Total Annual Responses:* 3,879,952.

*Estimated Time per Response:* The average response time is 0.30 hours per response.

*Estimated Total Annual Burden on Respondents:* See the table below for estimated total annual burden for each type of respondent.

Affected public	Estimated number of respondents	Number of responses per respondent	Total annual responses	Estimated total hours per response	Estimated total burden
<b>Reporting</b>					
State, Local, and Tribal Governments .....	20,866	11.16	232,774.24	0.26	59,589.50
Private for Profit .....	2,812	305.10	857,949.00	0.03	24,566.72
Private Not for Profit .....	1,600	2.03	3,240.00	0.19	614.50
Individual .....	611,200.00	1.96	1,199,200.00	0.25	304,400.00
<b>Total Estimated Reporting Burden .....</b>	<b>636,478.00</b>	<b>3.60</b>	<b>2,293,163.24</b>	<b>0.17</b>	<b>389,170.72</b>
<b>Recordkeeping</b>					
State, Local, and Tribal Governments .....	20,866.00	24.22	505,305.46	0.07	37,129.57
Private for Profit .....	2,812	367.99	1,034,786.00	0.06	62,790.72
Private Not for Profit .....	1,600	29.19	46,697.00	14.44	674,358.04
Individual .....	0	0.00	0.00	0.00	0.00
<b>Total Estimated Recordkeeping Burden</b>	<b>25,278.00</b>	<b>62.77</b>	<b>1,586,788.46</b>	<b>0.49</b>	<b>774,278.33</b>
<b>Total of Reporting and Recordkeeping</b>					
Reporting .....	636,478.00	3.60	2,293,163.24	0.17	389,170.72
Recordkeeping .....	25,278.00	62.77	1,586,788.46	0.49	774,278.33
<b>Total .....</b>	<b>636,478.00</b>	<b>6.10</b>	<b>3,879,951.70</b>	<b>0.30</b>	<b>1,163,449.05</b>

Note: A detailed table is included in the supplemental documents to this rule.

**J. Regulatory Impact Analysis**

This rule has been designated as Not Significant by the Office of Management and Budget, therefore, no Regulatory Impact Analysis is required.

**K. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments**

Executive Order 13175 requires Federal agencies to consult and

coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and

other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. On February 13, 2013, as part of its regular quarterly Tribal consultation schedule, USDA engaged in a consultative session to obtain input by Tribal officials, or their designees, and Tribal members concerning the effect of this and other rules on the Tribes or Indian Tribal governments. In regard to the provisions of this rule, at the consultative session a Tribal member requested, and FNS provided, clarification regarding the purpose of this rule. No concerns regarding the provisions of the rule were expressed.

We are unaware of any current Tribal laws that could be in conflict with the proposed rule.

#### L. E-Government Act Compliance

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

#### List of Subjects

##### 7 CFR Part 250

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

##### 7 CFR Part 251

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

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

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

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

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

■ 2. Revise Subpart A to read as follows:

#### **Subpart A—General Purpose and Administration**

Sec.

- 250.1 Purpose and use of donated foods.
- 250.2 Definitions.
- 250.3 Administration at the Federal level.
- 250.4 Administration at the State level.
- 250.5 Civil rights.

##### **§ 250.1 Purpose and use of donated foods.**

(a) *Purpose.* The Department purchases foods and donates them to State distributing agencies for further distribution and use in food assistance programs, or to provide assistance to needy persons, in accordance with legislation:

(1) Authorizing donated food assistance in specific programs (e.g., the Richard B. Russell National School Lunch Act for the National School Lunch Program (NSLP)); or

(2) Authorizing the removal of surplus foods from the market or the support of food prices (i.e., in accordance with Section 32, Section 416, and Section 709, as defined in § 250.2).

(b) *Use of donated foods.* Donated foods must be used in accordance with the requirements of this part and with other Federal regulations applicable to specific food assistance programs (e.g., 7 CFR part 251 includes requirements for the use of donated foods in The Emergency Food Assistance Program (TEFAP)). Such use may include activities designed to demonstrate or test the effective use of donated foods (e.g., in nutrition classes or cooking demonstrations) in any programs. However, donated foods may not be:

(1) Sold or exchanged, or otherwise disposed of, unless approved by FNS, or specifically permitted elsewhere in this part or in other Federal regulations (e.g., donated foods may be used in meals sold in NSLP);

(2) Used to require recipients to make any payments or perform any services in exchange for their receipt, unless approved by FNS, or specifically permitted elsewhere in this part or in other Federal regulations; or

(3) Used to solicit voluntary contributions in connection with their receipt, except for donated foods provided in the Nutrition Services Incentive Program (NSIP).

(c) *Legislative sanctions.* In accordance with the Richard B. Russell National School Lunch Act (42 U.S.C. 1760) and the Agriculture and Consumer Protection Act of 1973 (7 U.S.C. 612c note), any person who embezzles, willfully misapplies, steals, or obtains by fraud any donated foods (or funds, assets, or property deriving from such donated foods) will be subject to Federal criminal prosecution and

other penalties. Any person who receives, conceals, or retains such donated foods or funds, assets, or property deriving from such foods, with the knowledge that they were embezzled, willfully misapplied, stolen, or obtained by fraud, will also be subject to Federal criminal prosecution and other penalties. The distributing agency, or other parties, as applicable, must immediately notify FNS of any such violations.

##### **§ 250.2 Definitions.**

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

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

*7 CFR Part 3052* means the Department's regulations establishing audit requirements for State and local governments and nonprofit organizations that receive Federal grants.

*Administering agency* means a State agency that has been approved by the Department to administer a food assistance program. If such agency is also responsible for the distribution of donated foods, it is referred to as the distributing agency in this part.

*Adult care institution* means a nonresidential adult day care center that participates independently in CACFP, or that participates as a sponsoring organization, and that may receive donated foods or cash-in-lieu of donated foods, in accordance with an agreement with the distributing agency.

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

*Bonus foods* means Section 32, Section 416, and Section 709 donated foods, as defined in this section, which are purchased under surplus removal or price support authority, and provided to distributing agencies in addition to legislatively authorized levels of assistance.

*CACFP* means the Child and Adult Care Food Program.

*Carrier* means a commercial enterprise that transports donated foods from one location to another, but does not store such foods.

*Charitable institutions* means public institutions or private nonprofit organizations that provide a meal

service on a regular basis to predominantly needy persons in the same place without marked changes. Some types of charitable institutions are included in § 250.67.

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

*Child nutrition program* means NSLP, CACFP, SFSP, or SBP.

*Commodity offer value* means the minimum value of donated foods that the distributing agency must offer to a school food authority participating in NSLP each school year. The commodity offer value is equal to the national per-meal value of donated food assistance multiplied by the number of reimbursable lunches served by the school food authority in the previous school year.

*Commodity school* means a school that operates a nonprofit food service, in accordance with 7 CFR part 210, but that receives additional donated food assistance rather than the cash assistance available to it under Section 4 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1753).

*Consignee* means an entity (e.g., the distributing or recipient agency, a commercial storage facility, or a processor) that receives a shipment of donated foods from a vendor or Federal storage facility.

*Contract value of the donated foods* means the price assigned by the Department to a donated food which shall reflect the Department's current acquisition price, transportation and, if applicable, processing costs related to the food.

*Contracting agency* means the distributing agency, subdistributing agency, or recipient agency which enters into a processing contract.

*CSFP* means the Commodity Supplemental Food Program.

*Department* means the United States Department of Agriculture (USDA).

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

*Disaster* means a Presidentially declared disaster or emergency, in accordance with the Robert T. Stafford Disaster Relief and Emergency Assistance Act, in which Federal assistance, including donated food assistance, may be provided to persons in need of such assistance as a result of the disaster or emergency.

*Disaster organization* means an organization authorized by FNS or a distributing agency, when appropriate,

to provide assistance to survivors of a disaster or a situation of distress.

*Distributing agency* means a State agency selected by the Governor of the State or the State legislature to distribute donated foods in the State, in accordance with an agreement with FNS, and with the requirements in this part and other Federal regulations, as applicable (e.g., a State agency distributing donated foods in CSFP must comply with requirements in 7 CFR part 247). Indian Tribal Organizations may act as a distributing agency in the distribution of donated foods on, or near, Indian reservations, as provided for in applicable Federal regulations (e.g., 7 CFR parts 253 or 254 for FDPIR).

*Distribution charge* means the cumulative charge imposed by distributing agencies on school food authorities to help meet the costs of storing and distributing donated foods, and administrative costs related to such activities.

*Distributor* means a commercial food purveyor or handler who is independent of a processor and both sells and bills for the end products delivered to recipient agencies.

*Donated foods* means foods purchased by USDA for donation in food assistance programs, or for donation to entities assisting needy persons, in accordance with legislation authorizing such purchase and donation. Donated foods are also referred to as USDA Foods.

*Elderly nutrition project* means a recipient agency selected by the State or Area Agency on Aging to receive assistance in NSIP, which may include donated food assistance.

*End product* means a food product that contains processed donated foods.

*Entitlement* means the value of donated foods a distributing agency is authorized to receive in a specific program, in accordance with program legislation.

*Entitlement foods* means donated foods that USDA purchases and provides in accordance with levels of assistance mandated by program legislation.

*FDPIR* means the Food Distribution Program on Indian Reservations and the Food Distribution Program for Indian Households in Oklahoma.

*Federal acceptance service* means the acceptance service provided by:

(1) The applicable grading branches of the Department's Agricultural Marketing Service (AMS);

(2) The Department's Federal Grain Inspection Service; and

(3) The National Marine Fisheries Service of the U.S. Department of Commerce.

*Fee-for-service* means the price by pound or case representing a processor's cost of ingredients (other than donated foods), labor, packaging, overhead, and other costs incurred in the conversion of the donated food into the specified end product.

*Fiscal year* means the period of 12 months beginning October 1 of any calendar year and ending September 30 of the following calendar year.

*FNS* means the Food and Nutrition Service of the Department of Agriculture.

*Food recall* means an action to remove food products from commerce when there is reason to believe the products may be unsafe, adulterated, or mislabeled. The action is taken to protect the public from products that may cause health problems or possible death.

*Food service management company* means a commercial enterprise, nonprofit organization, or public institution that is, or may be, contracted with by a recipient agency to manage any aspect of a recipient agency's food service, in accordance with 7 CFR parts 210, 225, or 226, or, with respect to charitable institutions, in accordance with this part. To the extent that such management includes the use of donated foods, the food service management company is subject to the applicable requirements in this part. However, a school food authority participating in NSLP that performs such functions is not considered a food service management company. Also, a commercial enterprise that uses donated foods to prepare meals at a commercial facility, or to perform other activities that meet the definition of processing in this section, is considered a processor in this part, and is subject to the requirements in subpart C, and not subpart D, of this part.

*Household* means any of the following individuals or groups of individuals, exclusive of boarders or residents of an institution:

- (1) An individual living alone;
- (2) An individual living with others, but customarily purchasing food and preparing meals for home consumption separate and apart from the others;
- (3) A group of individuals living together who customarily purchase and prepare meals in common for home consumption; and
- (4) Other individuals or groups of individuals, as provided in FNS regulations specific to particular food assistance programs.

*Household programs* means CSFP, FDPIR, and TEFAP.

*In-kind replacement* means the replacement of a loss of donated food with the same type of food of U.S. origin, of equal or better quality as the donated food, and at least equal in value to the lost donated food.

*In-State processor* means a processor that has entered into agreements with distributing or recipient agencies that are located only in the State in which all of the processor's processing facilities are located.

*Multi-food shipment* means a shipment from a Federal storage facility that usually includes more than one type of donated food.

*Multi-State processor* means a processor that has entered into agreements with distributing or recipient agencies in more than one State, or that has entered into one or more agreements with distributing or recipient agencies that are located in a State other than the State in which the processor's processing facilities or business office is located.

*National per-meal value* means the value of donated foods provided for each reimbursable lunch served in NSLP in the previous school year, and for each reimbursable lunch and supper served in CACFP in the previous school year, as established in section 6(c) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1755(c)).

*Needy persons* means persons in need of food assistance as a result of their:

- (1) Economic status;
- (2) Eligibility for a specific food assistance program; or
- (3) Eligibility as survivors of a disaster or a situation of distress.

*Nonprofit organization* means a private organization with tax-exempt status under the Internal Revenue Code. Nonprofit organizations operated exclusively for religious purposes are automatically tax-exempt under the Internal Revenue Code.

*Nonprofit school food service* means all food service operations conducted by the school food authority principally for the benefit of schoolchildren, all of the revenue from which is used solely for the operation or improvement of such food services.

*NSIP* means the Nutrition Services Incentive Program.

*NSLP* means the National School Lunch Program.

*Out-of-condition donated foods* means donated foods that are no longer fit for human consumption as a result of spoilage, contamination, infestation, adulteration, or damage.

*Performance supply and surety bond* means a written instrument issued by a

surety company which guarantees performance and supply of end products by a processor under the terms of a processing contract.

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

- (1) Convert donated foods into an end product;
- (2) Repackage donated foods; or
- (3) Use donated foods in the preparation of meals.

*Processor* means a commercial enterprise that processes donated foods at a commercial facility.

*Recipient agencies* means agencies or organizations that receive donated foods for distribution to needy persons or for use in meals provided to needy persons, in accordance with agreements with a distributing or subdistributing agency, or with another recipient agency. Local agencies in CSFP, and Indian Tribal Organizations distributing donated foods to needy persons through FDPIR in a State in which the State government administers FDPIR, are considered recipient agencies in this part.

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

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

*SAE funds* means Federal funds provided to State agencies for State administrative expenses, in accordance with 7 CFR part 235.

*SBP* means the School Breakfast Program.

*School food authority* means the governing body responsible for the administration of one or more schools, and that has the legal authority to operate NSLP or be otherwise approved by FNS to operate NSLP.

*School year* means the period of 12 months beginning July 1 of any calendar year and ending June 30 of the following calendar year.

*Section 4(a)* means section 4(a) of the Agriculture and Consumer Protection Act of 1973, as amended (7 U.S.C. 612c note), which authorizes the Department to purchase donated foods to maintain the traditional level of assistance for food assistance programs authorized by law, including, but not limited to, CSFP, FDPIR, and disaster assistance.

*Section 6* means section 6 of the Richard B. Russell National School Lunch Act, as amended (42 U.S.C. 1755), which authorizes the Department to provide a specified value of donated food assistance in NSLP.

*Section 14* means section 14 of the Richard B. Russell National School Lunch Act, as amended (42 U.S.C. 1762a), which authorizes the Department to use Section 32 or Section 416 funds to maintain the annually programmed levels of donated food assistance in child nutrition programs.

*Section 27* means section 27 of the Food and Nutrition Act of 2008, as amended (7 U.S.C. 2036), which authorizes the purchase of donated foods for distribution in TEFAP.

*Section 32* means section 32 of Public Law 74-320, as amended (7 U.S.C. 612c), which authorizes the Department to purchase primarily perishable foods to remove market surpluses, and to donate them for use in domestic food assistance programs or by charitable institutions.

*Section 311* means section 311 of the Older Americans Act of 1965, as amended (42 U.S.C. 3030a), which permits State Agencies on Aging to receive all or part of their NSIP grant as USDA donated foods.

*Section 416* means section 416 of the Agricultural Act of 1949, as amended (7 U.S.C. 1431), which authorizes the Department to purchase nonperishable foods to support market prices, and to donate them for use in domestic food assistance programs or by charitable institutions.

*Section 709* means section 709 of the Food and Agricultural Act of 1965, as amended (7 U.S.C. 1446a-1), which authorizes the Department to purchase dairy products to meet authorized levels of assistance in domestic food assistance programs when such assistance cannot be met by Section 416 food purchases.

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

*SFSP* means the Summer Food Service Program.

*Similar replacement* means the replacement of a loss of donated food with another type of food from the same food category (i.e., dairy, grain, meat/meat alternate, vegetable, fruit, etc.) that is of U.S. origin, of equal or better quality than that type of donated food, and at least equal in value to the lost donated food.

*Single inventory management* means the commingling in storage of donated foods and foods from other sources, and the maintenance of a single inventory record of such commingled foods.

*Situation of distress* means a natural catastrophe or other event that does not meet the definition of disaster in this section, but that, in the determination of the distributing agency, or of FNS, as applicable, warrants the use of donated foods to assist survivors of such catastrophe or other event. A situation

of distress may include, for example, a hurricane, flood, snowstorm, or explosion.

*SNAP* means the Supplemental Nutrition Assistance Program.

*Split shipment* means a shipment of donated foods from a vendor that is split between two or more distributing or recipient agencies, and that usually includes more than one stop-off or delivery location.

*State* means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, and American Samoa.

*State Agency on Aging* means:

(1) The State agency that has been approved by DHHS to administer NSIP; or

(2) The Indian Tribal Organization that has been approved by DHHS to administer NSIP.

*Storage facility* means a publicly-owned or nonprofit facility or a commercial enterprise that stores donated foods or end products, and that may also transport such foods to another location.

*Subdistributing agency* means a State agency, a public agency, or a nonprofit organization selected by the distributing agency to perform one or more activities required of the distributing agency in this part, in accordance with a written agreement between the parties. A subdistributing agency may also be a recipient agency.

*Substitution* means:

(1) The replacement of donated foods with like quantities of domestically produced commercial foods of the same generic identity and of equal or better quality (i.e., cheddar cheese for cheddar cheese, nonfat dry milk for nonfat dry milk, etc.).

(2) In the case of donated nonfat dry milk, substitution as defined under paragraph (1) of this definition or replacement with an equivalent amount, based on milk solids content, of domestically produced concentrated skim milk.

(3) A processor can substitute commercial product for donated commodity, as described in paragraph (1) of this definition, without restrictions under full substitution. The processor must return to the contracting agency, in finished end products, the same number of pounds of commodity that the processor originally received for processing under full substitution. This is the 100-percent yield requirement.

(4) A processor can substitute commercial product for donated commodity product, as described in paragraph (1) of this definition, with some restrictions under limited substitution. Restrictions include, but

are not limited to, the prohibition against substituting for backhauled poultry 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.)

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

*TEFAP* means The Emergency Food Assistance Program.

*USDA Foods* means donated foods.

*Vendor* means a commercial food company from which the Department purchases foods for donation.

### **§ 250.3 Administration at the Federal level.**

#### *(a) Food and Nutrition Service.*

Within the Department, the Food and Nutrition Service (FNS) shall act on behalf of the Department to administer the distribution of donated foods to distributing agencies for further distribution and use at the State level, in accordance with the requirements of this part.

*(b) Audits or inspections.* The Department, the Comptroller General of the United States, or any of their authorized representatives, may conduct audits or inspections of distributing, subdistributing, or recipient agencies, or the commercial enterprises with which they have contracts or agreements, in order to determine compliance with the requirements of this part, or with other applicable Federal regulations.

#### *(c) Suspension or termination.*

Whenever it is determined that a distributing agency has materially failed to comply with the provisions of this part, or with other applicable Federal regulations, FNS may suspend or terminate the distribution of donated foods, or the provision of administrative funds, to the distributing agency. FNS must provide written notification of such suspension or termination of assistance, including the reasons for the action and the effective date. The distributing agency may appeal a suspension or termination of assistance if such appeal is provided for in Federal regulations applicable to a specific food assistance program (e.g., as provided for in § 253.5(l) for FDIPIR). FNS may also take other actions, as appropriate, including prosecution under applicable Federal statutes.

### **§ 250.4 Administration at the State level.**

*(a) Distributing agency.* The distributing agency, as defined in § 250.2, is responsible for ensuring compliance with the requirements in this part, and in other Federal regulations referenced in this part, in

the distribution and control of donated foods. In order to receive, store, and distribute donated foods, the distributing agency shall enter into a written agreement with FNS (the Federal-State Agreement, form FNS-74) for the distribution of donated foods in accordance with the provisions of this part and other applicable Federal regulations. The Federal-State agreement is permanent, but may be amended with the concurrence of both parties. FNS may terminate the Federal-State agreement if the distributing agency fails to meet its obligations, in accordance with § 250.3(c). The distributing agency may impose additional requirements relating to the distribution and control of donated foods in the State, as long as such requirements are not inconsistent with the requirements in this part or other Federal regulations referenced in this part.

*(b) Subdistributing agency.* The distributing agency may enter into a written agreement with a subdistributing agency, as defined in § 250.2, to perform specific activities required of the distributing agency in this part. However, the distributing agency may not assign its overall responsibility for donated food distribution and control to a subdistributing agency or to any other organization, and may not delegate its responsibility to ensure compliance with the performance standards in § 250.22. The agreement entered into with the subdistributing agency must include the provisions in paragraph (c) of this section, and must indicate the specific activities for which the subdistributing agency is responsible.

*(c) Recipient agencies.* The distributing agency must select recipient agencies, as defined in § 250.2, to receive donated foods for distribution to needy persons, or for use in meals provided to needy persons, in accordance with eligibility criteria for specific programs or outlets, and must enter into a written agreement with a recipient agency prior to distribution of donated foods to it. However, for child nutrition programs, the distributing agency must enter into agreements with those recipient agencies selected by the State administering agency to participate in such programs, prior to distribution of donated foods to such recipient agencies. The distributing agency must confirm such recipient agencies' approval for participation in the appropriate child nutrition program with the State administering agency. For household programs, distributing agencies must consider the past performance of recipient agencies when

approving applications for participation. Agreements with recipient agencies must include the provisions in this paragraph (c), as well as provisions required in Federal regulations applicable to specific programs (e.g., agreements with local agencies in CSFP must include the provisions in § 247.4(b)). The agreements with recipient agencies and subdistributing agencies must:

(1) Ensure compliance with the applicable requirements in this part, with other Federal regulations referenced in this part, and with the distributing agency's written agreement with FNS;

(2) Ensure compliance with all requirements relating to food safety and food recalls;

(3) Establish the duration of the agreement;

(4) Permit termination of the agreement by the distributing agency for failure of the recipient agency (or subdistributing agency, as applicable) to comply with its provisions or applicable requirements, upon written notification to the applicable party; and

(5) Permit termination of the agreement by either party, upon written notification to the other party, at least 60 days prior to the effective date of termination.

(d) *Procurement of services of commercial enterprises.* The distributing agency, or a recipient agency, must ensure compliance with Departmental procurement requirements in 7 CFR part 3016 or 3019, as applicable, to obtain the services of a commercial enterprise to conduct activities relating to donated foods. The distributing agency, or a recipient agency, must also ensure compliance with other applicable Departmental regulations in such procurements—for example, a school food authority must ensure compliance with requirements in §§ 210.16 and 210.21, and in subpart D of this part, in procuring the services of a food service management company.

#### § 250.5 Civil rights.

Distributing agencies, subdistributing agencies and recipient agencies shall comply with the Department's nondiscrimination regulations (7 CFR parts 15, 15a, and 15b) and the FNS civil rights instructions to ensure that in the operation of the program no person is discriminated against on a protected bases as it applies to each program.

■ 3. Revise Subpart B to read as follows:

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

Sec.

250.10 Availability and ordering of donated foods.

250.11 Delivery and receipt of donated food shipments.

250.12 Storage and inventory management at the distributing agency level.

250.13 Efficient and cost-effective distribution of donated foods.

250.14 Storage and inventory management at the recipient agency level.

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

250.16 Claims and restitution for donated food losses.

250.17 Use of funds obtained incidental to donated food distribution.

250.18 Reporting requirements.

250.19 Recordkeeping requirements.

250.20 Audit requirements.

250.21 Distributing agency reviews.

250.22 Distributing agency performance standards.

#### § 250.10 Availability and ordering of donated foods.

(a) *Ordering donated foods.* The distributing agency must utilize a request-driven ordering system in submitting orders for donated foods to FNS. As part of such system, the distributing agency must provide recipient agencies with the opportunity to submit input, on at least an annual basis, in determining the donated foods from the full list that are made available to them for ordering. Based on the input received, the distributing agency must ensure that the types and forms of donated foods that recipient agencies may best utilize are made available to them for ordering. The distributing agency must also ensure that donated foods are ordered and distributed only in amounts that may be utilized efficiently and without waste.

(b) *Provision of information on donated foods.* The distributing agency must provide recipient agencies, at their request, information that will assist them in ordering or utilization of donated foods, including:

(1) The types and quantities of donated foods that they may order;

(2) Donated food specifications and nutritional value; and

(3) Procedures for the disposition of donated foods that are out-of-condition or that are subject to a food recall.

#### § 250.11 Delivery and receipt of donated food shipments.

(a) *Delivery.* The Department arranges for delivery of donated foods from the vendor or Federal storage facility to the distributing agency's storage facility, or to a processor with which the distributing agency has entered into a contract or agreement. The Department

may also deliver donated foods directly to a recipient agency, or to a storage facility or processor with which the recipient agency has entered into a contract or agreement, with the approval of the distributing agency. In accordance with § 250.2, an entity that receives a shipment of donated foods directly from a USDA vendor or a Federal storage facility is referred to as the consignee. Consignees must provide a delivery address, and other information as required by FNS, as well as update this information as necessary, to ensure foods are delivered to the correct location.

(b) *Receipt of shipments.* The distributing or recipient agency, or other consignee, must comply with all applicable Federal requirements in receiving shipments of donated foods, including procedures for the disposition of any donated foods in a shipment that are out-of-condition (as this term is defined in § 250.2), or are not in accordance with ordered amounts. The distributing or recipient agency, or other consignee, must provide notification of the receipt of donated food shipments to FNS, through electronic means, and must maintain an electronic record of receipt of all donated food shipments.

(c) *Replacement of donated foods.* The vendor is responsible for the replacement of donated foods that are delivered out-of-condition. Such responsibility extends until expiration of the use-by or best-if-used-by date on the food label, or, if no such date is included on the food label, until expiration of the vendor warranty period included in the vendor contract with USDA. In all cases, responsibility for replacement is contingent on the determination that the foods were out-of-condition at the time of delivery. Replacement must be in-kind, unless FNS approves similar replacement (the terms in-kind and similar replacement are defined in § 250.2). If FNS determines that physical replacement of donated foods is not cost-effective or efficient, FNS may:

(1) Approve payment by the vendor to the distributing or recipient agency, as appropriate, for the value of the donated foods at time of delivery (or at another value determined by FNS); or

(2) Credit the distributing agency's entitlement, as feasible.

(d) *Payment of costs relating to shipments.* The Department is responsible for payment of processing, transportation, handling, or other costs incurred up to the time of delivery of donated foods to a distributing or recipient agency, or other consignee, as the Department deems in its best interest. However, the distributing or

recipient agency, or other consignee, is responsible for payment of any delivery charges that accrue as a result of such consignee's failure to comply with procedures in FNS instructions—e.g., failure to provide for the unloading of a shipment of donated foods within a designated time period.

(e) *Transfer of title.* Title to donated foods transfers to the distributing or recipient agency, as appropriate, upon acceptance of the donated foods at the time and place of delivery. Notwithstanding transfer of title, distributing and recipient agencies must ensure compliance with the requirements of this part in the distribution, control, and use of donated foods.

**§ 250.12 Storage and inventory management at the distributing agency level.**

(a) *Safe storage and control.* The distributing agency (or subdistributing agency, as applicable) must provide facilities for the storage and control of donated foods that protect against theft, spoilage, damage, or other loss. Accordingly, such storage facilities must maintain donated foods in sanitary conditions, at the proper temperature and humidity, and with adequate air circulation. The distributing agency must ensure that storage facilities comply with all Federal, State, or local requirements relative to food safety and health, as applicable, and obtain all required health inspections.

(b) *Inventory management.* The distributing agency must ensure that donated foods at all storage facilities used by the distributing agency (or by a subdistributing agency) are stored in a manner that permits them to be distinguished from other foods, and must ensure that a separate inventory record of donated foods is maintained. The distributing agency's system of inventory management must ensure that donated foods are distributed in a timely manner and in optimal condition. On an annual basis, the distributing agency must conduct a physical review of donated food inventories at all storage facilities used by the distributing agency (or by a subdistributing agency), and must reconcile physical and book inventories of donated foods. The distributing agency must report donated food losses to FNS, and ensure that restitution is made for such losses.

(c) *Inventory limitations.* The distributing agency is subject to the following limitations in the amount of donated food inventories on-hand, unless FNS approval is obtained to maintain larger inventories:

(1) For TEFAP, NSLP and other child nutrition programs, inventories may not exceed an amount needed for a six-month period, based on an average amount of donated foods utilized in that period; and

(2) For CSFP and FDPIR, inventories of each category of donated food in the food package may not exceed an amount needed for a three-month period, based on an average amount of donated food that the distributing agency can reasonably utilize in that period to meet CSFP caseload or FDPIR average participation.

(d) *Inventory protection.* The distributing agency must obtain insurance to protect the value of donated foods at its storage facilities. The amount of such insurance must be at least equal to the average monthly value of donated food inventories at such facilities in the previous fiscal year. The distributing agency must also ensure that the following entities obtain insurance to protect the value of their donated food inventories, in the same amount required of the distributing agency in this paragraph (d):

(1) Subdistributing agencies;

(2) Recipient agencies in household programs that have an agreement with the distributing agency or subdistributing agency to store and distribute foods; and

(3) Commercial storage facilities under contract with the distributing agency or with an agency identified in paragraph (d)(1) or (2) of this section.

(e) *Transfer of donated foods.* The distributing agency may transfer donated foods from its inventories to another distributing agency, or to another program, in order to ensure that such foods may be utilized in a timely manner and in optimal condition, in accordance with this part. However, the distributing agency must request FNS approval to transfer donated foods from one program to another (e.g., from NSLP to TEFAP). FNS may also require a distributing agency to transfer donated foods at the distributing agency's storage facilities or at a processor's facility, if inventories of donated foods are excessive or may not be efficiently utilized. If there is a question of food safety, or if directed by FNS, the distributing agency must obtain an inspection of donated foods by State or local health authorities to ensure that the donated foods are still safe and not out-of-condition before transferring them. The distributing agency is responsible for meeting any transportation or inspection costs incurred, unless it is determined by FNS that the transfer is not the result of negligence or improper action on the

part of the distributing agency. The distributing agency must maintain a record of all transfers from its inventories, and of any inspections related to such transfers.

(f) *Commercial storage facilities or carriers.* The distributing agency may obtain the services of a commercial storage facility to store and distribute donated foods, or a carrier to transport donated foods, but must ensure compliance with Departmental procurement requirements in 7 CFR part 3016. The distributing agency must enter into a written contract with a commercial storage facility or carrier, which may not exceed five years in duration, including any extensions or renewals. The contract must include applicable provisions required by Federal statutes and executive orders listed in 7 CFR 3016.36(i). The contract must also include, as applicable to a storage facility or carrier, provisions that:

(1) Assure storage, management, and transportation of donated foods in a manner that properly safeguards them against theft, spoilage, damage, or other loss, in accordance with the requirements in this part;

(2) Assure compliance with all Federal, State, or local requirements relative to food safety and health, including required health inspections, and procedures for responding to a food recall;

(3) Assure storage of donated foods in a manner that distinguishes them from other foods, and assure separate inventory recordkeeping of donated foods;

(4) Assure distribution of donated foods to eligible recipient agencies in a timely manner, in optimal condition, and in amounts for which such recipient agencies are eligible;

(5) Include the amount of insurance coverage obtained to protect the value of donated foods;

(6) Permit the performance of on-site reviews of the storage facility by the distributing agency, the Comptroller General, the Department of Agriculture, or any of its duly authorized representatives, in order to determine compliance with requirements in this part;

(7) Establish the duration of the contract, and provide for extension or renewal of the contract only upon fulfillment of all contract provisions;

(8) Provide for expeditious termination of the contract for noncompliance with its provisions; and

(9) Provide for termination of the contract by either party for other cause, after written notification of such intent

at least 60 days prior to the effective date of such action.

**§ 250.13 Efficient and cost-effective distribution of donated foods.**

(a) *Direct shipments.* The distributing agency must ensure that the distribution of donated foods is conducted in the most efficient and cost-effective manner, and, to the extent practical, in accordance with the specific needs and preferences of recipient agencies. In meeting this requirement, the distributing agency must, to the extent practical, provide for:

(1) Shipments of donated foods directly from USDA vendors to recipient agencies, including two or more recipient agencies acting as a collective unit (such as a school co-op), or to the commercial storage facilities of such agencies;

(2) Shipments of donated foods directly from USDA vendors to processors for processing of donated foods and sale of end products to recipient agencies, in accordance with Subpart C of this part; and

(3) The use of split shipments, as defined in § 250.2, in arranging for delivery of donated foods to recipient agencies that cannot accept a full truckload.

(b) *Distributing agency storage and distribution charge.* If a distributing agency determines that direct shipments of donated foods, as described in paragraph (a) of this section, are impractical, it must provide for the storage of donated foods at the distributing agency level, and subsequent distribution to recipient agencies, in the most efficient and cost-effective manner. The distributing agency must use a commercial storage facility, in accordance with § 250.12(f), if such system is determined to be more efficient and cost-effective. The distributing agency must utilize State Administrative Expense (SAE) funds, as available, to meet the costs of storing and distributing donated foods for school food authorities or other recipient agencies in child nutrition programs, and administrative costs related to such activities, in accordance with 7 CFR part 235. If SAE funds, or any other Federal or State funds received for such purpose, are insufficient to fully meet the distributing agency's costs of storing and distributing donated foods, and related administrative costs (e.g., salaries of employees engaged in such activities), the distributing agency may require school food authorities or other recipient agencies in child nutrition programs to pay a distribution charge, as defined in § 250.2, to help meet such

costs. The distribution charge may cover only allowable costs, in accordance with 7 CFR part 3016 and with OMB guidance. The distributing agency must maintain a record of costs incurred in storing and distributing donated foods and related administrative costs, and the source of funds used to pay such costs.

(c) *FNS approval of amount of distribution charge.* In determining the amount of a new distribution charge, or in increasing the amount (except for normal inflationary adjustments) or reducing the level of service provided once a distribution charge is established, the distributing agency must request FNS approval prior to implementation. Such requirement also applies to the distribution charge imposed by a commercial storage facility under contract with the distributing agency. The request for approval must be submitted to FNS at least 90 days in advance of its projected implementation, and must include justification of the newly established amount, or any increased charge or reduction in the level of service provided under an established distribution charge, and the specific costs covered under the distribution charge (e.g., storage, delivery, or administrative costs).

(d) *FNS review authority.* FNS may reject the distributing agency's proposed new, or changes to an existing, distribution charge if it determines that the charge would not provide for distribution of donated foods in the most efficient and cost-effective manner, or may otherwise impact recipient agencies negatively. In such case, the distributing agency would be required to adjust the proposed amount or the level of service provided in its distribution charge, or consider other distribution options. FNS may also require the distributing agency to submit documentation to justify the efficiency and cost-effectiveness of its storage and distribution system at other times, and may require the distributing agency to re-evaluate such system in order to ensure compliance with the requirements in this part.

**§ 250.14 Storage and inventory management at the recipient agency level.**

(a) *Safe storage and control.* Recipient agencies must provide facilities for the storage and control of donated foods that protect against theft, spoilage, damage, or other loss. Accordingly, such storage facilities must maintain donated foods in sanitary conditions, at the proper temperature and humidity, and with adequate air circulation. Recipient agencies must ensure that storage facilities comply with all Federal, State,

or local requirements relative to food safety and health, as applicable, and obtain all required health inspections.

(b) *Inventory management—household programs.* Recipient agencies in household programs must store donated foods in a manner that permits them to be distinguished from other foods in storage, and must maintain a separate inventory record of donated foods. Such recipient agencies' system of inventory management must ensure that donated foods are distributed to recipients in a timely manner that permits use of such foods while still in optimal condition. Such recipient agencies must notify the distributing agency of donated food losses and take further actions with respect to such food losses, as directed by the distributing agency.

(c) *Inventory management—child nutrition programs and charitable institutions.* Recipient agencies in child nutrition programs, and those receiving donated foods as charitable institutions, in accordance with § 250.67, are not required to store donated foods in a manner that distinguishes them from purchased foods or other foods, or to maintain a separate inventory record of donated foods—i.e., they may utilize single inventory management, as defined in § 250.2. For such recipient agencies, donated foods are subject to the same safeguards and effective management practices as other foods. Accordingly, recipient agencies in child nutrition programs and those receiving donated foods as charitable institutions (regardless of the inventory management system utilized), are not required to separately monitor and report donated food use, distribution, or loss to the distributing agency, unless there is evidence indicating that donated food loss has occurred as a result of theft or fraud.

(d) *Transfer of donated foods to another recipient agency.* A recipient agency operating a household program must request approval from the distributing agency to transfer donated foods to another recipient agency. The distributing agency may approve such transfer to another recipient agency in the same household program (e.g., the transfer of TEFAP foods from one food pantry to another) without FNS approval. However, the distributing agency must receive FNS approval to permit a recipient agency in a household program to transfer donated foods to a recipient agency in a different program (e.g., the transfer of TEFAP foods from a food pantry to a CSFP local agency), even if the same recipient agency administers both programs. A recipient

agency operating a child nutrition program, or receiving donated foods as a charitable institution, in accordance with § 250.67, may transfer donated foods to another recipient agency or charitable organization without approval from the distributing agency or FNS.

(e) *Commercial storage facilities.* Recipient agencies may obtain the services of commercial storage facilities to store and distribute donated foods, but must ensure compliance with Departmental procurement requirements in 7 CFR parts 3016 or 3019, as applicable. Recipient agencies must ensure that commercial storage facilities comply with all of the applicable requirements in this section regarding the storage and inventory management of donated foods.

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

(a) *Out-of-condition donated foods at the distributing agency level.* The distributing agency must ensure that donated foods that are out-of-condition, as defined in § 250.2, at any of its storage facilities are destroyed, or otherwise disposed of, in accordance with State or local requirements pertaining to food safety and health. The distributing agency must obtain an inspection of donated foods by State or local health authorities to determine their safety and condition, as necessary, or as directed by FNS. Out-of-condition donated foods may be sold (e.g., to a salvage company), if permitted by State or local laws or regulations.

(b) *Out-of-condition donated foods at the recipient agency level.* Recipient agencies in household programs must report out-of-condition donated foods at their storage facilities to the distributing agency, in accordance with § 250.14(b), and must ensure that such donated foods are destroyed, or otherwise disposed of, in accordance with State or local requirements pertaining to food safety and health. The distributing agency must ensure that such recipient agencies obtain an inspection of donated foods by State or local health authorities to determine their safety and condition, as necessary, or as directed by FNS. For charitable institutions, in accordance with § 250.67, and recipient agencies in child nutrition programs, donated foods must be treated as other foods when safety is in question. Consequently, such recipient agencies must comply with State or local requirements in determining the safety of foods (including donated foods), and in their destruction or other disposition. However, they are not required to report such actions to the distributing agency.

(c) *Food recalls.* The distributing or recipient agency, as appropriate, must follow all applicable Federal, State or local requirements for donated foods subject to a food recall, as this term is defined in § 250.2. Further, in the event of a recall, Departmental guidance is provided, including procedures or instructions for all parties in responding to a food recall, replacement of recalled donated foods, and reimbursement of specific costs incurred as a result of such actions.

(d) *Complaints relating to donated foods.* The distributing agency must inform recipient agencies of the preferred method of receiving complaints regarding donated foods. Complaints received from recipients, recipient agencies, or other entities relating to donated foods must be resolved in an expeditious manner, and in accordance with applicable requirements in this part. However, the distributing agency may not dispose of any donated food that is the subject of a complaint prior to guidance and authorization from FNS. Any complaints regarding product quality or specifications, or suggested product improvements, must be submitted to FNS through the established FNS donated foods complaint system for tracking purposes. If complaints may not be resolved at the State level, the distributing agency must provide information regarding the complaint to FNS. The distributing agency must maintain a record of its investigations and other actions with respect to complaints relating to donated foods.

**§ 250.16 Claims and restitution for donated food losses.**

(a) *Distributing agency responsibilities.* The distributing agency must ensure that restitution is made for the loss of donated foods, or for the loss or improper use of funds provided for, or obtained as an incident of, the distribution of donated foods. The distributing agency must identify, and seek restitution from, parties responsible for the loss, and implement corrective actions to prevent future losses.

(b) *FNS claim actions.* FNS may initiate and pursue claims against the distributing agency or other entities for the loss of donated foods, or for the loss or improper use of funds provided for, or obtained as an incident of, the distribution of donated foods. FNS may also initiate and pursue claims against the distributing agency for failure to take required claim actions against other parties. FNS may, on behalf of the Department, compromise, forgive, suspend, or waive a claim. FNS may, at

its option, require assignment to it of any claim arising from the distribution of donated foods.

**§ 250.17 Use of funds obtained incidental to donated food distribution.**

(a) *Distribution charge.* The distributing agency must use funds obtained from the distribution charge imposed on recipient agencies in child nutrition programs, in accordance with § 250.13(b), to meet the costs of storing and distributing donated foods or related administrative costs, consistent with the limitations on the use of funds provided under a Federal grant in 7 CFR part 3016 and OMB guidance. The distributing agency must maintain such funds in an operating account, separate from other funds obtained incidental to donated food distribution. The amount of funds maintained at any time in the operating account may not exceed the distributing agency's highest expenditure from that account over any three-month period in the previous school or fiscal year, unless the distributing agency receives FNS approval to maintain a larger amount of funds in such account. Unless such approval is granted, funds in excess of the established limit must be used to reduce the distribution charge imposed on recipient agencies, or to provide appropriate reimbursement to such agencies. The distributing agency may not use funds obtained from the distribution charge to purchase foods to replace donated food losses or to pay claims to make restitution for donated food losses.

(b) *Processing and food service management company contracts.* School food authorities must use funds obtained from processors in processing of donated foods into end products (e.g., through rebates for the value of such donated foods), or from food service management companies in crediting for the value of donated foods received, in support of the nonprofit school food service, in accordance with 7 CFR 210.14 of this chapter. Other recipient agencies must use such funds in accordance with the requirements in paragraph (c) of this section.

(c) *Claims and other sources.* The distributing agency must ensure that funds collected in payment of claims for donated food losses are used only for the payment of expenses of the food distribution program. The first priority for the use of funds collected in a claim for the loss of donated foods is the purchase of replacement foods for use in the program in which the loss occurred. If the purchase of replacement foods is not feasible, funds collected in a claim for the loss of donated foods must be

used to pay allowable administrative costs incurred in the storage and distribution of donated foods. The distributing agency, or recipient agency, must use funds obtained from sources incidental to donated food distribution (except as otherwise indicated in this section) to pay administrative costs incurred in the storage and distribution of donated foods, consistent with the limitations on the use of funds provided under a Federal grant in 7 CFR parts 3016 or 3019, and OMB guidance, as applicable. The distributing agency must maintain funds obtained from claims and other sources included in this paragraph (c) in a donated food account (separate from the operating account maintained in accordance with paragraph (a) of this section), and must obtain FNS approval for any single deposit into, or expenditure from, such account in excess of \$25,000. Distributing and recipient agencies must maintain records of funds obtained and expended in accordance with this paragraph (c). Examples of funds applicable to the provisions in this paragraph (c) include funds accrued from:

- (1) The salvage of out-of-condition donated foods.
- (2) The sale of donated food containers, pallets, or packing materials.
- (3) Payments by processors for failure to meet processing yields or other cause.
- (d) *Prohibitions.* The distributing agency may not use funds obtained incidental to donated food distribution to meet State matching requirements for Federal administrative funds provided in household programs, or in place of State Administrative Expense (SAE) funds provided in accordance with 7 CFR part 235.

(e) *Buy American.* When funds obtained in accordance with this section are used to purchase foods in the commercial market, a distributing or recipient agency in the continental United States, and in Hawaii, must, to the maximum extent practical, purchase only domestic foods or food products. Such requirement is also applicable to food purchases made with the cash-in-lieu-of-donated foods provided in NSLP and CACFP, in accordance with §§ 250.56(e) and 250.61(c). For the purposes of this section, domestic foods or food products are:

- (1) Agricultural commodities that are produced in the United States; or
- (2) Food products that are processed in the United States substantially using agricultural commodities that are produced in the United States.

#### § 250.18 Reporting requirements.

(a) *Inventory and distribution of donated foods.* The distributing agency must submit to FNS reports relating to the inventory and distribution of donated foods in this paragraph (a) or in other regulations applicable to specific programs. Such reports must be submitted in accordance with the time frames established for each respective form. For donated foods received in FDPIR, the distributing agency must submit form FNS-152, Monthly Distribution of Donated Foods to Family Units. For donated foods received in TEFAP, NSLP, or other child nutrition programs, the distributing agency must submit form FNS-155, the Inventory Management Register.

(b) *Processor performance reports.* Processors must submit monthly performance reports to the distributing agency, in accordance with § 250.30(m). Such reports must include the information listed in § 250.30(m).

(c) *Disasters and situations of distress.* The distributing agency must submit to FNS a report of the types and amounts of donated foods used from distributing or recipient agency storage facilities in disasters and situations of distress, and a request for replacement of such foods, using electronic form FNS-292A, *Report of Commodity Distribution for Disaster Relief*, in accordance with §§ 250.69 and 250.70. The report must be submitted within 45 days of the termination of such assistance.

(d) *Other information.* The distributing agency must submit other information, as requested by FNS, in order to ensure compliance with requirements in this part. For example, FNS may require the distributing agency to submit information with respect to its assessment of the distribution charge, or to justify the efficiency and cost-effectiveness of its distribution system, in accordance with § 250.13(c) and (d).

#### § 250.19 Recordkeeping requirements.

(a) *Required records.* Distributing agencies, recipient agencies, and other entities must maintain records of agreements and contracts, reports, audits, and claim actions, funds obtained as an incident of donated food distribution, and other records specifically required in this part or in other Departmental regulations, as applicable. In addition, distributing agencies must keep a record of the value of donated foods each of its school food authorities receives, and records to demonstrate compliance with the professional standards for distributing agency directors established in 235.11(g). Processors must also maintain records documenting the sale of end

products to recipient agencies, including the sale of such end products by distributors. Specific recordkeeping requirements relating to the use of donated foods in contracts with food service management companies are included in § 250.54. Failure of the distributing agency, recipient agency, or other entity to comply with recordkeeping requirements shall be considered prima facie evidence of improper distribution or loss of donated foods and may result in a claim against such party for the loss or misuse of donated foods, in accordance with § 250.16, or in other sanctions or corrective actions.

(b) *Retention of records.* Records relating to requirements for donated foods must be retained for a period of three years from the close of the fiscal or school year to which they pertain. However, records pertaining to claims or audits that remain unresolved in this period of time must be retained until such actions have been resolved.

#### § 250.20 Audit requirements.

(a) *Requirements for distributing and recipient agencies.* Audit requirements for State or local government agencies and nonprofit organizations that receive Federal awards or grants (including distributing and recipient agencies under this part) are included in Departmental regulations in 7 CFR part 3052 (which codifies audit requirements in OMB Circular A-133). In accordance with such regulations, the value of Federal grants or awards expended in a fiscal year determine if the distributing or recipient agency is required to obtain an audit in that year. The value of donated foods must be considered as part of the Federal grants or awards in determining if an audit is required. FNS provides guidance for distributing and recipient agencies in valuing donated foods for audit purposes, and in determining whether an audit must be obtained. (For availability of the OMB circular mentioned in this paragraph, please refer to 5 CFR 1310.3).

(b) *Requirements for processors.* In-State processors must obtain an independent certified public accountant (CPA) audit in the first year that they receive donated foods for processing, while multi-State processors must obtain such an audit in each of the first two years that they receive donated foods for processing. After this initial requirement period, in-State and multi-State processors must obtain an independent CPA audit at a frequency determined by the average value of donated foods received for processing per year, as indicated in this paragraph (b). The value of donated foods used in

determining if an audit is required must be the contract value of the donated foods, as defined in § 250.2. The audit must determine that the processor's performance is in compliance with the requirements in this part, and must be conducted in accordance with procedures in the FNS Audit Guide for Processors. All processors must pay for audits required in this paragraph (b). An in-State or multi-State processor must obtain an audit:

(1) Annually, if it receives, on average, more than \$5,000,000 in donated foods for processing per year;

(2) Every two years, if it receives, on average, between \$1,000,000 and \$5,000,000 in donated foods for processing per year; or

(3) Every three years, if it receives, on average, less than \$1,000,000 in donated foods for processing per year.

(c) *Post-audit actions required of processors.* In-State processors must submit a copy of the audit to the distributing agency for review by December 31st of each year in which an audit is required. The distributing agency must ensure that in-State processors provide a corrective action plan with timelines for correcting deficiencies identified in the audit, and must ensure that such deficiencies are corrected. Multi-State processors must submit a copy of the audit, and a corrective action plan with timelines for correcting deficiencies identified in the audit, as appropriate, to FNS for review by December 31st of each year in which an audit is required. FNS may conduct an audit or investigation of a processor to ensure correction of deficiencies, in accordance with § 250.3(b).

(d) *Failure to meet audit requirements.* If a distributing agency or recipient agency fails to obtain the required audit, or fails to correct deficiencies identified in the audit, FNS may withhold, suspend, or terminate the Federal award. If a processor fails to obtain the required audit, or fails to correct deficiencies identified in the audit, a distributing or recipient agency may terminate the processing agreement, and may not extend or renew such an agreement. Additionally, FNS may prohibit the further distribution of donated foods to such processor.

#### **§ 250.21 Distributing agency reviews.**

(a) *Scope of review requirements.* The distributing agency must ensure that subdistributing agencies, recipient agencies, and other entities comply with applicable requirements in this part, and in other Federal regulations, through the on-site reviews required in paragraph (b) of this section, and the

review of required reports or audits. However, the distributing agency is not responsible for the review of school food authorities and other recipient agencies in child nutrition programs. The State administering agency is responsible for the review of such recipient agencies, in accordance with review requirements of part 210.

(b) *On-site reviews.* The distributing agency must conduct an on-site review of:

(1) Charitable institutions, whenever the distributing agency identifies actual or probable deficiencies in the use of donated foods by such institutions, through audits, investigations, complaints, or any other information;

(2) Storage facilities at the distributing agency level (including commercial storage facilities under contract with the distributing or subdistributing agency), on an annual basis; and

(3) Subdistributing and recipient agencies in CSFP, TEFAP, and FDPIR, in accordance with 7 CFR parts 247, 251, and 253, respectively.

(c) *Identification and correction of deficiencies.* The distributing agency must inform each subdistributing agency, recipient agency, or other entity of any deficiencies identified in its reviews, and recommend specific actions to correct such deficiencies. The distributing agency must ensure that such agencies or entities implement corrective actions to correct deficiencies in a timely manner.

#### **§ 250.22 Distributing agency performance standards.**

(a) *Performance standards.* The distributing agency must meet the basic performance standards included in this paragraph in the ordering, distribution, processing, if applicable, and control of donated foods. Some of the performance standards apply only to distributing agencies that distribute donated foods in NSLP or other child nutrition programs, as indicated. However, the identification of specific performance standards does not diminish the responsibility of the distributing agency to meet other requirements in this part. In meeting basic performance standards, the distributing agency must:

(1) Provide recipient agencies with information on donated food availability, assistance levels, values, product specifications, and processing options, as requested;

(2) Implement a request-driven ordering system, in accordance with § 250.10(a), and, for child nutrition programs, § 250.58(a);

(3) Offer school food authorities in NSLP, at a minimum, the commodity

offer value of donated foods, in accordance with § 250.58;

(4) Provide for the storage, distribution, and control of donated foods in accordance with all Federal, State, or local requirements relating to food safety and health;

(5) Provide for the distribution of donated foods in the most efficient and cost-effective manner, including, to the extent practical, direct shipments from vendors to recipient agencies or processors, and the use of split shipments;

(6) Use SAE funds, or other Federal or State funds, as available, in paying State storage and distribution costs for child nutrition programs, and impose a distribution charge on recipient agencies in child nutrition programs only to extent that such funds are insufficient to meet applicable costs;

(7) Provide for the processing of donated foods, at the request of school food authorities, in accordance with Subpart C of this part, including the testing of end products with school food authorities, and the solicitation of acceptability input, when procuring end products on behalf of school food authorities or otherwise limiting the procurement of end products; and

(8) Provide recipient agencies information regarding the preferred method for submission of donated foods complaints to the distributing agency and act expeditiously to resolve submitted complaints.

(b) *Corrective action plan.* The distributing agency must submit a corrective action plan to FNS whenever it is found to be substantially out of compliance with the performance standards in paragraph (a) of this section, or with other requirements in this part. The plan must identify the corrective actions to be taken, and the timeframe for completion of such actions. The plan must be submitted to FNS within 60 days after the distributing agency receives notification from FNS of a deficiency.

(c) *Termination or suspension.* FNS may terminate or suspend all, or part, of the distributing agency's participation in the distribution of donated foods, or in a food distribution program, for failure to comply with requirements in this part, with other applicable Federal regulations, or with its written agreement with FNS. FNS may also take other actions, as appropriate, including prosecution under applicable Federal statutes.

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

■ 4. In Subpart C, § 250.30:

- a. Revise all references to “FNSRO” to read “FNS Regional Office”.
- b. Amend paragraph (b)(2) introductory text by removing the reference, “§ 250.12(b)”, and adding in its place the reference, “§ 250.4(c)”.
- c. Amend paragraph (b)(2)(i) by removing the words, “as defined in § 250.3”, and adding in their place the words, “in accordance with paragraph (d) of this section”.
- d. Amend paragraph (c) as follows:
- i. Redesignate paragraphs (c)(1)(i) through (vi) as paragraphs (c)(1)(i)(A) through (F).
- ii. Redesignate paragraph (c)(1) introductory text as (c)(1)(i) introductory text.
- iii. Designate the undesignated paragraph following paragraph (c)(1)(i)(F), beginning with the words “These criteria will be reviewed”, as paragraph (c)(1)(ii).
- e. Amend newly designated paragraph (c)(1)(ii) by removing the references, “Attachment O to OMB Circular A–102” and “Attachment O of OMB Circular A–102”, and adding in their place the reference, “7 CFR parts 3016 or 3019, as applicable”.
- f. Amend paragraph (c)(4)(iii) by removing the reference, “§ 250.3”, and adding in its place the reference, “§ 250.2”.
- g. Revise paragraphs (c)(4)(viii)(G) and (c)(4)(xi).
- h. Remove paragraph (c)(4)(xiv), and redesignate paragraphs (c)(4)(xv) through (xviii) as paragraphs (c)(4)(xiv) through (xvii).
- i. Revise paragraph (d)(1)(i).
- j. Remove the second and third sentences of paragraph (d)(1)(iii).
- k. Revise paragraph (e)(1)(i).
- l. Amend paragraph (f)(1) introductory text by removing the reference, “§ 250.3”, and adding in its place the reference, “§ 250.2”.
- m. Amend paragraph (f)(2) by removing the reference, “§ 250.16”, and adding in its place the reference, “§ 250.19”.
- n. Amend paragraph (f)(3)(vii) by removing the reference, “§ 250.16(a)(4)”, and adding in its place the reference, “§ 250.19(a)”.
- o. Amend paragraph (j)(3) by removing the reference, “FNS Instruction 410–1, Non-Audit Claims, Food Distribution Program”, and adding in its place the reference, “§ 250.17(c)”.
- p. Remove the last sentence of paragraph (k)(3).
- q. Remove paragraphs (m)(1)(vii) and (viii), and redesignate paragraph (m)(1)(ix) as paragraph (m)(1)(vii).
- r. Revise the second sentence of paragraph (n)(3).

- s. Remove paragraph (n)(4), and redesignate paragraph (n)(5) as paragraph (n)(4).
- t. Remove paragraphs (o), (q), and (r), and redesignate paragraphs (p), (s), and (t) as paragraphs (o), (p), and (q), respectively.

The revisions read as follows:

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

- \* \* \* \* \*
- (c) \* \* \*
- (4) \* \* \*
- (viii) \* \* \*

(G) Meet the requirements of § 250.19 in maintaining records pertaining to the receipt, distribution, and control of donated foods, and the sale of end products;

- \* \* \* \* \*

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

- \* \* \* \* \*
- (d) \* \* \*
- (1) \* \* \*

(i) A refund system in which the processor provides a payment to the recipient agency in the amount of the contract value of the donated food contained in the end product;

- \* \* \* \* \*
- (e) \* \* \*
- (1) \* \* \*

(i) A refund system in which the processor provides a payment to the recipient agency in the amount of the contract value of the donated food contained in the end product;

- \* \* \* \* \*
- (n) \* \* \*

(3) \* \* \* As a part of the annual reconciliation, the distributing agency must ensure that a processor with excessive inventories of donated foods reduces such inventories. \* \* \*

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

- 5. In § 250.50, revise the second sentence of paragraph (a) to read as follows:

#### § 250.50 Contract requirements and procurement.

(a) \* \* \* The contract must ensure that all donated foods received for use by the recipient agency in the school or fiscal year, as applicable, are used in the recipient agency’s food service, or that commercially purchased foods are used in place of such donated foods only in

accordance with the requirements in § 250.51(d). \* \* \*

\* \* \* \* \*

- 6. In § 250.52, revise paragraph (a) to read as follows:

#### § 250.52 Storage and inventory management of donated foods.

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

\* \* \* \* \*

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

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

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

(a) *Ordering and distribution of donated foods.* The distributing agency must ensure that school food authorities are able to submit donated food orders through the FNS electronic donated foods ordering system, or through a comparable electronic food ordering system. The distributing agency must ensure that all school food authorities have the opportunity to provide input at least annually in determining the donated foods from the full list that are made available to them for ordering in the FNS electronic donated foods ordering system or other comparable electronic ordering system. The distributing agency must ensure distribution to school food authorities of all such ordered donated foods that may be distributed to them in a cost-effective manner (including the use of split shipments, as necessary), and that they may utilize efficiently and without waste.

\* \* \* \* \*

(e) *Donated food value in offer and crediting.* In offering the school food authority the commodity offer value of donated foods, the distributing agency must use either the cost-per-pound donated food prices posted annually by USDA or the most recently published cost-per-pound price in the USDA donated foods catalog. The distributing agency must credit the school food authority using the USDA purchase price (cost-per-pound), and update the price at least semi-annually to reflect the most recent USDA purchase price.

- 8. Revise § 250.59 to read as follows:

#### § 250.59 Storage, control, and use of donated foods.

(a) *Storage and inventory management.* The distributing agency must ensure compliance with

requirements in §§ 250.12 and 250.13 in order to ensure the safe and effective storage and inventory management of donated foods, and their efficient and cost-effective distribution to school food authorities. The school food authority must ensure compliance with requirements in § 210.13 to ensure the safe and sanitary storage, inventory management, and use of donated foods and purchased foods. In accordance with § 250.14(c), the school food authority may commingle donated foods and purchased foods in storage and maintain a single inventory record of such commingled foods, in a single inventory management system.

(b) *Use of donated foods in the nonprofit school food service.* The school food authority must use donated foods, as much as is practical, in the lunches served to schoolchildren, for which they receive an established per-meal value of donated food assistance each school year. However, the school food authority may also use donated foods in other activities of the nonprofit school food service. Revenues received from such activities must accrue to the school food authority's nonprofit school food service account, in accordance with § 210.14. Some examples of such activities in which donated foods may be used include:

- (1) School breakfasts or other meals served in child nutrition programs;
- (2) A la carte foods sold to schoolchildren;
- (3) Meals served to adults directly involved in the operation and administration of the nonprofit school food service, and to other school staff; and

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

(c) *Use of donated foods outside of the nonprofit school food service.* The school food authority should not use donated foods in meals or other activities that do not benefit primarily schoolchildren, such as banquets or catered events. However, as their use in such activities may not always be avoided (e.g., if donated foods are commingled with purchased foods in a single inventory management system), the school food authority must ensure reimbursement to the nonprofit school food service for the value of donated foods used in such activities. When such reimbursement may not be based on actual usage of donated foods (e.g., in a single inventory management system), the school food authority must establish an alternate method of reimbursement—e.g., by including the current per-meal value of donated food

assistance in the price charged for the meal or other activity.

(d) *Use of donated foods in a contract with a food service management company.* When the school food authority contracts with a food service management company to conduct the food service, in accordance with § 210.16, it must ensure compliance with requirements in Subpart D of this part, which address the treatment of donated foods under such contract. The school food authority must also ensure compliance with the use of donated foods in paragraphs (b) and (c) of this section under its contract with a food service management company.

(e) *School food authorities acting as a collective unit.* Two or more school food authorities may conduct activities of the nonprofit school food service as a collective unit (e.g., in a school co-op or consortium), including activities relating to donated foods. Such activities must be conducted in accordance with a written agreement or contract between the parties. The school food authority collective unit is subject to the same requirements as a single school food authority in conducting such activities. For example, the school food authority collective unit may use a single inventory management system in its storage and control of purchased and donated foods.

#### § 250.60 [Removed]

- 9. Remove § 250.60.

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

- 10. Redesignate §§ 250.61 and 250.62 as §§ 250.60 and 250.61, respectively.
- 11. Revise Subpart F to read as follows:

#### Subpart F—Household Programs

Sec.

250.63 Commodity Supplemental Food Program (CSFP).

250.64 The Emergency Food Assistance Program (TEFAP).

250.65 Food Distribution Program on Indian Reservations (FDPIR).

250.66 [Reserved]

#### § 250.63 Commodity Supplemental Food Program (CSFP).

(a) *Distribution of donated foods in CSFP.* The Department provides donated foods in CSFP to the distributing agency (i.e., the State agency, in accordance with 7 CFR part 247) for further distribution in the State, in accordance with 7 CFR part 247. State agencies and recipient agencies (i.e., local agencies in 7 CFR part 247) must comply with the requirements of this part in the distribution, control, and use of donated foods in CSFP, to the extent that such requirements are not

inconsistent with the requirements in 7 CFR part 247.

(b) *Types of donated foods distributed.* Donated foods distributed in CSFP include Section 4(a) foods, and donated foods provided under Section 32, Section 416, or Section 709, as available.

#### § 250.64 The Emergency Food Assistance Program (TEFAP).

(a) *Distribution of donated foods in TEFAP.* The Department provides donated foods in TEFAP to the distributing agency (i.e., the State agency, in accordance with 7 CFR part 251) for further distribution in the State, in accordance with 7 CFR part 251. State agencies and recipient agencies must comply with the requirements of this part in the distribution, control, and use of donated foods, to the extent that such requirements are not inconsistent with the requirements in 7 CFR part 251.

(b) *Types of donated foods distributed.* Donated foods distributed in TEFAP include Section 27 foods, and donated foods provided under Section 32, Section 416, or Section 709, as available.

#### § 250.65 Food Distribution Program on Indian Reservations (FDPIR).

(a) *Distribution of donated foods in FDPIR.* The Department provides donated foods in FDPIR to the distributing agency (i.e., the State agency, in accordance with 7 CFR parts 253 and 254, which may be an Indian Tribal Organization) for further distribution, in accordance with 7 CFR parts 253 and 254. The State agency must comply with the requirements of this part in the distribution, control, and use of donated foods, to the extent that such requirements are not inconsistent with the requirements in 7 CFR parts 253 and 254.

(b) *Types of donated foods distributed.* Donated foods distributed in FDPIR include Section 4(a) foods, and donated foods provided under Section 32, Section 416, or Section 709, as available.

#### 250.66 [Reserved]

#### Subpart G—Additional Provisions

- 12. Revise the heading for subpart G to read as set forth above.
- 13. Revise § 250.69 to read as follows:

#### § 250.69 Disasters.

(a) *Use of donated foods to provide congregate meals.* The distributing agency may provide donated foods from current inventories, either at the distributing or recipient agency level, to

a disaster organization (as defined in § 250.2), for use in providing congregate meals to persons in need of food assistance as a result of a Presidentially declared disaster or emergency (hereinafter referred to collectively as a "disaster"). FNS approval is not required for such use. However, the distributing agency must notify FNS that such assistance is to be provided, and the period of time that it is expected to be needed. The distributing agency may extend such period of assistance as needs dictate, but must notify FNS of such extension.

(b) *Use of donated foods for distribution to households.* Subject to FNS approval, the distributing agency may provide donated foods from current inventories, either at the distributing or recipient agency level, to a disaster organization, for distribution to households in need of food assistance because of a disaster. Such distribution may continue for the period that FNS has determined to be necessary to meet the needs of such households. However, households receiving disaster SNAP (D-SNAP) benefits are not eligible to receive such donated food assistance.

(c) *Approval of disaster organization.* Before distribution of donated foods to a disaster organization, the distributing agency must review and approve such organization's application, which must be submitted to the distributing agency either electronically or in written form. The distributing agency must also submit such application to FNS for review and approval before permitting distribution of donated foods to households.

(1) The disaster organization's application must, to the extent possible, include the following information:

- (i) A description of the disaster situation;
- (ii) The number of people requiring assistance;
- (iii) The period of time for which donated foods are requested;
- (iv) The quantity and types of food needed; and
- (v) The number and location of sites where donated foods are to be used, to the extent that such information is known.

(2) In addition to the information required above, disaster organizations applying to distribute donated foods to households must include the following information in their application:

- (i) An explanation as to why such distribution is needed;
- (ii) The method(s) of distribution available; and
- (iii) A statement assuring that D-SNAP benefits and donated food assistance will not be provided

simultaneously to individual households, and a description of the system that will be implemented to prevent such dual participation.

(d) *Information from households.* If the issuance of D-SNAP benefits has been approved, the distributing agency must ensure that the disaster organization obtains the following information from households receiving donated foods, and reports such information to the distributing agency:

- (1) The name and address of the household members applying for assistance;
- (2) The number of household members; and
- (3) A statement from the head of the household certifying that the household is in need of food assistance, is not receiving D-SNAP benefits, and understands that the sale or exchange of donated foods is prohibited.

(e) *Eligibility of emergency relief workers for congregate meals.* The disaster organization may use donated foods to provide meals to any emergency relief workers at the congregate feeding site who are directly engaged in providing relief assistance.

(f) *Reporting and recordkeeping requirements.* The distributing agency must report to FNS the number and location of sites where donated foods are used in congregate meals or household distribution as these sites are established. The distributing agency must also report the types and amounts of donated foods from distributing or recipient agency storage facilities used in disaster assistance, utilizing form FNS-292A, *Report of Commodity Distribution for Disaster Relief*, which must be submitted electronically, within 45 days from the termination of disaster assistance. This form must also be used to request replacement of donated foods, in accordance with paragraph (g) of this section. The distributing agency must maintain records of reports and other information relating to disasters.

(g) *Replacement of donated foods.* In order to ensure replacement of donated foods used in disasters, the distributing agency must submit to FNS a request for such replacement, utilizing form FNS-292A, *Report of Commodity Distribution for Disaster Relief*, within 45 days following the termination of disaster assistance. The distributing agency may request replacement of foods used from inventories in which donated foods are commingled with other foods (i.e., at storage facilities of recipient agencies utilizing single inventory management), if the recipient agency received donated foods of the same type as the foods used during the year preceding the onset of the disaster assistance. FNS will replace

such foods in the amounts used, or in the amount of like donated foods received during the preceding year, whichever is less.

(h) *Reimbursement of transportation costs.* In order to receive reimbursement for any costs incurred in transporting donated foods within the State, or from one State to another, for use in disasters, the distributing agency must submit a public voucher to FNS with documentation of such costs. FNS will review the request and reimburse the distributing agency.

■ 14. Revise § 250.70 to read as follows:

**§ 250.70 Situations of distress.**

(a) *Use of donated foods to provide congregate meals.* The distributing agency may provide donated foods from current inventories, either at the distributing or recipient agency level, to a disaster organization, for use in providing congregate meals to persons in need of food assistance because of a situation of distress, as this term is defined in § 250.2. If the situation of distress results from a natural event (e.g., a hurricane, flood, or snowstorm), such donated food assistance may be provided for a period not to exceed 30 days, without the need for FNS approval. However, the distributing agency must notify FNS that such assistance is to be provided. FNS approval must be obtained to permit such donated food assistance for a period exceeding 30 days. If the situation of distress results from other than a natural event (e.g., an explosion), FNS approval is required to permit donated food assistance for use in providing congregate meals for any period of time.

(b) *Use of donated foods for distribution to households.* The distributing agency must receive FNS approval to provide donated foods from current inventories, either at the distributing or recipient agency level, to a disaster organization for distribution to households in need of food assistance because of a situation of distress. Such distribution may continue for the period of time that FNS determines necessary to meet the needs of such households. However, households receiving D-SNAP benefits are not eligible to receive such donated food assistance.

(c) *Approval of disaster organizations.* Before distribution of donated foods to a disaster organization, the distributing agency must review and approve such organization's application, which must be submitted to the distributing agency either electronically or in written form. The distributing agency must also submit such application to FNS for review and approval before permitting

distribution of donated foods in a situation of distress that is not the result of a natural event, or for any distribution of donated foods to households. The disaster organization's application must, to the extent possible, include the information required in § 250.69(c).

(d) *Information from households.* If the issuance of D-SNAP benefits has been approved, the distributing agency must ensure that the disaster organization obtains the information in § 250.69(d) from households receiving donated foods, and reports such information to the distributing agency.

(e) *Eligibility of emergency relief workers for congregate meals.* The disaster organization may use donated foods to provide meals to any emergency relief workers at the congregate feeding site that are directly engaged in providing relief assistance.

(f) *Reporting and recordkeeping requirements.* The distributing agency must report to FNS the number and location of sites where donated foods are used in congregate meals or household distribution as these sites are established. The distributing agency must also report the types and amounts of donated foods from distributing or recipient agency storage facilities used in the situation of distress, utilizing form FNS-292A, *Report of Commodity Distribution for Disaster Relief*, which must be submitted electronically, within 45 days from the termination of assistance. This form must also be used to request replacement of donated foods, in accordance with paragraph (g) of this section. The distributing agency must maintain records of reports and other information relating to situations of distress.

(g) *Replacement of donated foods.* FNS will replace donated foods used in a situation of distress only to the extent that funds to provide for such replacement are available. The

distributing agency must submit to FNS a request for replacement of such foods, utilizing form FNS-292A, *Report of Commodity Distribution for Disaster Relief*, which must be submitted electronically, within 45 days from the termination of assistance. The distributing agency may request replacement of foods used from inventories in which donated foods are commingled with other foods (i.e., at storage facilities of recipient agencies utilizing single inventory management), if the recipient agency received donated foods of the same type as the foods used during the year preceding the onset of the situation of distress. Subject to the availability of funds, FNS will replace such foods in the amounts used, or in the amount of like donated foods received during the preceding year, whichever is less.

(h) *Reimbursement of transportation costs.* In order to receive reimbursement for any costs incurred in transporting donated foods within the State, or from one State to another, for use in a situation of distress, the distributing agency must submit a public voucher to FNS with documentation of such costs. FNS will review the request and reimburse the distributing agency to the extent that funds are available.

■ 15. Add § 250.71 to read as follows:

**§ 250.71 OMB control numbers.**

Unless as otherwise specified in the table below, the information collection reporting and recordkeeping requirements in 7 CFR part 250 are accounted for in OMB control number 0584-0293.

CFR cite	OMB control No.
250.4(a) .....	0584-0067
250.19(a) .....	0584-0067, 0584-0293
250.69(f)-(g) & 250.70(f)-(g).	0584-0067, 0584-0293

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

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

**Authority:** 7 U.S.C. 7501-7516.

■ 17. In § 251.4:

■ a. Remove paragraph (f)(4) and redesignate paragraph (f)(5) as paragraph (f)(4).

■ b. Revise paragraph (g).

■ c. Remove paragraph (l).

The revision reads as follows:

**§ 251.4 Availability of commodities.**

\* \* \* \* \*

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

\* \* \* \* \*

Dated: October 8, 2014.

**Jeffrey J. Tribiano,**

*Acting Administrator, Food and Nutrition Service.*

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