

Part 250-1 of the TEFAP Regulations

These regulations are provided by the State of Iowa for maintenance of their Emergency Food Program. Included are Parts 250 and 251 described in the Agency Member Agreement. The State of Iowa has tasked food banks to ensure that agencies adhere to these standards. River Bend Foodbank has acted accordingly in response. If you have any questions, please contact Diane Erickson at derickson@riverbendfoodbank.org or by phone at 563-345-6490 Ext. 203.

Part 250

7 CFR 250.30 – State Processing of Donated Foods.

§ 250.30 State processing of donated foods.

(a) General. This section sets forth the terms and conditions under which distributing agencies, subdistributing agencies, or recipient agencies may enter into contracts for the processing of donated foods and prescribes the minimum requirements to be included in such contracts.

(b) Permissible contractual arrangements.

(1) A distributing agency, subdistributing agency, or recipient agency may contract for processing, pay the processing fee, and deliver the end products to eligible recipient agencies through its own distribution system. Distributing agencies shall assure that the acceptability of processed end products is tested with recipient agencies eligible to receive them prior to entering into a processing contract and shall develop a system for monitoring product acceptability. Distributing agencies may exempt end products from testing if they have been used previously, have been determined by the distributing agency to be acceptable by recipient agencies, and have had no changes in specifications.

(2) A distributing agency or subdistributing agency may contract for processing on behalf of one or more recipient agencies. All recipient agencies eligible to receive the donated foods to be processed may receive end products made from those foods and produced under such processing contracts by virtue of the distributing agency—recipient agency agreement required by § [250.12\(b\)](#). Under this arrangement and subject to the approval of the distributing agency:

(i) Processors shall utilize either a discount or a refund system as defined in § [250.3](#) when they sell end products directly to recipient agencies, or

(ii) When selling end products through a distributor, such sales shall be in accordance with paragraph (e) of this section.

(3) Distributing agencies shall permit subdistributing agencies and recipient agencies to enter into processing contracts with a processor under arrangements similar to those described in paragraph (b) (1) or (2) of this section.

(c) Requirements for processing contracts.

(1) Contracts with processors shall be in a standard written form and shall be reviewed by the appropriate FNSRO. Processing contracts shall terminate on June 30 of each year. However, processing contracts may give contracting agencies the option of extending contracts for two 1-year periods, provided that any changed information must be updated before any contract

extension is granted, including the information in paragraphs (c)(3), (c)(4)(ii), and (c)(4)(viii)(B) of this section. The processor must have performed to the satisfaction of the contracting agency during the previous contract year, submitted all required reports and any corrections to such reports up to the time that contract extension occurs, and submitted its certified public accountant report as required under paragraph (c)(4)(xi) of this section before the contract may be extended. Distributing agencies shall develop criteria for use in evaluating and selecting processing contracts. The selection criteria shall be used in selecting or rejecting processors in a manner that ensures equitable treatment of processors. The selection criteria shall, at a minimum, include:

- (i) The nutritional contribution which the end product will provide;
- (ii) The marketability of the end product;
- (iii) The distribution method which the processor intends to utilize;
- (iv) Price and yield schedule data;
- (v) Any applicable labeling requirements; and
- (vi) The ability of the processor to meet the terms and conditions set forth in the regulations.

These criteria will be reviewed by the appropriate FNSRO during the management evaluation review of the distributing agency. Distributing agencies and subdistributing agencies which enter into contracts on behalf of recipient agencies but which do not limit the types of end products which can be sold or the number of processors which can sell end products within the State are not required to follow the selection criteria. In addition to utilizing these selection criteria, when a contracting agency enters into a contract both for the processing of donated food and the purchase of the end products produced from the donated food, the procurement standards set forth in Attachment O to OMB Circular A-102 must be followed. Recipient agencies which purchase end products produced under Statewide agreements are also required to comply with Attachment O of OMB Circular A-102. Contracting agencies shall not enter contracts with processors which cannot demonstrate the ability to meet the terms and conditions of the regulations and the distributing agency agreements; furnish prior to the delivery of any donated foods for processing, a performance bond, an irrevocable letter of credit or an escrow account in an amount sufficient to protect the contract value of donated food on hand and on order; demonstrate the ability to distribute end products to eligible recipient agencies; provide a satisfactory record of integrity, business ethics and performance and provide adequate storage.

(2) Standard form contracts shall be prepared or reviewed by the appropriate State legal staff to assure conformity with the requirements of these regulations and of applicable Federal, State and local laws.

(3) The contract shall be signed for the processor by the owner, a partner, or a corporate officer duly authorized to sign the contract, as follows:

- (i) In a sole proprietorship, the owner shall sign the contract;
- (ii) In a partnership, a partner shall sign the contract;
- (iii) In a corporation, a duly authorized corporate officer shall sign the contract.

(4) At a minimum, each processing contract shall include:

- (i) The names and telephone numbers of the contracting agency and processor;
- (ii) A description of each end product, the quantity of each donated food and the identification of any other ingredient which is needed to yield a specific number of units of each end product (except that the contracting agency may permit the processor to specify the total quantity of any flavorings or seasonings which may be used without identifying the ingredients which are, or may be, components of flavorings or seasonings), the total weight of all ingredients in the batch formula, the yield factor for each donated food, and any pricing information provided by the

processor in addition to that required in paragraph (c)(4)(iii) of this section as requested by the contracting agency and a thorough explanation of what this additional pricing information represents. The yield factor is the percentage of the donated food which must be returned in the end product to be distributed to eligible recipient agencies. For substitutable donated foods, at least 100 percent of the donated food provided to the processor must be physically contained in the end products with no allowable tolerance;

(iii) The contract value of each donated food to be processed and, where processing is to be performed only on a fee-for-service basis as defined in § [250.3](#), the fee-for-service;

(iv) A provision for:

(A) Termination of the contract upon thirty days written notice by the contracting agency or the processor and

(B) Immediate termination of the contract when there has been noncompliance with its terms and conditions by the contracting agency or the processor;

(v) In the event of contract termination, a provision for disposition of donated foods and end products in the processor's inventories or payment of funds in accordance with paragraph (j) of this section;

(vi) A provision for inspection and certification during processing, where applicable, by the appropriate acceptance service in accordance with paragraphs (g) and (h) of this section;

(vii) A provision that end products containing donated foods that are not substitutable under paragraph (f) of this section shall be delivered only to eligible recipient agencies and that end products containing both substitutable and non-substitutable donated foods may be delivered and sold in accordance with the requirements of paragraph (d) and (e) of this section;

(viii) Provisions that the processor shall:

(A) Fully account for all donated foods delivered into its possession by production and delivery to the contracting agency or eligible recipient agencies of an appropriate number of units of end products meeting the contract specifications, and where end products are sold through a distributor, that the processor remains full accountable for the donated foods until refunds or any other credits equal to their contracted value have been made to eligible recipient agencies in accordance with paragraph (k) of this section or to distributing agencies in accordance with paragraph (n)(2) of this section;

(B) Furnish to the contracting agency prior to the delivery of any donated foods for processing documentation that a performance supply and surety bond from a surety company listed in the most recent U.S. Department of Treasury Circular 570, an irrevocable letter of credit or an escrow account has been obtained in an amount that is sufficient to protect the contract value of all donated foods. Since the distributing agency is held liable by FNS for any donated foods provided to a processor the distributing agency shall determine the dollar value of the performance supply and surety bond, irrevocable letter of credit or the escrow account taking into consideration the

(1) Value of donated foods on hand;

(2) Value of donated foods on order and

(3) Anticipated usage rate during the contract period;

(C) Use or dispose of the containers in which donated foods are received from the Department in accordance with the instructions of the contracting agency;

(D) Apply as credit against the processing fee or return to the contracting agency and identify:

(1) Any funds received from the sale of containers, and

- (2) The market value or the price received from the sale of any by-products of donated foods or commercial foods which have been substituted for donated foods;
- (E) Substitute donated foods with commercially purchased foods only in accordance with paragraph (f) of this section;
- (F) Meet the requirements of paragraph (i) of this section for labeling end products;
- (G) Maintain accurate and complete records pertaining to the receipt, disposal, and inventory of donated foods in accordance with § [250.16](#);
- (H) Submit processing performance reports in accordance with paragraph (m) of this section; and
- (I) Submit annual reconciliation reports and make payments to distributing agencies for any inventory remaining at the termination of the contract in accordance with paragraph (n)(3) of this section.
- (ix) A provision that approval of the contract by distributing agency shall not obligate that agency or the Department to deliver donated foods for processing;
- (x) A description of the processor's quality control system and assurance that an effective quality control system will be maintained for the duration of the contract;
- (xi) In instances when the processor is a multi-State processor as defined in § [250.3](#), a provision that the processor agrees to obtain an independent audit by a certified public accountant in accordance with § [250.18\(b\)](#);
- (xii) A requirement that inventory drawdowns shall be limited to the actual amount of donated foods contained in the end product. Additional commodity required to account for production loss shall be obtained from non-donated foods;
- (xiii) A provision that the fee-for-service or value pass-through system to be used for the sale of end products to recipient agencies shall be described and be consistent with paragraphs (d) and (e) of this section.
- (xiv) In instances when the distributing agency has delegated the responsibility for sales verification for end products provided by a distributor to recipient agencies at a discount, assurance that the processor will submit sales verification data to the distributing agency in accordance with § [250.30\(m\)\(l\)](#); and
- (xv) A provision that the contracting agency shall give the processor a list of all recipient agencies eligible to purchase end products under the contract and provide updates for any changes which occur during the contract period.
- (xvi) A provision that the processor shall not assign the processing contract or delegate any aspect of processing under a subcontract or other arrangement without the written consent of the contracting agency and the distributing agency.
- (xvii) A provision that the processor shall provide pricing information summaries and updated pricing information summaries as required in paragraphs (d)(3) and (e)(2) of this section.
- (xviii) A provision that the processor shall maintain documentation which demonstrates that the level of the processor's commercial production has not been reduced, as required in paragraph (f)(1)(iii) of this section.

(d) *End products sold by processors.*

- (1) When recipient agencies pay the processor for end products, such sales shall be under:
- (i) A refund system as defined in § [250.3](#) and in accordance with paragraph (k) of this section; or

(ii) A discount system which provides the price of each unit of end product purchased by eligible recipient agencies to be discounted by the stated contract value of the donated foods contained therein; or

(iii) An alternative value pass-through system under which the value of the donated food contained in each unit of end product shall be passed to the recipient agency and which has been approved by FNS at the request of the distributing agency. Any alternative value pass-through system approved under this paragraph must comply with the sales verification requirements specified in § [250.19\(b\)](#) of this part, or an alternative verification system approved by FNS. The Department retains the authority to inspect and review all pertinent records including records pertaining to the verification of a statistically valid sample of sales. FNS may consider the paperwork and resource burden associated with alternative value pass-through systems when considering approval and reserves the right to deny the approval of systems which are labor-intensive and provide no greater accountability than those systems permitted under paragraphs (d) and (e) of this section.

(2) When a processor delivers end products produced under a fee-for-service contract, the processor shall separately identify on the bill for the recipient agency the agreed-upon fee-for-service and any delivery costs.

(3) Processors shall provide pricing information summaries to contracting agencies and contracting agencies shall provide this information to recipient agencies as soon as possible after contract approval. If this pricing information changes during the contract period, processors shall provide updated pricing information to the contracting agency 30 days prior to the effective date of the change, which, in turn, shall provide this updated information to eligible recipient agencies.

(e) *End products sold by distributors.*

(1) When a processor transfers end products to a distributor for delivery and sale to recipient agencies, such sales shall be under:

(i) A refund system as defined in § [250.3](#) and in accordance with paragraph (k) of this section; or

(ii) A hybrid system which provides a refund for the contract value of the donated food shall be provided to the distributor in accordance with paragraph (k) of this section and the price of each unit of end product purchased by eligible recipient agencies through a distributor shall be discounted by the contract value of the donated foods contained therein; or

(iii) An alternative value pass-through system under which the contract value of the donated food contained in each unit of end product shall be passed on to the recipient agency and which has been approved by FNS in accordance with paragraph (d)(1)(iii) of this section; or

(iv) When a processor arranges for delivery of processed end products produced under fee-for-service contracts by distributors, the products shall be delivered and invoiced using one of the following procedures:

(A) The recipient agency is billed by the processor for the fee-for-service and the distributor bills the recipient agency for the storage and delivery of the end products; or

(B) The processor arranges for the delivery of end products through a distributor on behalf of the recipient agency. In this system, the processor's invoice must include both the fee-for-service and the distributor's charges as separate, clearly identifiable charges.

(2) Processors shall provide pricing information summaries to contracting agencies and contracting agencies shall provide this information to recipient agencies as soon as possible after contract approval. If this pricing information changes during the contract period, the processor

shall provide updated pricing information to the contracting agency, which, in turn, shall provide this information to the eligible recipient agencies.

(f) *Substitution of donated foods with commercial foods.*

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

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

(ii) Poultry shall be eligible for limited substitution. Any processors that wish to substitute poultry must have a plan approved by both FNS and AMS. Only bulk pack chicken, chicken parts, and bulk pack turkey delivered by USDA vendors to the processor are eligible for substitution. No backhauled poultry product may be substituted. (Backhauled product is typically cut-up frozen poultry parts delivered to schools that may be turned over to processors for further processing at a later time.) Should a processor want to amend its approved plan, it shall submit any amendments to USDA for approval prior to implementing such amendments.

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

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

(iii) Processors shall maintain documentation that they have not reduced their level of commercial production because of participation in the State processing program.

(2) Documentation must be maintained by both parties in accordance with § [250.16](#). Where commercial food is authorized to be substituted for any donated, the processor shall maintain records to substantiate that it continues to acquire on the commercial market sufficient purchases of substitutable food for commercial production and any amounts necessary to meet the 100

percent yield requirement. When there is substitution, the donated foods shall be used by the processor and shall not otherwise be sold or disposed of in bulk form. The applicable Federal acceptance service shall, upon request by the Department, the contracting agency or the distributing agency determine if the quality analysis meets the requirements set forth in the original USDA procurement specification and, in the case of concentrated skim milk replacing donated nonfat dry milk, determine if the concentrated skim milk contains the amount of milk solids as specified in the contract. When donated foods are nonsubstitutable, the applicable Federal acceptance service shall ensure against unauthorized substitutions, and verify that quantities of donated foods used are as specified in the contract.

(3) When concentrated skim milk is used to replace donated nonfat dry milk, the contract shall also specify (in addition to the requirements in paragraph (c) of this section):

(i) The percent of milk solids that, at a minimum, must be contained in the concentrated skim milk;

(ii) The weight ratio of concentrated skim milk to donated nonfat dry milk;

(A) The weight ratio is the weight of concentrated skim milk which equals one pound of donated nonfat dry milk, based on milk solids;

(B) In calculating this weight, nonfat dry milk shall be considered as containing 96.5 percent milk solids;

(C) If more than one concentration of concentrated skim milk is to be used, a separate weight ratio must be specified for each concentration;

(iii) The processor's method of verifying that the milk solids content of the concentrated skim milk is as stated in the contract;

(iv) A requirement that inventory drawdowns of donated nonfat dry milk shall be limited to an amount equal to the amount of concentrated skim milk, based on the weight ratio, used to produce the end product;

(v) A requirement that the contract value of donated food for a given amount of concentrated skim milk used to produce an end product is the value of the equivalent amount of nonfat dry milk, based on the weight ratio of the two foods;

(vi) A requirement that the concentrated skim milk shall be produced in a USDA approved plant or in a plant approved by the appropriate regulatory authority for the processing of Grade A milk products; and

(vii) A requirement that documentation sufficient to substantiate compliance with the contract provisions shall be maintained in accordance with § [250.16\(a\)\(4\)](#).

(4) Title to the substituted food shall transfer to the contracting agency upon the initiation of the processing of the end product containing the substituted food. Title to the equivalent amount of donated food shall transfer to the processor at the same time (except when the substitution is necessary to meet the 100 percent yield requirement or to otherwise replace missing or out-of-condition donated food). As with the processing of donated poultry into end products, AMS graders must monitor the processing of any substituted commercial poultry to ensure that program integrity is maintained. Once title has transferred, the processor shall use the substituted food in accordance with the terms and conditions of this part.

(g) *Meat and poultry inspection programs.* When donated meat or poultry products are processed or when any commercial meat or poultry products are incorporated into an end product containing one or more donated foods, all of the processing shall be performed in plants under continuous Federal meat or poultry inspection, or continuous State meat or poultry inspection in

States certified to have programs at least equal to the Federal inspection programs. In addition to FSIS inspection, all donated meat and poultry processing shall be performed under AMS acceptance service grading. The cost of this service shall be borne by the processor. In the event the processor can demonstrate that grading is impractical, exemptions in the use of acceptance services shall be approved by the distributing agency prior to processing each order. Exemptions in the use of acceptance service graders will be authorized on the basis of each order to be processed provided the processor can demonstrate:

- (1) That even with ample notification time, the processor cannot secure the services of a grader,
- (2) That the cost for a grader would be unduly excessive relative to the value of foods being processed and that production runs cannot be combined or scheduled to enable prorating of the costs of services among the purchasers of end products, or
- (3) The documented urgency of the recipient agency's need for the end product precludes the use of acceptance services.

Prior to approving a processor's request to waive the acceptance service requirement the distributing agency shall ensure, based on the processor's past performance, that the quality of the end product produced will in no way be adversely affected as a result of waiving the requirement.

(h) *Certification by acceptance service.*

- (1) All processing activities of donated foods shall be subject to review and audit by the Department, including the applicable Federal acceptance service. The contracting agency may also require acceptance and certification by such acceptance service in addition to the requirements set forth in paragraph (g) of this section.
- (2) In the case of substitutable donated foods, in deciding whether to require acceptance and certification, the contracting agency should consider the dollar value of the donated foods delivered to the processor.
- (3) When contracting agencies require certification in accordance with paragraph (h) (1) or (2) of this section, the degree of acceptance and certification necessary under the processing contract shall be determined by the appropriate Federal acceptance service after consultation with the distributing agency concerning the type and volume of the donated foods and anticipated value of end products to be processed. The cost of this service shall also be borne by the processor.

(i) *Labeling end products.*

- (1) Except when end products contain donated foods that are substituted under paragraph (f) of this section, the exterior shipping containers of end products and, where practicable, the individual wrappings or containers of end products, shall be clearly labeled "Contains Commodities Donated by the United States Department of Agriculture. This Product Shall Be Sold Only to Eligible Recipient Agencies."
- (2) Labels on all end products shall meet applicable Federal labeling requirements.
- (3) When a processor makes any claim with regard to an end product's contribution toward meal requirements of any child nutrition program, the processor shall follow procedures established by FNS, the Food Safety and Inspection Service of the Department, the National Marine Fisheries Service of the U.S. Department of Commerce or other applicable Federal agencies for approval of such labels.

(j) *Termination of processing contracts.*

(1) When contracts are terminated or completed and the processor has commodities remaining in inventory, the processor shall be directed, at the option of the distributing agency and the FNSRO, to do the following:

(i) With respect to nonsubstitutable commodities, the processor shall:

(A) Return the commodities to the contracting agency;

(B) Pay the contracting agency for the commodities based on the Department's replacement costs, determined by using the most recent data provided by the Department; or

(C) Pay the contracting agency for the commodities based on the contract value stated in the processor's contract;

(D) Pay the contracting agency the CCC unrestricted sales price;

(ii) With respect to substitutable commodities, the processor shall:

(A) With the concurrence of any affected contracting agencies, transfer the donated foods to the accounts of other contracting agencies with which the processor has contracts;

(B) Return the foods donated to the contracting agency;

(C) Replace the commodities with the same foods of equal or better quality as certified in accordance with paragraph (f)(2) of this section and deliver such foods to the contracting agency;

(D) Pay the contracting agency for the commodities based on the Department's replacement costs, determined by using the most recent data provided by the Department; or

(E) Pay the contracting agency for the commodities based on the contract value stated in the processor's contract.

(F) Pay the contracting agency the CCC unrestricted sales price.

(2) When a processor's contract is terminated at the processor's request or due to noncompliance or negligence on the part of the processor and commodities remaining in the processor's inventory are transported pursuant to paragraph (j)(1)(i)(A), (j)(1)(ii)(B) or (j)(1)(ii)(C) of this section, the processor shall pay the transportation costs.

(3) Funds received by distributing agencies upon termination of contracts shall be used in accordance with FNS Instruction 410-1, Non-Audit Claims, Food Distribution Program.

(k) Refund payments.

(1) When end products are sold to recipient agencies in accordance with the refund provisions of paragraph (d) or (e) of this section, each recipient agency shall submit refund applications to the processor within 30 days from the close of the month in which the sales were made, except that recipient agencies may submit refund applications to a single processor on a Federal fiscal quarterly basis if the total anticipated refund due for all purchases of product from that processor during the quarter is 25 dollars or less.

(2) In instances when refunds are to be provided to distributors which have sold end products to recipient agencies at a discount, distributors shall submit refund applications to processors within 30 days from the close of the month in which the sales were made of the date of sale to recipient agencies in order to receive benefits.

(3) Not later than 30 days after receipt of the application by the processor, the processor shall make a payment to the recipient agency or distributor equal to the stated contract value of the donated foods contained in the purchased end products covered by the refund application, except that processors may group together refund applications for a single recipient agency on a Federal fiscal quarterly basis if the total anticipated refund due that recipient agency during the quarter is 25 dollars or less. Copies of requests for refunds and payments to recipient agencies and/or distributors shall be forwarded to the appropriate distributing agency by the processor.

(l) *Contract approvals.* Distributing agencies shall review and approve processing contracts entered into or renewed by subdistributing and recipient agencies prior to the delivery of commodities for processing under such contracts. The distributing agency which enters into or approves a processing contract shall provide a copy of the contract and of these regulations to the processors, forward a copy of the contract to the appropriate FNSRO, and retain a copy for its files.

(m) *Performance reports.*

(1) Processors shall be required to submit to distributing agencies monthly reports of performance under each processing contract with year-to-date totals. Processors contracting with agencies other than a distributing agency shall submit such reports to the distributing agency having authority over that particular contracting agency. Performance reports shall be postmarked no later than the final day of the month following the reporting period; however, the final performance report for the contract period shall be postmarked no later than 60 postmarked days from the close of the contract year. The report shall include:

- (i)** A list of all recipient agencies purchasing end products under the contract;
- (ii)** Donated-food inventory at the beginning of the reporting period;
- (iii)** Amount of donated foods received during the reporting period;
- (iv)** Amount of donated foods transferred to and/or from existing inventory;
- (v)** Number of units approved end products delivered to each eligible recipient agency during the reporting period and the number of pounds of each donated food represented by these delivered end products;
- (vi)** Donated food inventory at the end of the reporting period;
- (vii)** [Reserved]
- (viii)** In instances in which sales verification has been delegated to the processor pursuant to § [250.19\(b\)\(2\)](#), sales verification findings shall be reported as an attachment to the December and June performance reports in whatever format the State distributing agency deems necessary.
- (ix)** A certification statement that sufficient donated foods are in inventory or on order to account for the quantities needed for production of end products for State processing contracts and that the processor has on hand or on order adequate quantities of foods purchased commercially to meet the processor's production requirements for commercial sales.

(2) In addition to reporting the information identified in paragraph (m)(1) of this section, processors which substitute concentrated skim milk for donated nonfat dry milk shall also report the following information for the reporting period:

- (i)** The number of pounds of nonfat dry milk used in commercial products sold to outlets which are not recipient agencies; and
- (ii)** The number of pounds of concentrated skim milk, and the percent of milk solids contained therein, used in end products sold to recipient agencies.

(3) Distributing agencies shall review and analyze reports submitted by processors to ensure that performance under each contract is in accordance with the provisions set forth in this section.

(n) *Inventory controls.*

(1) Distributing agencies shall monitor processor inventories to ensure that the quantity of donated foods for which a processor is accountable is the lowest cost-efficient level but in no event more than a six-month supply based on the processor's average monthly usage, unless a

higher level has been specifically approved by the distributing agency on the basis of a written justification submitted by the processor. Under no circumstances should the amount of donated foods ordered by the contracting agency for processing purposes be in excess of anticipated usage or beyond the processor's ability to accept and store the donated foods at any one time. Distributing agencies shall make no further distribution to processors whose inventories exceed these limits until such inventories have been reduced.

(2) For processors substituting concentrated skim milk for donated nonfat dry milk, distributing agencies shall review the processors' monthly performance reports to ensure that:

(i) Donated nonfat dry milk inventory is being drawn down based on the amount of milk solids contained in the concentrated skim milk which was used in end products sold to eligible recipient agencies;

(ii) An amount of milk solids equivalent to the amount in the donated nonfat dry milk is contained in end products sold to eligible recipient agencies; and

(iii) Donated nonfat dry milk is not being sold in bulk form.

(3) The last monthly performance report for the contract period, as required in paragraph (m)(1) of this section, shall serve as the annual reconciliation report. As a part of the annual reconciliation, a processor which has entered into a contract with the contracting agency for the next year shall pay the distributing agency, at the contract value, for any donated food inventory held which is in excess of the inventory level which has been approved by the State distributing agency. A processor whose contract has been completed or terminated shall return or pay for commodities as required by subsection (j).

(4) Distributing agencies shall certify the accuracy of the annual reconciliation report and forward it to the FNS Regional Office. Such report shall be postmarked no later than 90 days following the close of the contract year. All monies shall be used in accordance with FNS Instruction 410-1, Non-Audit Claims, Food Distribution Program.

(5) Distributing agencies shall not submit food requisitions for processors reporting no sales activity during the prior year's contract period unless documentation is submitted by the processor which outlines specific plans for product promotion or sales expansion.

(o) *Processing inventory reports.*

(1) Distributing agencies shall forward to the FNS Regional Office the inventory summary portion of the monthly performance report submitted by the processors in accordance with paragraph (m)(1) of this section for the last month of each Federal fiscal quarter. Such reports shall be postmarked no later than 60 days following the close of each Federal fiscal quarter, except that such reports shall be postmarked no later than 90 days following the close of the contract year.

(2) In addition to the reporting requirements in paragraph (o)(1) of this section, for each processor which substitutes concentrated skim milk for donated nonfat dry milk the distributing agency shall also report the following information for the reporting period:

(i) The number of pounds of nonfat dry milk used in commercial products sold to nonprogram outlets; and

(ii) The number of pounds of concentrated skim milk and the percent of milk solids contained therein used in end products sold to recipient agencies.

(p) *Cooperation with administering agencies for child nutrition programs.* If the distributing agency which enters into or approves contracts for end products to be used in a child nutrition

program does not also administer such program, it shall collaborate with the administering agency by;

- (1) Giving that agency an opportunity to review all such contracts to determine whether end products to be provided contribute to required nutritional standards for reimbursement under the applicable regulations for such program (7 CFR parts [210](#), [225](#), and [226](#)) or are otherwise suitable for use in such program;
- (2) Consulting with the agency with regard to the labeling requirements for the end products; and
- (3) Otherwise requesting technical assistance as needed from that agency.

(q) *FNSRO review of contracts and inventory reports.* The FNSRO shall:

- (1) Review all processing contracts and provide guidance, including written recommendations for termination, where necessary, to distributing agencies concerning any contracts which do not meet the requirements of this section;
- (2) Allow distributing agencies 30 days to respond to any recommendation concerning contracts not meeting the requirements of this section;
- (3) Review and analyze the processing inventory reports required by paragraph (o) of this section to ensure that no additional donated foods shall be distributed to processors with excess inventories until such inventories have been reduced;
- (4) Assist distributing agencies in reducing such inventories; and
- (5) Review annual reconciliation reports required by paragraph (n) of this section and ensure that payments for commodities have been made.

(r) *Availability of copies of processing contracts.* Contracts entered into in accordance with this Section are public records and FNS will provide copies of such contracts to any person upon request. The FNSRO will retain copies of processing contracts submitted by distributing agencies for a period of three years from the close of the Federal fiscal year to which they pertain.

(s) *Processing activity guidance.* Distributing agencies shall develop and provide a processing manual or similar procedural material for guidance to contracting agencies, recipient agencies, and processors. Distributing agencies must revise these materials as necessary to reflect policy and regulatory changes. This guidance material shall be provided to contracting agencies, recipient agencies and processors at the time of the approval of the initial agreement by the distributing agency, when there have been regulatory or policy changes which necessitate changes in the guidance materials, and upon request. The manual shall include, at a minimum, statements of the distributing agency's policies and procedures on

- (1) Contract approval,
- (2) Monitoring and review of processing activities,
- (3) Recordkeeping and reporting requirements,
- (4) inventory controls, and (5) refund applications.

(t) *Waiver authority.* The Food and Nutrition Service may waive any of the requirements contained in this part for the purpose of conducting demonstration projects to test program changes designed to improve the State processing of donated foods.

(Approved by the Office of Management and Budget under control number 0584-0007)

[53 FR 20226, June 3, 1988, as amended at 53 FR 20598, June 6, 1988; 53 FR 27476, July 21, 1988; 53 FR 46080, Nov. 16, 1988; 54 FR 7525, Feb. 22, 1989; 54 FR 25564, June 16, 1989; 58

FR 39122, July 22, 1993; 59 FR 62984, Dec. 7, 1994; [61 FR 5272](#), Feb. 12, 1996; [67 FR 65015](#), Oct. 23, 2002]

Title 7 published on 2013-01-01

This is a list of [United States Code](#) sections, Statutes at Large, Public Laws, and Presidential Documents, which provide rulemaking authority for this CFR Part.

This list is taken from the [Parallel Table of Authorities and Rules](#) provided by [GPO \[Government Printing Office\]](#).

It is not guaranteed to be accurate or up-to-date, though we do refresh the database weekly. More limitations on accuracy are described at the GPO site.

United States Code

U.S. Code: Title 7 - AGRICULTURE

7 U.S. Code § 612c - Appropriation to encourage exportation and domestic consumption of agricultural products

7 U.S. Code § 612c - Appropriation to encourage exportation and domestic consumption of agricultural products

7 U.S. Code § 1431 - Disposition of commodities to prevent waste

7 U.S. Code § 1431b - Distribution of surplus commodities to other United States areas

7 U.S. Code § 1431e - Distribution of surplus commodities to special nutrition projects; reprocessing agreements with private companies

7 U.S. Code § 1431 - Disposition of commodities to prevent waste

7 U.S. Code § 1446a-1 - Use of Commodity Credit Corporation funds for purchases of dairy products requirements for school and other programs

7 U.S. Code § 1859 - Donation to penal and correctional institutions

7 U.S. Code § 2014 - Eligible households

7 U.S. Code § 2025 - Administrative cost-sharing and quality control

U.S. Code: Title 15 - COMMERCE AND TRADE

15 U.S. Code § 713c - Federal Surplus Commodities Corporation; continuance of existence; purchase and distribution of surplus agricultural commodities

U.S. Code: Title 22 - FOREIGN RELATIONS AND INTERCOURSE

22 U.S. Code § 1922 - Repealed.

U.S. Code: Title 42 - THE PUBLIC HEALTH AND WELFARE

42 U.S. Code § 1751 - Congressional declaration of policy

42 U.S. Code § 1755 - Direct expenditures for agricultural commodities and other foods

42 U.S. Code § 1758 - Program requirements

42 U.S. Code § 1760 - Miscellaneous provisions

42 U.S. Code § 1761 - Summer food service program for children

42 U.S. Code § 1762a - Commodity distribution program

42 U.S. Code § 1766 - Child and adult care food program

42 U.S. Code § 3030a - Nutrition services incentive program

42 U.S. Code § 5179 - Benefits and distribution

42 U.S. Code § 5180 - Food commodities

Part 251

PART 251—THE EMERGENCY FOOD ASSISTANCE PROGRAM

§ 251.2 Administration.

(a) *Food and Nutrition Service.* Within the United States Department of Agriculture (the “Department”), the Food and Nutrition Service (FNS) shall have responsibility for the distribution of food commodities and allocation of funds under the part.

(b) *State Agencies* Within the States, distribution to eligible recipient agencies and receipt of payments for storage and distribution shall be the responsibility of the State agency which has: (1) Been designated for such responsibility by the Governor or other appropriate State executive authority; and (2) entered into an agreement with the Department for such distribution and receipt in accordance with paragraph (c) of this section.

(c) *Agreements* —

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

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

(d) *Contents of agreements between State agencies and eligible recipient agencies and between eligible recipient agencies.*

(1) Agreements between State agencies and eligible recipient agencies and between eligible recipient agencies must provide:

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

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

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

(i) If the State agency delegates the responsibility for any aspect of the program to an eligible recipient agency, each function for which the eligible recipient agency will be held responsible; except that in no case may State agencies delegate responsibility for establishing eligibility criteria for organizations in accordance with § 251.5(a), establishing eligibility criteria for recipients in accordance with § 251.5(b), or conducting reviews of eligible recipient agencies in accordance with § 251.10(e);

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

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

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

[51 FR 12823, Apr. 16, 1986, as amended at 51 FR 17933, May 13, 1987; 59 FR 16974, Apr. 11, 1994; 62 FR 53731, Oct. 16, 1997; 64 FR 72902, 72903, Dec. 29, 1999]

§ 251.3 Definitions.

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

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

- (1) Is public, or
- (2) Is private, possessing tax exempt status pursuant to § 251.5(a)(3); and
- (3) Is not a penal institution (this exclusion also applies to correctional institutions which conduct rehabilitation programs); and
- (4) Provides food assistance to needy persons.

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

Eligible recipient agency means an organization which—

- (1) Is public, or
- (2) Is private, possessing tax exempt status pursuant to § 251.5(a)(3); and
- (3) Is not a penal institution; and
- (4) Provides food assistance—
 - (i) Exclusively to needy persons for household consumption, pursuant to a means test established pursuant to § 251.5 (b), or

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

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

(6) Falls into one of the following categories:

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

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

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

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

(v) Disaster relief programs.

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

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

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

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

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

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

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

[64 FR 72903, Dec. 29, 1999]

251.4 Availability of commodities.

(a) *General.* The Department shall make commodities available for distribution and use in accordance with the provisions of this part and also in accordance with the terms and conditions of part 250 of this chapter to the extent that the part 250 terms and conditions are not inconsistent with this part.

(b) *Displacement.* State agencies shall require that eligible recipient agencies receiving commodities under this part shall not diminish their normal expenditures for food because of receipt of commodities. Additionally, the Secretary shall withhold commodities from distribution if it is determined that the commodities would substitute for the same or a similar product that would otherwise be purchased in the market.

(c) *Allocations.* (1) Allocations of commodities shall be made to State agencies on the basis of the formula defined in § 251.3(h).

(2) FNS shall promptly notify State agencies regarding their allocation of commodities to be made available under this part.

(3) State agencies shall notify the appropriate FNSRO of the amount of the commodities they will accept not later than 30 days prior to the beginning of the shipping period.

(d) *Quantities requested.* State agencies shall:

(1) Request commodities only in quantities which can be utilized without waste in providing food assistance to needy persons under this part;

(2) Ensure that no eligible recipient agency receives commodities in excess of anticipated use, based on inventory records and controls, or in excess of its ability to accept and store such commodities; and

(e) *Initial processing and packaging.* The Department will furnish commodities to be distributed to institutions and to needy persons in households in forms and units suitable for institutional and home use.

(f) *Bulk processing by States.* Commodities may be made available to a State agency or, at the direction of the State agency, directly to private companies for processing bulk commodities for use by eligible recipient agencies.

(1) The Department will reimburse the State agency at the current flat rate for such processing.

(2) Minimum yields and product specifications established by the Department shall be met by the processor.

(3) The State shall require the processor to meet State and local health standards.

(4) The external shipping containers of processed products shall be clearly labeled “Donated by the U.S. Department of Agriculture—Not to be Sold or Exchanged”. Internal packaging shall be clearly marked “Donated by the U.S. Department of Agriculture—Processed Under Agreement with the State of ____.” FNS may grant waivers to the internal label requirement if the enforcement of this requirement precludes a State’s participation in the program, or in cases where other processors are not available who are able to meet the labeling requirement within the allowed reimbursement.

(5) Processors and State agencies shall also meet the basic minimum requirements of § 250.30.

(g) *Availability and control of donated commodities.* Donated commodities will be made available to State agencies only for distribution and use in accordance with this part. Except as otherwise provided in paragraph (f) of this section, donated commodities not so distributed or used for any reason may not be sold, exchanged, or otherwise disposed of without the approval of the Department. However, donated commodities made available under section 32 of Pub. L. 74-320 (7 U.S.C. 612c) may be transferred by eligible recipient agencies receiving commodities under this part, or recipient agencies, as defined in § 250.3 of this chapter, to any other eligible recipient agency or recipient agency which agrees to use such donated foods to provide without cost or waste, nutrition assistance to individuals in low-income groups. Such transfers will be effected only with prior authorization by the appropriate State agency and must be documented. Such documentation shall be maintained in accordance with § 251.10(a) of this part and § 250.16 of this chapter by the distributing agency and the State agency responsible for administering TEFAP and made available for review upon request.

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

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

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

concentrate commodity resources upon a certain type or types of such organizations, to the exclusion of others.

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

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

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

(i) *Distribution of non-USDA foods.* Eligible recipient agencies may incorporate the distribution of foods which have been donated by charitable organizations or other entities with the distribution of USDA-donated commodities or distribute them separately.

(j) *Interstate cooperation.* State agencies may enter into interagency cooperative agreements to provide jointly or to transfer commodities to an eligible recipient agency that has signed an agreement with the respective State agencies when such organization serves needy persons in a contiguous area which crosses States' borders.

(k) *Distribution in rural areas.* State agencies shall encourage eligible recipient agencies to implement or expand commodity distribution activities to relieve situations of emergency and distress through the provision of commodities to needy households in rural areas of the State.

(l) *Commodity losses.* (1) The State agency shall be responsible for the loss of commodities:
(i) When the loss arises from the State agency's improper distribution or use of any commodities or failure to provide proper storage, care, or handling; and
(ii) When the State agency fails to pursue claims arising in its favor, fails to provide for the rights to assert such claims, or fails to require its eligible recipient agencies to provide for such rights.

Except as provided in paragraph (1)(4) of this section, the State agency shall begin claims action immediately upon receipt of information concerning the improper distribution, loss of or damage to commodities, and shall make a claim determination within 30 days of the receipt of information, as described in further detail in FNS Instruction 410-1, *Non-Audit Claims—Food Distribution*. The funds received from the collection of claims shall be returned to FNS. In instances in which it has been determined by the Department that the collection of funds will have a significant adverse effect on the operation of the program, the Department may permit in-kind replacement of the donated foods in lieu of payment to FNS. Replacement in kind will only be permitted under such terms and conditions as agreed to by the Secretary.

(2) If the State agency itself causes the loss of commodities and the value exceeds \$250, the State agency shall immediately transmit the claim determination to the FNS Regional Office, fully documented as to facts and findings. Except as provided in paragraph (1)(4) of this section, if the State agency itself causes the loss of commodities, and the value does not exceed \$250, the State agency shall immediately return funds equal to the claim amount to FNS.

(3) If the State agency determines that a claim exists against an eligible recipient agency, warehouseman, carrier or any other entity and the value of the lost commodities exceeds \$2500, the State agency shall immediately transmit the claim determination to the appropriate FNS Regional Office, fully documented as to facts and findings. If FNS determines from its review of the claim determination that a claim exists, the State agency shall make demand for restitution upon the entity liable immediately upon receipt of notice from the FNS Regional Office. Except as provided in paragraph (1)(4) of this section, if the State agency determines that a claim exists in favor of the State agency against an eligible recipient agency, warehouseman, carrier or any other entity and the value of the lost commodities does not exceed \$2500, the State agency shall immediately proceed to collect the claim.

(4) No claim determination shall be required where the value of the lost commodities is \$100 or less. However, no such claim shall be disregarded where:

- (i) There is evidence of fraud or a violation of Federal, State or local criminal law; or
- (ii) Program operations would be adversely affected.

(5) The State agency shall maintain records and substantiating documents, on all claims actions and adjustments including documentation of those cases in which no claim was asserted because of the minimal amount involved.

(6) In making final claim determinations for commodity losses incurred by eligible recipient agencies when there is no evidence of fraud or negligence, State agencies and FNS Regional Offices, as applicable, shall consider the special needs and circumstances of the eligible recipient agencies, and adjust the claim and/or conditions for claim collection as appropriate. These special needs and circumstances include but are not limited to the eligible recipient agency's use of volunteers and limited financial resources and the effect of the claim on the organization's ability to meet the food needs of low-income populations.

(Approved by the Office of Management and Budget under control number 0584-0313 and 0584-0341)

[51 FR 12823, Apr. 16, 1986, as amended at 52 FR 17933, May 13, 1987; 52 FR 42634, Nov. 6, 1987; 59 FR 16974, Apr. 11, 1994; 64 FR 72904, Dec. 29, 1999]

251.5 Eligibility determinations.

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

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

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

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

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

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

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

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

circumstances beyond its control. It is the responsibility of the organization to document that it has complied with all IRS requirements and has provided all information requested by IRS in a timely manner.

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

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

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

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

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

[64 FR 72904, Dec. 29, 1999]

§ 251.6 Distribution plan.

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

(1) A designation of the State agency responsible for distributing commodities and administrative funds provided under this part, and the address of such agency;

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

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

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

(b) *Plan submission and amendments.* Once approved, State plans are permanent. State agencies must submit amendments to the distribution plan when necessary to reflect any changes

in program operations or administration as described in the plan, or at the request of FNS, to the appropriate FNS Regional Office.

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

[64 FR 72905, Dec. 29, 1999, as amended at 74 FR 62474, Nov. 30, 2009]

§ 251.7 Formula adjustments.

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

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

[64 FR 72905, Dec. 29, 1999]

§ 251.8 Payment of funds for administrative costs.

(a) *Availability and allocation of funds.* Funds made available to the Department for State and local costs associated with the distribution of commodities under this part shall, in any fiscal year, be distributed to each State agency on the basis of the funding formula defined in § 251.3(h).

(b) *Uniform Federal Assistance Regulations.* Funds provided under this section shall be subject to the Department's regulations issued under 7 CFR part 3016 or part 3019, as applicable.

(c) *Payment to States.*

(1) Funds under this section shall be made available by means of letters of credit in favor of the State agency. The State agency shall use any funds received without delay in accordance with paragraph (d) of this section.

(2) Upon notification by the FNS Regional Office that an agreement has been entered into in accordance with § 251.2(c) of this part, FNS shall issue a grant award pursuant to procedures established by FNS, and promptly make funds available to each State agency within the State's allocation through issuance of a letter of credit. To the extent funds are available and subject to the provisions of paragraph (f) of this section, funds will be made available to State agencies on an advance basis.

(3) Each State agency shall return to FNS any funds made available under this section either through the original allocation or through subsequent reallocations which are unobligated as of the end of the fiscal year for which they were made available. Such return shall be made as soon as practicable but in no event later than 30 days following demand made by FNS.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(f) *Recovery and reallocation.* If, during the course of the fiscal year, the Department determines that a State agency is unable to use all of the funds allocated to it during the fiscal year, the Department shall recover or withhold and reallocate such unused funds among other States.

[51 FR 12823, Apr. 16, 1986, as amended at 59 FR 16974, Apr. 11, 1994; 64 FR 72906, Dec. 29, 1999; 74 FR 62474, Nov. 30, 2009]

§ 251.9 Matching of funds.

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

(b) *Exceptions.* In accordance with the provisions of 48 U.S.C. 1469a, American Samoa, Guam, the Virgin Islands and the Northern Mariana Islands shall be exempt from the matching requirements of paragraph (a) of this section if their respective matching requirements are under \$200,000.

(c) *Applicable contributions.* States shall meet the requirements of paragraph (a) of this section through cash or in-kind contributions from sources other than Federal funds which are prohibited by law from being used to meet a Federally mandated State matching requirement. Such contributions shall meet the requirements set forth in 7 CFR 3016.24. In accordance with part 3016 or 3019, as applicable, the matching requirement shall not be met by contributions for costs supported by another Federal grant, except as provided by Federal statute. Allowable contributions are only those contributions for costs which would otherwise be allowable as State or local-level administrative costs.

(1) *Cash.* An allowable cash contribution is any cash outlay of the State agency for a specifically identifiable allowable State- or local-level administrative cost, including the outlay of money contributed to the State agency by other public agencies and institutions, and private organizations and individuals. Examples of cash contributions include, but are not limited to, expenditures for office supplies, storage space, transportation, loading facilities and equipment, employees' salaries, and other goods and services specifically identifiable as State- or local-level administrative costs for which there has been a cash outlay by the State agency.

(2) *In-kind.* (i) Allowable in-kind contributions are any contributions, which are non-cash outlays, of real property and non-expendable personal property and the value of goods and

services specifically identifiable with allowable State administrative costs or, when contributed by the State agency to an eligible recipient agency, allowable local-level administrative costs. Examples of in-kind contributions include, but are not limited to, the donation of office supplies, storage space, vehicles to transport the commodities, loading facilities and equipment such as pallets and forklifts, and other non-cash goods or services specifically identifiable with allowable State-level administrative costs or, when contributed by the State agency to an eligible recipient agency, allowable local-level administrative costs. In-kind contributions shall be valued in accordance with part 3016 or 3019, as applicable.

(ii) In order for a third-party in-kind contribution to qualify as a State-level administrative cost for purposes of meeting the match, all of the following criteria shall be met:

(A) In its administration of food assistance programs, the State has performed this type of function over a sustained period of time in the past;

(B) The function was not previously performed by the State on behalf of eligible recipient agencies; and

(C) The State would normally perform the function as part of its responsibility in administering TEFAP or related food assistance programs if it were not provided as an in-kind contribution.

(d) *Assessment fees.* States shall not assess any fees for the distribution of donated foods to eligible recipient agencies.

(e) *Reporting requirements.* State agencies shall identify their matching contribution on the FNS-667, Report of TEFAP Administrative Costs, in accordance with § 251.10(d).

(f) *Failure to match.* If, during the course of the fiscal year, the quarterly FNS-667 indicates that the State is or will be unable to meet the matching requirements in whole or in part, the Department shall suspend or disallow the unmatched portion of Federal funds subject to the provisions of paragraph (a) of this section. If, upon submission of the final FNS-667 for the fiscal year, the Department determines that the State has not met the requirements of paragraph (a) of this section in whole or in part, the unmatched portion of Federal funds subject to the requirements of paragraph (a) of this section shall be subject to disallowance by FNS. [52 FR 17934, May 13, 1987, as amended at 59 FR 16975, Apr. 11, 1994; 64 FR 72906, Dec. 29, 1999]

§ 251.10 Miscellaneous provisions.

(a) *Records* —

(1) *Commodities.* State agencies, subdistributing agencies (as defined in § 250.3 of this chapter), and eligible recipient agencies must maintain records to document the receipt, disposal, and inventory of commodities received under this part that they, in turn, distribute to eligible recipient agencies. Such records must be maintained in accordance with the requirements set forth in § 250.16 of this chapter. Eligible recipient agencies must sign a receipt for program commodities which they receive under this part for distribution to households or for use in preparing meals, and records of all such receipts must be maintained.

(2) *Administrative funds.* In addition to maintaining financial records in accordance with 7 CFR part 3016, State agencies must maintain records to document the amount of funds received

under this part and paid to eligible recipient agencies for allowable administrative costs incurred by such eligible recipient agencies. State agencies must also ensure that eligible recipient agencies maintain such records.

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

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

(b) *Commodities not income.* In accordance with section 206 of Pub. L. 98-8, as amended, and notwithstanding any other provision of law, commodities distributed for home consumption and meals prepared from commodities distributed under this part shall not be considered income or resources for any purposes under any Federal, State, or local law.

(c) *Nondiscrimination.* There shall be no discrimination in the distribution of foods for home consumption or availability of meals prepared from commodities donated under this part because of race, color, national origin, sex, age, or handicap.

(d) *Reports —*

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

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

(e) *State monitoring system.*

(1) Each State agency must monitor the operation of the program to ensure that it is being administered in accordance with Federal and State requirements. State agencies may not delegate this responsibility.

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

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

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

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

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

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

(f) *Limitation on unrelated activities.* (1) Activities unrelated to the distribution of TEFAP foods or meal service may be conducted at distribution sites as long as:

(i) The person(s) conducting the activity makes clear that the activity is not part of TEFAP and is not endorsed by the Department (impermissible activities include information not related to TEFAP placed in or printed on bags, boxes, or other containers in which commodities are distributed). Recipes or information about commodities, dates of future distributions, hours of operations, or other Federal, State, or local government programs or services for the needy may be distributed without a clarification that the information is not endorsed by the Department;

(ii) The person(s) conducting the activity makes clear that cooperation is not a condition of the receipt of TEFAP commodities for home consumption or prepared meals containing TEFAP commodities (cooperation includes contributing money, signing petitions, or conversing with the person(s)); and

(iii) The activity is not conducted in a manner that disrupts the distribution of TEFAP commodities or meal service.

(2) Eligible recipient agencies and distribution sites shall ensure that activities unrelated to the distribution of TEFAP foods or meal service are conducted in a manner consistent with paragraph (f)(1) of this section.

(3) *Termination for violation.* Except as provided in paragraph (f)(4) of this section, State agencies shall immediately terminate from further participation in TEFAP operations any eligible recipient agency that distributes or permits distribution of materials in a manner inconsistent with the provisions of paragraph (f)(1) of this section.

(4) *Termination exception.* The State agency may withhold termination of an eligible recipient agency's or distribution site's TEFAP participation if the State agency cannot find another eligible recipient agency to operate the distribution in the area served by the violating organization. In such circumstances, the State agency shall monitor the violating organization to ensure that no further violations occur.

(g) *Use of volunteer workers and non-USDA commodities.* In the operation of the Emergency Food Assistance Program, State agencies and eligible recipient agencies shall, to the maximum extent practicable, use volunteer workers and foods which have been donated by charitable and other types of organizations.

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

(i) *Data collection related to eligible recipient agencies.* (1) Each State agency must collect data related to eligible recipient agencies that have an agreement with the State agency to participate in the program for each of Federal fiscal years 2006 through 2009, including those eligible recipient agencies that participated only for part of the fiscal year. Such data shall include:

(i) The name of each eligible recipient agency;

(ii) The city in which each participating eligible recipient agency was headquartered and the name of the state;

(iii) The amount of funds provided to the participating organization, i.e., the sum of the amount of federal administrative funds plus the value of the commodities purchased under Section 214 of the Emergency Food Assistance Act of 1983 provided to each participating eligible recipient agency; and

(iv) The type of participating organization, e.g., government agency, educational institution, non-profit organization/secular, non-profit organization/faith-based, and "other."

(2) On or before August 31, 2007, and each subsequent year through 2010, State agencies must report to FNS data as specified in paragraph (i)(1) of this section for the prior Federal fiscal year. State agencies must submit this data in a format designated by FNS.

(Approved by the Office of Management and Budget under control number 0584-0313)
[51 FR 12823, Apr. 16, 1986. Redesignated and amended at 51 FR 17934, May 13, 1987; 53 FR 15357, Apr. 29, 1988; 59 FR 16975, Apr. 11, 1994; 62 FR 53731, Oct. 16, 1997; 64 FR 72907, Dec. 29, 1999; 72 FR 24184, May 2, 2007]