Rules and Regulations

Federal Register
Vol. 73, No. 154
Friday, August 8, 2008

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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 250

[FNS–2007–0039]

RIN 0584–AD45

Management of Donated Foods in Child Nutrition Programs, the Nutrition Services Incentive Program, and Charitable Institutions

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule revises and clarifies requirements for the management, distribution, and use of donated foods in the National School Lunch Program and other child nutrition programs, in the Nutrition Services Incentive Program, and by charitable institutions. In response to an audit by the USDA Office of Inspector General, the rule establishes specific requirements to ensure that recipient agencies in child nutrition programs receive the benefit and value of all donated foods received and provided to food service management companies to conduct the food service. The rule also incorporates legislative changes affecting the distribution of donated foods in the Nutrition Services Incentive Program, and reduces reporting and administrative requirements for donated foods provided to charitable institutions. Lastly, the rule restructures and revises regulatory provisions in a plain language format to make them easier to read and understand.

DATES: *Effective Date:* This final rule is effective November 6, 2008.

Implementation Date: State agencies and recipient agencies are required to implement the provisions of this final rule by November 6, 2008, except for the new contract requirements in §§ 250.50 to 250.54. State agencies and recipient agencies must implement those requirements according to the implementation schedule in section II.I of the preamble of this rule.

FOR FURTHER INFORMATION CONTACT: Lillie F. Ragan, Assistant Branch Chief, Policy Branch, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, Room 500, 3101 Park Center Drive, Alexandria, Virginia 22302–1594, or telephone (703) 305–2662. A regulatory impact analysis has been prepared for this rule. You may request a copy of the analysis by contacting us at the above address or by e-mail to *Robert.Delorenzo@fns.usda.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On June 8, 2006, the Department of Agriculture (the Department or USDA) published a proposed rule in the **Federal Register** (71 FR 33344) to amend provisions in 7 CFR part 250, which contain the general regulations for USDA domestic food distribution. The proposals were intended to accomplish the following objectives:

- Establish requirements to ensure that recipient agencies in child nutrition programs receive the benefit and value of all donated foods received and provided to food service management companies for use in the recipient agencies' meal service;
- Revise and clarify requirements for the use and management of donated foods in the National School Lunch Program (NSLP) and other child nutrition programs;
- Reduce the paperwork burden associated with the distribution of donated foods to charitable institutions and summer camps;
- Revise provisions for the distribution of donated foods in the Nutrition Services Incentive Program (NSIP) to reflect legislative changes; and
- Restructure and rewrite revised provisions in a plain language format, including new subparts and sections, to make the regulations easier to read and understand.

II. Analysis of Comments Received

The Department received a total of 668 comment submissions to the proposed rule, including 576 schools, 7 school associations, 35 State agencies, 49 members of industry and outside organizations, and one member of Congress. The comments are discussed in detail below.

A. Definitions, 7 CFR 250.3

In the proposed rule, we proposed to remove, add, and revise definitions in 7 CFR 250.3 to provide program administrators and recipients with a better understanding of the requirements contained in 7 CFR part 250. We received three comments expressing general support for the proposed changes in definitions.

We received one comment objecting to the proposed removal of the definition of "Offer and acceptance system", stating that it supports the current means of ordering donated foods through the Electronic Commodity Ordering System (ECOS). While true, we believe that 7 CFR 250.58 of this final rule clearly describes the requirements for the distributing agency to offer, order, and provide, donated foods to school food authorities for their use, making the definition unnecessary. Since we did not receive any other comments, this final rule will remove definitions, as proposed, of "Nonprofit summer camps for children", "Nonresidential child or adult care institution", "Nutrition program for the elderly", "Offer and acceptance system", "Program", and "Students in home economics".

Since we did not receive any comments in response, this final rule will add definitions, as proposed, of "Adult care institution", "AoA", "Bonus foods", "CACFP", "Child care institution", "Commodity offer value", "DHHS", "Elderly nutrition project", "Entitlement", "Entitlement foods", "National per-meal value", "Nonprofit organization", "Nonprofit school food service account", "NSIP", "NSLP", "Reimbursable meals", "SBP", "7 CFR part 3016", "7 CFR part 3019", "SFSP", "Single inventory management", and "Summer camp".

We received two comments on the proposed revision of the definition of "Food service management company". One commenter was unsure if a company that was hired to repair refrigerators would be characterized as a food service management company. Another commenter questioned if a company operating only as a consultant would be required to credit the recipient agency for donated foods, in accordance with the proposed requirements for food

service management companies. Under the proposed definition, a food service management company is an entity that manages any aspect of a recipient agency's food service. We believe that this definition clearly excludes a company that simply repairs refrigerators, since this activity would not constitute management of the food service. We also believe that it is clear, in 7 CFR 250.51(a) of this final rule, that a commercial enterprise performing only a consulting service with respect to donated foods would not have to provide a credit for the value of donated foods, since they are not receiving and using such foods in the food service. However, to provide further clarification, in this final rule we refine the definition of "Food service management company" to include the statement in proposed 7 CFR 250.50(a) that, to the extent that such management includes the use of donated foods, the food service management company is subject to the applicable requirements in this part. As discussed in section II.E of the preamble, we are removing the characterization of a food service management company in 7 CFR 250.50 of this final rule.

We did not receive any other comments in objection to proposed revisions to definitions, and received one comment in support of the revised definition of "Charitable institutions". Accordingly, this final rule will revise definitions, as proposed, of "Charitable institutions", "Child nutrition program", "Commodity school", "End product", " Processing", "Processor", "Recipient agencies", "Recipients", "Section 311", "Service institutions", and "State Agency on Aging".

B. Agreements and Contracts, 7 CFR 250.12

In the proposed rule, we proposed to remove reference to agreements between the Department and State Agencies on Aging, in 7 CFR 250.12(a), and to remove 7 CFR 250.12(d), which addresses contract requirements with food service management companies, in conjunction with the proposed new requirements for the use of donated foods under such contracts in proposed subpart D of 7 CFR part 250. We also proposed to remove 7 CFR 250.12(e) and (f), as requirements relative to storage facility and processor contracts or agreements are currently addressed in 7 CFR 250.14, and in subpart C of 7 CFR part 250, respectively. Lastly, we proposed to revise the section heading to *Agreements*. Since we did not receive any comments in response to these proposals, this final rule retains the amendments to 7 CFR 250.12, as proposed.

C. Reviews, 7 CFR 250.19

In the proposed rule, we proposed to clarify or revise required procedures in the distributing agency's review system in 7 CFR 250.19(b)(1), by which the distributing agency ensures compliance with the requirements in 7 CFR part 250. We proposed to amend the introductory text to clarify that the listed requirements may apply to some, but not all, programs that receive donated foods. While we did not receive any comments in response to this proposal, we have further revised the introductory text in this final rule to provide additional clarification.

We proposed to remove the requirement that review procedures must include on-site reviews of recipient agencies in NSIP, since oversight of this program is currently the responsibility of the Department of Health and Human Services (DHHS). We proposed to streamline and clarify the requirement to conduct on-site reviews of charitable institutions and summer camps, and the food service management companies under contract with them. Since we did not receive any comments in response to these proposals, this final rule retains them.

We also proposed to include a requirement that the distributing agency's review procedures include on-site reviews of recipient agencies in NSLP, the Child and Adult Care Food Program (CACFP), and the Summer Food Service Program (SFSP) that have contracts with food service management companies in order to ensure compliance with the proposed requirements for the use of donated foods under such contracts. However, we proposed to permit the distributing agency to enter into an agreement with the appropriate State administering agency (if a different agency) to include its review as part of the State administering agency's required on-site review of such recipient agencies.

We received thirteen comments in response to this proposal. Twelve of the commenters indicated that requiring State agency on-site reviews of recipient agencies to ensure compliance with requirements for the use of donated foods in food service management company contracts would impose a significant additional burden. Commenters indicated that State agencies often do not have sufficient personnel to conduct such reviews, or sufficient funds to permit travel throughout the State. Additionally, commenters noted that State agency personnel often have limited expertise in reviewing contract provisions and ensuring that the value of all Federal resources provided to school food authorities and other recipient agencies has accrued to them. One commenter indicated that the cost of conducting such reviews would likely be passed on to schools.

We agree with commenters that the proposed review requirements would impose an additional burden on the State distributing agency, which does not currently conduct on-site reviews of recipient agencies in NSLP, CACFP, and SFSP. This would be especially true in States in which a large number of recipient agencies have contracts with food service management companies. However, the State agency responsible for administering these programs (usually the State Education Agency) currently conducts on-site reviews of these recipient agencies to ensure compliance with requirements set forth in contracts with food service management companies. Additionally, in accordance with a final rule published in the **Federal Register** on October 31, 2007 at 72 FR 61479, such State agencies are required to review and approve all school food authority contracts with food service management companies prior to their execution. Accordingly, the proposed requirement that the distributing agency's review system must include an on-site review of recipient agencies in NSLP, CACFP, and SFSP has been removed in this final rule. In accordance with the removal of the proposal described above, this final rule removes current 7 CFR 250.19(b)(1)(v), rather than redesignating and revising it, as proposed.

One commenter suggested that compliance with requirements in food service management company contracts should be determined by auditors, in accordance with Federal audit requirements under the Single Audit Act and Office of Management and Budget (OMB) Circular A–133, and codified in departmental regulations in 7 CFR part 3052. Under the audit requirements, a State or local government or nonprofit agency that expends at least $500,000 in Federal awards in a school or fiscal year (including the value of donated foods) must obtain a single audit (or, in some cases, a program-specific audit) for that year. Audits can be an effective tool in helping State agencies to ensure that Federal resources are used for the intended purpose, and in accordance with Federal requirements. However, auditors do not, as a rule, determine compliance with requirements for donated foods in contracts with food

service management companies in conducting the required Federal audit, and including such determination would likely increase the cost of obtaining the audits for school food authorities and other recipient agencies. Accordingly, we do not believe it would be in the best interest of the child nutrition programs served to include the audit as a replacement for the State agency on-site review in ensuring compliance with the requirements for donated foods in contracts with food service management companies. We also received one comment indicating that agreements between State agencies and recipient agencies should include assurance of compliance with requirements relating to the use of donated foods in food service management company contracts. However, we believe that current agreement provisions requiring that recipient agencies distribute and use donated foods in accordance with the requirements in 7 CFR part 250, and that hold them responsible for noncompliance with such requirements, are sufficient.

We proposed to remove 7 CFR 250.19(d), which requires the monitoring of funds in NSIP to ensure purchase of only U.S. agricultural products. As previously indicated, DHHS is currently responsible for the oversight of NSIP. Since we did not receive any comments in response to this proposal, 7 CFR 250.19(d) is removed in this final rule.

D. Distributing Agency Performance Standards, 7 CFR 250.24

In 7 CFR 250.24 of the proposed rule, we proposed to revise current performance standards required of the distributing agency with respect to the ordering of donated foods and their distribution to school food authorities, in accordance with proposed changes in 7 CFR 250.58. We proposed to revise 7 CFR 250.24(d)(8) to state that distributing agencies are responsible for providing recipient agencies with ordering options and commodity values, and considering the specific needs and capabilities of such agencies in ordering donated foods. We received four comments indicating that distributing agencies do not always consider the needs of recipient agencies in ordering donated foods. Two of the commenters indicated that distributing agencies may instead order those donated foods that generate higher delivery fees, or may charge such fees for donated foods delivered directly to a processor. Two other commenters suggested requiring distributing agencies to permit school food authorities capable of accepting full truckload shipments to submit donated food orders to FNS. In 7 CFR 250.58 in this final rule, we are requiring the distributing agency to ensure that all school food authorities have an opportunity to state their food preferences each year before the distributing agency submits donated food orders to FNS. The revision of 7 CFR 250.24(d)(8), as proposed, would ensure that the distributing agency complies with this requirement. However, as discussed in section II.F.3 of the preamble, we have chosen to reserve any revision of requirements relating to the distributing agency's system of donated food distribution for future proposed rulemaking. We received one comment stating that recipient agencies are guaranteed ordering options and visibility of donated food values through ECOS, making this performance standard unnecessary. However, not all distributing agencies utilize ECOS for all food distribution programs. Accordingly, 7 CFR 250.24(d)(8) is revised as proposed.

We proposed to revise 7 CFR 250.24(d)(9) to state that distributing agencies are responsible for offering school food authorities participating in NSLP the commodity offer value of donated food assistance, at a minimum, and for determining an adjusted assistance level in consultation with school food authorities, as appropriate, in accordance with the proposed 7 CFR 250.58. Since we did not receive any comments in response to this proposal, 7 CFR 250.24(d)(9) is revised as proposed in this final rule.

In 7 CFR 250.24(d)(10), we proposed to state that distributing agencies be responsible for providing each school food authority participating in the NSLP with the opportunity to order, or select, donated foods from the full list of available foods, and to distribute the selected donated foods to each school food authority, to the extent that distribution of such foods to, and within, the State would be cost-effective. In accordance with the amendments to the proposed 7 CFR 250.58 in this final rule, we have revised 7 CFR 250.24(d)(10) in this final rule to state that distributing agencies are responsible for ensuring that all school food authorities participating in the NSLP are aware of the full list of available donated foods, have the opportunity to provide input at least annually in determining the donated foods from the full list that they may select for their food service, and receive all such selected donated foods that may be cost-effectively distributed to them.

The proposed rule included a restructuring of some sections of 7 CFR part 250, including:

- The removal of current subpart E.
- The revision of subpart D to include new sections with proposed requirements for the use and management of donated foods in contracts with food service management companies.
- The addition of a new subpart E to include revisions and clarifications in current requirements for the use of donated foods in the NSLP and other child nutrition programs.
- The addition of a new subpart F to include current requirements, without change, for household programs.
- The addition of a new subpart G to include revisions and clarifications in requirements for the use of donated foods by charitable institutions and summer camps, and in NSIP, and to include current requirements, without change, for the use of donated foods in disasters and situations of distress.

Since we received no comments in response to the proposed restructuring, it is retained as proposed in this final rule. The comments received in response to the specific new or revised requirements proposed in each of these subparts are described below.

E. Subpart D—Donated Foods in Contracts with Food Service Management Companies

We proposed to revise Subpart D of 7 CFR part 250 to include, in six new sections, specific requirements to ensure that recipient agencies receive the benefit and value of donated foods in contracts with food service management companies. As previously indicated, this subpart would replace the current 7 CFR 250.12(d). In the first two sections, we proposed to include the contract and procurement requirements for recipient agencies in retaining the services of a food service management company, and the specific activities relating to donated foods that a food service management company may perform in accordance with the contract.

We also proposed to clarify the distinction between a food service management company and a processor. However, since this distinction is clearly made in the definitions of these two entities in 7 CFR 250.3, as revised in this final rule, we are removing it in this subpart. Consequently, we are consolidating the proposed 7 CFR 250.50 and 250.51 into 7 CFR 250.50 in this final rule, and revising the heading of this section to *Contract requirements and procurement.* Accordingly, proposed 7 CFR 250.52 through 250.55

are redesignated as 7 CFR 250.51 through 250.54, respectively, in this final rule. The specific comments are described below under the pertinent sections.

1. Contract Requirements and Procurement, 7 CFR 250.50

We proposed to clarify that the recipient agency must enter into a contract with a food service management company, in accordance with Federal requirements in 7 CFR parts 210, 220, 225, or 226, as applicable, and that the contract must ensure that all donated foods received for use by the recipient agency in the school or fiscal year, as applicable, are used to benefit the recipient agency's food service. We proposed to require that contracts between child nutrition program recipient agencies and food service management companies also ensure compliance with other requirements in this subpart. We also proposed to clarify the two types of contracts—fixed-price and cost-reimbursable—that may be used, and the differences between them. Since we did not receive any comments in response to these proposals, this final rule retains the proposed provisions relating to contract requirements and types of contracts in 7 CFR 250.50(a) and (b), respectively, with one exception. In 7 CFR 250.50(a) of this final rule, we require that the contract ensure that all donated foods received for use by the recipient agency in the school or fiscal year, as applicable, are used in (instead of benefit) the recipient agency's food service. This change is made in accordance with the revised requirements for the use of donated foods in 7 CFR 250.51(d) of this final rule, as discussed in section II.E.2 of the preamble.

We proposed to clarify that the recipient agency must meet Departmental procurement requirements in 7 CFR part 3016 or 3019, and in 7 CFR parts 210, 220, 225, or 226, as applicable, in obtaining the services of a food service management company, and to require that procurement documents, as well as contract provisions, include the donated food activities that the food service management company is to perform. We also proposed to indicate some of the donated food activities that the food service management company may perform, in accordance with its contract, such as preparing and serving meals, and ordering or storing donated foods. We proposed to specifically prohibit a food service management company from entering into a contract or agreement with a processor to process donated foods or finished end products for use in the recipient agency's food service.

Six commenters indicated that the food service management company must play a role in ordering or selecting donated foods, in order to ensure that the selected foods are those that may be most effectively used in the food service. We agree, and 7 CFR 250.50(d), as finalized in this rule, will permit the food service management company to order or select donated foods for use in the food service, in coordination with the recipient agency.

Seven commenters indicated that the food service management company should be permitted to enter into processing contracts, or to procure processed end products, on behalf of recipient agencies, since it would permit those agencies to benefit from the food service management company's purchasing expertise and buying power. Two other commenters indicated that, as most processing agreements are between the processor and the distributing agency, and not the recipient agency, the significance of prohibiting food service management companies from entering into such agreements is unclear. The parties to the processing agreements required in subpart C of 7 CFR part 250 are usually the distributing agency and the processor. Such agreements permit the distributing agency to ensure compliance with the processing requirements in subpart C of 7 CFR part 250, which include the processing of donated foods into approved end products, compliance with processing yields of donated foods, and maintenance of donated food inventories at approved levels. The distributing agency may permit recipient agencies to enter into processing agreements, and to ensure compliance with the processing requirements. However, it would be inappropriate to delegate such oversight of a commercial enterprise (i.e., the processor) to another commercial enterprise (i.e., the food service management company). Hence, we retain in this final rule the prohibition of a food service management company from entering into the processing agreement with the processor required in subpart C of 7 CFR part 250.

The actual procurement of processed end products from processors (or commercial distributors), however, is usually conducted by recipient agencies. Such procurement must be conducted in accordance with Departmental procurement requirements in 7 CFR parts 3016 or 3019, as applicable, and with requirements in subpart C of 7 CFR part 250. Although we included the payment of processing fees or remittance of refunds from a processor among the donated food activities that a food service management company may perform on behalf of a recipient agency, we did not specifically include the procurement of processed end products among such activities. However, such procurement is not prohibited. Furthermore, we agree with commenters that recipient agencies could benefit from food service management company procurements of processed end products on their behalf, since it would reduce their time and labor in conducting such activity, and may result in decreased purchase costs. Thus, we specifically include the procurement of processed end products as an activity that the food service management company may perform on behalf of the recipient agency in 7 CFR 250.50(d) of this final rule. However, we also clarify that such procurement must ensure compliance with the requirements in subpart C of 7 CFR part 250, and with the provisions of distributing or recipient agency processing agreements, and must ensure crediting of the recipient agency for the value of donated foods contained in processed end products at the processing agreement value. Other donated food activities included in the proposed rule are retained in 7 CFR 250.50(d) of this final rule, with some consolidation.

2. Crediting for, and Use of, Donated Foods, 7 CFR 250.51

In the proposed rule, we proposed to include requirements to ensure that recipient agencies in child nutrition programs receive the benefit and value of donated foods in the meal service provided by food service management companies. We proposed to require the recipient agency to ensure that the food service management company, in both fixed-price and cost-reimbursable contracts, credits it for the value of all donated foods received for use in the recipient agency's food service in a school year or fiscal year (including both entitlement and bonus foods), with the exception of donated foods contained in processed end products. We proposed to include the accepted means by which crediting for the value of donated foods must be achieved, the required frequency of such crediting, and that, in all cases, crediting be clearly documented.

One commenter suggested that we require crediting for donated foods as they are used (rather than as they are received), to avoid a situation in which credit is provided for donated foods that may not be used during the contract

period—e.g., due to receipt of a shipment late in the year. However, requiring crediting for the value of donated foods only as they are used would provide a disincentive to use them. Additionally, we do not want to create a situation in which school food authorities with food service management company contracts must monitor donated food inventories to ensure proper crediting, as such monitoring would impose an additional burden, and would be very difficult under a single inventory management system, in which school food authorities (and, in accordance with 7 CFR 250.52(b) of this final rule, food service management companies) may commingle donated foods and commercially purchased foods.

We received two comments expressing uncertainty whether crediting must occur for donated foods delivered to processors for processing into end products when the end products are delivered to the recipient agency, or when the food service management company uses the end products in the recipient agency's food service. As we described in the proposed rule, the processor (or commercial distributor, as applicable) must credit the recipient agency for donated foods contained in processed end products in the sale of such end products to the recipient agency, in accordance with the requirements in subpart C of 7 CFR part 250. Hence, the value of the donated foods accrues to the recipient agency's nonprofit food service in its purchase of the processed end products. Although the food service management company must use such end products in the recipient agency's food service, it is not required to provide an additional credit for the value of donated foods contained in them when they are used, or received for use, in the food service. However, an exception would be if the food service management company's contract requires it to procure processed end products on behalf of the recipient agency, or to act as an intermediary in passing the donated food value in such end products on to the recipient agency, in accordance with 7 CFR 250.50(d) of this final rule. Hence, in 7 CFR 250.51(a) of this final rule, we clarify that, in such cases, the food service management company must also credit the recipient agency for the value of donated foods contained in processed end products.

We include the proposed methods of crediting permitted, and the required frequency of crediting, together in 7 CFR 250.51(b) of this final rule, in the interest of clarity. We proposed to include "pre-crediting" as an accepted means of crediting for the value of donated foods in fixed-price contracts. In pre-crediting, the food service management company deducts the value of donated foods the recipient agency is expected to receive from the fixed-price bid submitted during procurement of the food service management company to conduct the food service. In contracts with school food authorities, this deduction is usually for the per-meal value of donated food assistance established in accordance with section 6(c) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1755(c)). However, school food authorities may receive a greater value of donated food assistance for the school year. This may result for a number of reasons (some of which are described in 7 CFR 250.58(d) of this final rule), but is most commonly due to the receipt of surplus, or bonus, foods purchased by the Department to remove market surpluses, and donated to school food authorities and other recipient agencies later in the year.

As indicated in the Office of Inspector General (OIG) audit (#27601–0027–CH) referenced in the proposed rule, food service management companies that utilize "pre-crediting" sometimes fail to credit school food authorities for the additional foods received later in the year. Hence, in the proposed rule, we also proposed to require the food service management company to provide an additional credit for the value of any donated foods not accounted for in the fixed-price per meal.

We received nine comments indicating that this requirement would discourage food service management companies from efficiently using donated foods, since providing recipient agencies with an additional credit for the value of donated foods received later in the year would reduce their revenue. However, as the proposal would require crediting for all donated foods received in the school or fiscal year, and not just those donated foods that are actually used, it would not discourage the use of donated foods. We received four comments questioning whether a recipient agency would have to reimburse the food service management company if it actually received less than the pre-credited value of donated foods. This may occur, for example, if a school food authority does not select donated foods offered by the distributing agency equal to its commodity offer value (i.e., the legislated per-meal value), or if selected foods may not be purchased, due to market conditions or other factors. However, the proposed requirement is intended only to ensure that the recipient agency is credited for the value of all donated foods received. It would not require reimbursement of the food service management company if such crediting is in excess of that value. However, such reimbursement may be established by the food service management company and the recipient agency, in accordance with their contract.

One commenter contended that some recipient agencies are more interested in a guaranteed cost of the service (i.e., in the fixed-price per meal), rather than assurance that credit is received for the value of all donated foods. Another commenter suggested that additional credits be excused when a food service management company does not include other related costs, such as storage, in the fixed price. However, permitting any exceptions to the requirement that the recipient agency receive credit for the value of all donated foods would not meet the primary intent of the regulations, or address the concerns expressed in the OIG audit. Notwithstanding this requirement, a recipient agency may consider storage or handling costs in establishing the value of donated foods to be used in crediting, as permitted in 7 CFR 250.51(c) of this final rule. Another commenter questioned the accuracy of the term "fixed-price" contract if deductions for the value of donated foods are required on invoices. While technically true, this designation is commonly used, and use of an alternate term would be confusing.

We proposed to permit "crediting by disclosure" in cost-reimbursable contracts. Under such contracts, the food service management company bills the recipient agency for costs incurred in conducting the food service, and also charges a fixed management fee. However, one commenter was unsure if crediting by disclosure meant disclose to the recipient agency the value of donated foods received during the period covered by the invoice, or actually credit funds to the recipient agency for such foods. We agree with the commenter that the meaning is not clear. Therefore, we are amending the language in 7 CFR 250.51(b) of this final rule to clarify that, in crediting by disclosure, the food service management company credits the recipient agency for the value of donated foods by disclosing, in its billing for food costs submitted to the recipient agency, the savings resulting from the receipt of donated foods for the billing period. However, it does not require a reduction of the fee charged for conducting the food service, or any other type of payment for the value of donated foods.

We proposed to require the recipient agency to ensure that crediting for the value of donated foods be performed not less frequently than annually. Two commenters were unsure if the food service management company must credit the recipient agency for the value of donated foods when such foods are delivered to the recipient agency, or when the food service management company actually uses the donated foods in the recipient agency's food service. The proposal did not include a specific time that crediting must be performed, only that it be performed at least annually. Hence, the recipient agency may require a food service management company to credit it for donated foods upon delivery, quarterly, or all at once at the end of the year (provided that, for a school food authority, such a one-time credit would not result in its cash resources exceeding the limits established in 7 CFR 210.9(b)(2)). The recipient agency may also permit crediting for donated foods as they are used in the food service. However, the recipient agency must ensure that the food service management company credits it for the value of all donated foods received during the year; permitting the food service management company to credit for donated foods as they are used may not ensure that this requirement is met. Additionally, it may be difficult to track donated foods as they are used if the entity responsible for storing them is using a single inventory management system.

Another commenter indicated that it should be clear exactly when crediting for the value of donated foods must be achieved, as a food service management company might offer to provide an upfront payment for such value as an inducement to winning the bid for the contract. However, such an upfront payment for the value of donated foods would be acceptable if this method of crediting were provided for in procurement documents and in contract provisions, as required in this final rule. It would be unlikely, though, to include crediting for all donated foods received in the school or fiscal year, and would, therefore, necessitate additional crediting at a later time.

Accordingly, we have retained the allowed methods of crediting for donated foods, as proposed, in 7 CFR 250.51(b) of this final rule, with the clarification of crediting by disclosure in cost-reimbursable contracts. We have also retained, as proposed, the required frequency of crediting, and the requirement that all forms of crediting provide clear documentation of the value received from the donated foods. As in the proposed rule, we have indicated that a school food authority must also ensure that the required method and frequency of crediting does not cause its cash resources to exceed the limits established in 7 CFR 210.9(b)(2).

In the proposed rule, we proposed to provide some flexibility in determining the value of donated foods to be used in crediting, in order to permit the recipient agency to ensure that the donated foods received provide a good value to its food service. Hence, rather than require use of the donated food value utilized by the distributing agency in crediting the recipient agency's donated food "entitlement" (as described in 7 CFR 250.58(e) of this final rule), we proposed to permit the use of an alternate value determined by the recipient agency, and approved by the distributing agency. We proposed to require that the method of determining the donated food values to be utilized in crediting be included in procurement documents and in the contract. We received two comments stating that the donated food values used by food service management companies in crediting school food authorities should be the same as the values used by distributing agencies in crediting the school food authority's donated food "entitlement". Three commenters indicated that school food authorities do not have the time or expertise to determine alternate donated food values. We agree that most school food authorities would not have the time or expertise to determine alternate donated food values for use in crediting, and will likely use the values established by the distributing agency. However, we believe that having the flexibility to use alternate values may benefit some school food authorities or other recipient agencies. We received three comments indicating that the proposed flexibility in valuation of donated foods, while commendable, may be confusing to the parties responsible (e.g., the distributing agency or the State administering agency) for ensuring that recipient agencies have received credit for the value of all donated foods. We agree that the use of different values in crediting may be confusing to such parties. However, as previously indicated, most recipient agencies will likely use the values established by the distributing agency, rather than use alternate values—which, in any case, would have to be approved by the distributing agency. Additionally, in 7 CFR 250.54(a) of this final rule, we require recipient agencies to maintain a record of the donated food values used in crediting, which will help State agencies or other entities to determine compliance with requirements for crediting of the donated food value.

Accordingly, we have included the options for valuing donated foods as proposed in 7 CFR 250.51(c) of this final rule. We have included, as proposed, the requirement that the method of determining the donated food values to be utilized in crediting be included in procurement documents and in the contract. We have also included, as proposed, the requirement that the method of valuation specified must result in the determination of actual values, and may not permit any negotiation of such values. Lastly, we have included, as proposed, the requirement that the recipient agency must ensure that the specified method of valuation of donated foods permits crediting to be achieved in accordance with regulatory requirements and the provisions of the contract.

We also proposed to provide some flexibility in the use of donated foods by the food service management company, especially in its contracts with school food authorities to conduct the meal service. Under the proposal, the food service management company would not be required to use those donated foods that are not included in school menu plans, with a few exceptions (although it must provide a credit for all donated foods received). Rather, the food service management company could use its food purchasing capacity to provide other foods that meet nutritional requirements in place of those donated foods that do not fit easily into the school menu plans. We received 641 comments in opposition to this proposal. Almost all of them indicated that food service management companies should be required to use all donated foods in the school food service, or should use either the donated foods or a commercial substitute of the same type, of U.S. origin, and of equal or better quality (as required of processors under subpart C of 7 CFR part 250). Many commenters saw the proposal as providing school food authorities under contract with food service management companies with the opportunity to receive cash in exchange for donated foods (i.e., for those donated foods not used in the food service)—an option not available to school food authorities that operate their own food service. Some of the commenters feared that this might lead to a "cash-out" of NSLP. Other commenters feared that the proposal would permit sale of donated foods on the open market and wondered if the Federal government would be liable for donated foods that went out-

of-condition and were sold by a food service management company to another party.

In the proposal, we sought to provide school food authorities and food service management companies with the flexibility needed to integrate donated foods into the food service as effectively as possible. It was not meant to provide an advantage to school food authorities with food service management company contracts, or to signal a move to discontinue the distribution of donated foods in NSLP, and provide cash instead. However, we are sensitive to the perception that the proposal would provide a "cash for food" option, and would create an unfair playing field, to the disadvantage of those school food authorities that operate their own food service. Therefore, we have amended the proposed requirements for the use of donated foods by food service management companies in 7 CFR 250.51(d) of this final rule. We require that the food service management company use all donated ground beef, donated ground pork, and all end products, in the recipient agency's food service. We also require that the food service management company use all other donated foods, or commercially purchased foods of the same generic identity, of U.S. origin, and of equal or better quality than the donated foods, in the recipient agency's food service. However, the recipient agency may choose to prohibit the food service management company from using commercial substitutes in place of the donated foods, in accordance with its contract.

In the proposed rule, we addressed the disposition of donated foods upon termination of the contract in this section. However, in the interest of clarity, we have moved this provision to the next section, which includes requirements for storage and inventory management of donated foods, in this final rule.

3. Storage and Inventory Management of Donated Foods, 7 CFR 250.52

In the proposed rule, we proposed to include requirements for the storage and inventory management of donated foods by food service management companies. We did not receive any comments in response to the proposal that the food service management company comply with the general storage and inventory management requirements in 7 CFR 250.14. Therefore, we have retained this requirement, as proposed, in 7 CFR 250.52(a) of this final rule. However, as the general storage and inventory requirements are in 7 CFR 250.14(b), we have amended the regulatory citation accordingly in this final rule in the interest of clarity.

We proposed to permit the food service management company to store and inventory donated foods together with commercially purchased foods–i.e., utilize a single inventory management system, as defined in this final rule–if allowed in its contract with the recipient agency. However, we proposed to require that the food service management company store donated ground beef, donated ground pork, and all end products in a manner that ensures they will be used in the recipient agency's food service. We received one comment stating that ensuring the use of donated ground beef and ground pork, and end products, under a single inventory management system will be impractical. Another commenter stated that single inventory management should apply to all school food authorities, irrespective of their contracts with food service management companies. In single inventory management, a school food authority may store and inventory its donated foods together with its commercially purchased foods, unless the distributing agency requires the donated foods to be distinguished from commercially purchased foods in storage and inventoried separately. This applies to all school food authorities, with or without food service management company contracts. Likewise, a food service management company may store and inventory donated foods together with foods it has purchased commercially for use in the school food authority's food service. However, it may store and inventory such foods together with other foods only to the extent that such a system may ensure compliance with the requirements for the use of donated foods in 7 CFR 250.51(d)—i.e., use all donated ground beef and ground pork, and all end products in the food service, and use all other donated foods or commercially purchased foods of the same generic identity, of U.S. origin, and of equal or better quality than the donated foods, in the food service. In the interest of clarity, we have included this revised language in 7 CFR 250.52(b) of this final rule. We have also included, without change, the requirement that, in cost-reimbursable contracts, the system of inventory management must ensure that the recipient agency is not charged for donated foods.

We proposed that, upon termination of the contract, the food service management company return all unused donated ground beef, donated ground pork, and end products, and that it return other donated foods, at the recipient agency's discretion, or pay the recipient agency for the value of the donated foods. One commenter indicated that the recipient agency should take ownership of all unused donated foods upon termination of the contract, in accordance with the contention that all donated foods should be used in the recipient agency's food service. However, if the food service management company is storing donated foods together with foods purchased commercially for the recipient agency, as permitted in this final rule, the return of donated foods remaining in inventory upon termination of the contract may be achieved only if all such foods "owned" by the recipient agency are returned. Such disposition of unused foods would be a matter for the recipient agency and the food service management company to resolve, in accordance with their contract. Therefore, in 7 CFR 250.52(c) of this final rule, we have retained the requirement that the food service management company return all unused donated ground beef, donated ground pork, and end products, and that it return other donated foods at the recipient agency's discretion. However, rather than providing the option of payment for the value of the donated foods, we have included the requirement that the recipient agency must ensure that the food service management company has credited it for the value of all donated foods received for use in its food service in the school or fiscal year. Accordingly, we have revised the heading of this section to *Disposition of donated foods and credit reconciliation upon termination of the contract.*

4. Contract Provisions, 7 CFR 250.53

In the proposed rule, we proposed to require specific contract provisions to ensure compliance with the proposed requirements for the use of donated foods in contracts with food service management companies. The provisions of 7 CFR 250.53 of this final rule include those contract provisions required to ensure compliance with such requirements in this final rule. It clarifies that the contract must include any activities relating to donated foods that the food service management company will be responsible for, in accordance with 7 CFR 250.50(d), and assurance that such activities will be performed in accordance with the applicable requirements in 7 CFR part 250. It also clarifies that contract provisions must assure compliance with storage and inventory requirements for donated foods, and that an on-site review of the food service management

company's operation may include a review of required records.

One commenter indicated that the proposed contract provisions will require State agencies to amend prototype contracts, or to communicate the new requirements to recipient agencies to ensure their inclusion in their contracts with food service management companies, which will impose an additional burden on State agencies. We agree that it will require additional work for State and recipient agencies to implement the new contract requirements. However, once implemented, the additional burden would be minimal. As previously indicated, the inclusion of the contract provisions is necessary to ensure compliance with the requirements in this subpart. Additionally, in accordance with a final rule published in the **Federal Register** on October 31, 2007 at 72 FR 61479, the State administering agency is required to review and approve all school food authority contracts with food service management companies prior to their execution.

5. Recordkeeping and Reviews, 7 CFR 250.54

In the proposed rule, we proposed to include specific recordkeeping requirements for recipient agencies and food service management companies in order to clearly document compliance with the requirements in this subpart. We did not receive any comments in response to the proposals. However, in accordance with 7 CFR 250.51(a) of this final rule, we clarify, in 7 CFR 250.54(a) and (b), that documentation of crediting for the value of donated foods must include crediting for such foods in processed end products, as applicable. Additionally, in accordance with 7 CFR 250.50(d) of this final rule, we clarify, in 7 CFR 250.54(b), that the food service management company must include documentation of its procurement of processed end products on behalf of the recipient agency, as applicable.

We also proposed to include specific review requirements for recipient agencies and distributing agencies, in order to ensure compliance with the requirements in this subpart. We proposed to require that the recipient agency include a review of food service management company activities relating to the use of donated foods as part of its required monitoring of the food service operation, in accordance with 7 CFR parts 210, 220, 225, or 226, as applicable. We also proposed to require that the recipient agency conduct a reconciliation to ensure that the food service management company has credited it for the value of all donated foods received for use in the food service in the school or fiscal year, as applicable.

One commenter indicated that the reconciliation process should be formalized to provide clear guidance on accounting for donated foods, including beginning and ending inventories, processing yields, and theft or damage. However, the recipient agency is not required to monitor the food service management company's beginning and ending donated food inventories as part of the proposed review requirement, or to make a separate accounting of donated food loss. Although the recipient agency would have to ensure crediting for donated foods contained in processed end products procured by the food service management company on its behalf, it would not have to monitor processing yields as part of its reconciliation. We received two comments indicating that the food service management company and the school food authority must receive accurate and timely data on food values to ensure that crediting for the value of donated foods is accurate. While true, the distributing agency is required to provide recipient agencies with information on donated food values, in accordance with 7 CFR 250.24(d)(8) of this final rule.

We received seven comments indicating that the proposed review requirements would impose additional costs on school food authorities, and that such requirements should be reviewed for their impact on schools. Another commenter suggested that FNS test the proposals to assess their impact on a cost-benefit basis. We agree that the proposed requirement to ensure crediting for the value of donated foods through a reconciliation process would require school personnel to commit more time to this activity, and thus has the potential to increase costs. However, we believe the flexibility provided in the method and frequency of crediting for donated foods will permit school food authorities to minimize such an impact. A school food authority may find that it works best to require a one-time refund for the value of all donated foods near the end of the year, or may choose to require that donated food value be credited each month or quarter through reductions on invoices. In short, we expect that school food authorities will find the method that is most cost-effective and efficient for them. Hence, in 7 CFR 250.54(c) of this final rule, we retain the review requirements for recipient agencies as proposed. However, we clarify that the required reconciliation must also ensure crediting for the value of donated foods contained in processed end products, in accordance with the requirements in 7 CFR 250.51(a), and that such reconciliation must be conducted at least annually, and upon termination of the contract.

In accordance with the removal of the proposal in this final rule that the distributing agency's review system include an on-site review of recipient agencies in NSLP, CACFP, and SFSP with food service management company contracts, as described in section II.C of the preamble, this final rule removes the proposed reference to such review requirement in this section.

Lastly, we proposed to indicate that the Department may also conduct reviews of food service management company operations with respect to the use and management of donated foods, in order to ensure compliance with the requirements of 7 CFR part 250. As we did not receive any comments in response to this proposal, it is retained in 7 CFR 250.54(d) of this final rule.

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

In the proposed rule, we proposed to provide a clearer, more comprehensive, description of the requirements relating to donated foods in NSLP and other child nutrition programs in a new subpart E of 7 CFR part 250, which includes seven new sections. This subpart would replace the current 7 CFR 250.48, 250.49, and 250.50. Since we received no comments in response to the proposed restructuring of these requirements, it is retained in this final rule. Comments received in response to proposed revisions or clarifications of specific requirements are discussed below in the pertinent sections.

1. Provision of Donated Foods in NSLP, 7 CFR 250.56

In 7 CFR 250.56 of the proposed rule, we proposed to include a general description of the provision of donated foods in NSLP, including the types and amounts provided, and to reference applicable regulatory requirements, in addition to 7 CFR part 250. We also included a streamlined description of the quantity of donated foods provided to distributing agencies each school year, in accordance with Section 6(c) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1755(c)), and the values of donated foods utilized in determining the quantities provided. Lastly, we included the current description of the cash option offered to States previous to 1974, in lieu of receiving donated foods. We received

one comment indicating that the general description, and the types and amounts of donated foods provided, do not add any value to the regulations, and are, therefore, unnecessary. However, we believe that these provisions help to clarify the role of donated foods in NSLP, and have retained them, as proposed, in 7 CFR 250.56 of this final rule.

2. Commodity Schools, 7 CFR 250.57

In 7 CFR 250.57 of the proposed rule, we proposed to describe the provision of donated foods to commodity schools, including a streamlined description of the determination of the quantity of donated foods provided to distributing agencies for commodity schools each school year, in accordance with section 6(c) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1755(c)). We also included the types of donated foods available to commodity schools. Since we received no comments in response to the proposals, 7 CFR 250.57 is retained in this final rule as proposed.

3. Ordering Donated Foods and Their Provision to School Food Authorities, 7 CFR 250.58

In 7 CFR 250.58 of the proposed rule, we proposed to describe the means by which the distributing agency orders donated foods and provides them to school food authorities for use in the school food service. We included, in 7 CFR 250.58(a), a description of ECOS, the web-based system implemented in 2003 to permit the distributing agency to submit donated food orders to FNS. We proposed to require that, before submitting orders to FNS, the distributing agency provide the school food authority with the opportunity to order, or select, donated foods for its food service from the full list of available donated foods. We received eighteen comments indicating that, because of the wide variety of donated foods available, this proposal is impractical, and would impose a significant additional burden on distributing agencies. Many orders submitted by school food authorities could not be fulfilled, since they would not constitute full truckload shipments, and would necessitate the submission of alternate selections. This would make the process of submitting food orders to FNS more time-consuming and work-intensive. Several commenters also indicated that, in current practice, distributing agencies "filter out" some foods from the full list, using information received in advance from school food authorities with respect to those foods that are most desired and useful for their food service. Such information may be obtained through annual advisory councils, periodic surveys, or by other means. Seven commenters supported the proposal, indicating the importance of having a "request-driven" ordering system, in which all school food authorities have input, and of providing all schools with the opportunity to order and receive the donated foods that they need and want.

We have amended the proposal in response to the comments received. In 7 CFR 250.58(a) of this final rule, we have required the distributing agency, before submitting orders to FNS, to ensure that all school food authorities are aware of the full list of available donated foods, and have the opportunity to provide input at least annually in determining the donated foods from the full list that are made available to them for ordering or selection. This requirement will ensure that all school food authorities have a chance to submit to the distributing agency their food preferences each year, with knowledge of the full list of foods available, while also permitting the distributing agency to "filter out" some foods from that list, based on the input received, in order to ensure efficient ordering and distribution of donated foods.

We also proposed to require that the distributing agency ensure distribution of all donated foods selected by the school food authority that may be cost-effectively distributed to it, and that the distributing agency explore all available storage and distribution options to determine if such distribution may be performed cost-effectively. In making such determination, the distributing agency may not prohibit the use of split shipments—*i.e.*, donated food shipments with more than one stop-off or delivery location. We received five comments in support of the proposal that the distributing agency may not prohibit the use of split shipments. We received two comments indicating that the distributing agency may not be aware of, or have the capacity to explore, all available storage and distribution options, and to determine the most cost-effective option. The commenters recommended that the distributing agency be required to permit school food authorities to accept full truckload shipments, rather than use the State distribution system. Two other commenters indicated that the distributing agency should be required to permit recipient agencies to divert donated foods to processors for processing. Another commenter indicated that requiring the distributing agency to explore other storage and distribution options would necessitate costly logistics studies.

The proposal to require the distributing agency to explore all available storage and distribution options was intended to help ensure that school food authorities receive the donated foods that they desired, and could most effectively use in their food service. A few States currently order limited varieties of donated foods for delivery to a distributing agency storage facility with limited storage space, rather than permit direct shipments to school food authorities or to processors. For example, one commenter stated that permitting school food authorities to order from the full list of donated foods would increase the amount of storage space that the State must rent, and that the additional cost would be passed on to school food authorities. However, we agree with commenters that requiring the exploration of all available storage and distribution options could be costly and time-consuming for the distributing agency. Furthermore, the comments received reveal the issue of the cost-effectiveness of the food distribution system to be more complex than simply assuring that school food authorities have access to the donated foods that they desire for their food service. In light of these concerns, this final rule does not require that, in determining the cost-effectiveness of distribution, the distributing agency must explore all available storage and distribution options. However, we have retained in this final rule the proposed requirement, in 7 CFR 250.58(a), that the distributing agency must ensure distribution to school food authorities of all such selected donated foods that may be cost-effectively distributed to them, and may not prohibit the use of split shipments in determining such cost-effectiveness. Since we have consolidated the requirements for ordering and distribution of donated foods in 7 CFR 250.58(a) of this final rule, we have revised the section heading to *Ordering and distribution of donated foods.* We will review current requirements in 7 CFR 250.14 for the distributing agency to evaluate its storage and distribution system to ensure cost-effective delivery of donated foods to recipient agencies, and may include any proposals for change in future rulemaking as appropriate.

We proposed to remove the current regulatory provision that permits the distributing agency to utilize an "offer and refusal" system, which provides school food authorities with a more limited assurance of receiving the donated foods that they desire for their food service. Since we did not receive

any comments in response to this proposal, that provision is removed in this final rule.

We proposed to describe the value of donated foods that the distributing agency must offer to school food authorities each school year, in accordance with section 6(c)(2) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1755(c)(2)), and the value of donated foods that the distributing agency must offer to commodity schools each school year, in accordance with section 14(f) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1762(f)). We also included the eligibility of the school food authority to receive bonus foods in addition to the Section 6 foods. We proposed to remove the current option provided to the distributing agency to use another method to determine the value of donated foods offered to school food authorities that would provide them with an equitable share of foods. Since we received no comments in response to these proposals, they are retained in 7 CFR 250.58(b) of this final rule as proposed.

For the purpose of clarity, we proposed to describe some factors that might result in a school food authority receiving less than the commodity offer value of donated foods, or an "adjusted assistance level", and to describe circumstances in which a school food authority might receive more than the commodity offer value of donated foods. We received two comments indicating that, if a school food authority does not utilize its full commodity offer value, the distributing agency should be required to permit it to carry over the remaining value into the next school year. If the school food authority does not utilize such value in that year, then it must be offered in the following year to other school food authorities on a fair-share basis. Currently, the regulations do not restrict the distributing agency in allocating the remaining value of donated foods if a school food authority does not utilize its full commodity offer value. School food authorities are not "entitled" to receive a specific amount of donated foods but must only be offered the commodity offer value. Accordingly, the distributing agency may choose to permit the school food authority to carry over the remaining donated food value into the next year, or may reallocate it in the current year to other school food authorities. Since the distributing agency is in the best position to determine how donated foods may be most efficiently utilized, we have concluded that the regulations should not restrict such decision-making. Therefore, we have retained the proposed list of factors relating to receipt of the commodity offer value in 7 CFR 250.58(c) and (d) in this final rule without change.

We proposed to include the current options in 7 CFR 250.13(a)(5) that the distributing agency may use to value donated foods in crediting school food authorities for the commodity offer value (or adjusted assistance level), but to clarify the meaning of the USDA purchase price. Since we received no comments in response to the proposal, these options are included in 7 CFR 250.58(e) of this final rule as proposed.

4. Storage and Inventory Management of Donated Foods, 7 CFR 250.59

In 7 CFR 250.59 of the proposed rule, we proposed to include the requirements for the storage and inventory management of donated foods, including the general requirements in current 7 CFR 250.14, and the specific requirements for distributing agencies and school food authorities. Since we received no comments in response to the reference to the general storage and inventory requirements, it is retained in 7 CFR 250.59(a) of this final rule.

In accordance with 7 CFR 250.14(b)(4), the distributing agency, or subdistributing agency, must store and inventory donated foods in a manner that permits donated foods to be distinguished from commercially purchased foods or other foods. However, a school food authority may utilize single inventory management—i.e., may commingle donated foods and commercially purchased foods in storage, and maintain a single inventory record of such commingled foods, unless the distributing agency imposes other storage and inventory requirements. We received one comment indicating that single inventory management should also be permitted for distributing agencies, since it would save money in contracting with commercial distributors. However, the distributing (or subdistributing) agency must remain accountable for donated foods in its storage facilities, or in those of its commercial distributors, and ensure their distribution to school food authorities. Such accountability cannot be achieved if donated foods are commingled with other foods at the distributing agency level. While retaining the storage and inventory requirements for the distributing agency, as proposed, we have amended 7 CFR 250.59(b) in this final rule to clarify that such storage must permit donated foods to be distinguished from commercially purchased foods or other foods (rather than actual physical separation at the storage facility) in order to ensure compliance with the requirements for the distribution and control of donated foods in this part. In a similar manner, we have retained the single inventory management option for the school food authority, as proposed, in 7 CFR 250.59(c) of this final rule. Such option may be exercised unless the distributing agency requires donated foods to be distinguished from commercially purchased foods in storage and inventoried separately at the school food authority level.

We also proposed to clarify that a commercial storage facility under contract with the school food authority may store and inventory donated foods together with commercially purchased foods it is storing for the school food authority, unless prohibited in its contract. However, the commercial enterprise may not commingle foods it is storing for a school food authority with foods it is storing for a commercial enterprise or other entity, since this might jeopardize the use of the donated foods provided in the school food service. Since we received no comments in response to the proposal, 7 CFR 250.59(d) is retained in this final rule as proposed.

5. Use of Donated Foods in the School Food Service, 7 CFR 250.60

In 7 CFR 250.60 of the proposed rule, we proposed to include the requirements for school food authorities in the use of donated foods in the school food service. We proposed to require that the school food authority use donated foods, as far as practical, in the school lunches, but that they may also use donated foods in other nonprofit school food service activities. Such activities are listed in 7 CFR 250.60(a), and include, for example, school breakfasts, a la carte foods sold to children, and meals served to adults directly involved in the operation and administration of the food service. Revenues received from all such activities must accrue to the school food authority's nonprofit school food service account. We proposed to state that donated foods should not be used in food service activities that do not benefit primarily schoolchildren, such as banquets or catered events. However, we recognized that their use in such activities may not always be avoided—e.g., if a school food authority utilizes a single inventory management system. Hence, we proposed to require that the school food authority ensure reimbursement to the nonprofit school food service account for the value of the

donated foods used in such activities, in addition to its responsibility to ensure reimbursement for any other resources utilized from that account.

The only comment received in response to the proposals indicated that school food authorities should be permitted to use donated foods only in those a la carte meals that may be claimed as reimbursable meals, in accordance with the nutritional requirements for such meals in 7 CFR part 210. However, the intent of the proposal was to ensure that schoolchildren receive the nutritional benefits provided by the donated foods, which they would receive whether those foods were included in the reimbursable meals or in the a la carte foods provided. Therefore, we have retained the requirements in 7 CFR 250.60(a) and (b) of this final rule as proposed, with one clarification. In addition to permitting donated foods to be used in meals served to adults directly involved in the operation and administration of the food service, this final rule permits their use in meals served to other school staff as well.

We proposed to include in this section the option for the school food authority to use donated foods in a contract with a food service management company to provide meals for use in its food service, in accordance with the requirements in subpart D of 7 CFR part 250. We proposed to require the school food authority to assure that a food service management company ensures reimbursement to the nonprofit food service account for donated foods used in catered meals or other activities outside of the nonprofit school food service. We also proposed to state that a school food authority may use donated foods to provide a meal service to other school food authorities, in accordance with an agreement between the parties. Under such an agreement, a school food authority providing the food service may commingle its own donated foods and the donated foods of the other school food authorities that are parties to the agreement. Since we received no comments in response to the proposals, they are retained in 7 CFR 250.60(c) and (d) of this final rule as proposed, except that the reference to "catered meals" in 7 CFR 250.60(c) is changed to "meals for banquets or catered events", in order to be consistent with the use of this term in 7 CFR 260.60(b).

6. Donated Foods in CACFP, 7 CFR 250.61

In 7 CFR 250.61 of the proposed rule, we proposed to describe the provision of donated foods in CACFP, through the distributing agency, for use in serving lunches and suppers to eligible participants in child care and adult care institutions. We proposed to include, in streamlined form, the determination of the minimum value of donated foods provided for distribution to such institutions participating in CACFP, in accordance with section 6(c) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1755(c)). We proposed to indicate that the number of reimbursable lunches and suppers may be adjusted during, or at the end of the year, in accordance with 7 CFR part 226. We also proposed to include the types of donated foods that the distributing agency may receive for distribution to child and adult care institutions. Since we did not receive any comments in response to the proposals, they are retained in 7 CFR 250.61(a) and (b) of this final rule as proposed, with only the following clarification. In 7 CFR 250.61(b), we clarify that, for each school year, the distributing agency receives, at a minimum, the national per-meal value of donated food assistance, or cash in lieu of donated foods, for each lunch and supper served in the previous year.

We proposed to include the responsibility of the State administering agency to determine whether child care and adult care institutions wish to receive donated foods or cash, and to work with the distributing agency (if a different agency) to ensure that donated foods are provided to those institutions that wish to receive them. We also proposed to include in this section the option for child care and adult care institutions to use donated foods in a contract with a food service management company to provide meals for use in its food service, in accordance with the requirements in subpart D of 7 CFR part 250. Lastly, we proposed to indicate that the requirements in this subpart relating to the ordering, storage and inventory management, and use of donated foods in NSLP, also apply to CACFP, except that a child care or adult care institution that uses donated foods to prepare and provide meals to other such institutions is considered a food service management company. Since we received no comments in response to the proposals, they are retained in 7 CFR 250.61(c), (d), and (e) of this final rule.

7. Donated Foods in SFSP, 7 CFR 250.62

In 7 CFR 250.62 of the proposed rule, we proposed to describe the provision of donated foods to service institutions participating in SFSP for use in serving meals to needy children primarily in the summer months, in their nonprofit food service programs. We proposed to describe the types and quantities of donated foods received by the distributing agency in SFSP. We proposed to indicate that the distributing agency provides donated foods to service institutions based on the number of meals served that are eligible for donated food support, in accordance with 7 CFR part 225. We also proposed to include in this section the option for service institutions to use donated foods in a contract with a food service management company to provide meals for use in its food service, in accordance with the requirements in subpart D of 7 CFR part 250. Lastly, we proposed to indicate that the requirements in this subpart relating to the ordering, storage and inventory management, and use of donated foods in NSLP, also apply to SFSP. Since we received no comments in response to the proposals, they are retained in 7 CFR 250.62 of this final rule.

G. Subpart F—Household Programs

In the proposed rule, we proposed to include, in a new subpart F of 7 CFR part 250, current requirements in 7 CFR 250.45, 250.46, 250.47, and 250.51, and redesignate them as 7 CFR 250.63 through 250.66, respectively, but otherwise without change. Since we received no comments in response to the proposed restructuring, it is included in this final rule as proposed.

H. Subpart G—Other Donated Food Outlets

In the proposed rule, we proposed to add a new subpart G of 7 CFR part 250 to include the distribution of donated foods to other outlets, including charitable institutions, NSIP, and to organizations assisting in situations of disasters and distress. In this new subpart, we proposed to include requirements for the distribution of donated foods to charitable institutions and to summer camps together in 7 CFR 250.67, which would replace current 7 CFR 250.40 and 250.41. We proposed to include requirements for the distribution of donated foods in NSIP in 7 CFR 250.68, which would replace the current 7 CFR 250.42. We proposed to include the current requirements in 7 CFR 250.43 and 250.44 for the distribution of donated foods in disasters and situations of distress in redesignated 7 CFR 250.69 and 250.70, but otherwise without change. Since we received no comments in response to the proposed redesignation and restructuring, it is included in this final rule as proposed. The following sections describe the specific changes to the current requirements for charitable institutions and NSIP.

1. Charitable Institutions, 7 CFR 250.67

In the proposed rule, we proposed to remove current requirements that a charitable institution's agreement with the distributing agency include information on the institution's days of operation and number of participants and meals served, data relating to the number of needy persons served, and a statement assuring that proper inventory controls will be maintained. We also proposed to remove current requirements that a summer camp's agreement with the distributing agency include data on the number of adults participating at camps relative to the number of children. We proposed to list some types of charitable institutions that may receive donated foods, if they meet the eligibility requirements in this section (including summer camps that do not participate in child nutrition programs), as well as some organizations that may not receive donated foods as charitable institutions. We proposed to streamline the qualifying criteria with respect to the rehabilitation programs of adult correctional institutions, which determine if such institutions may receive donated foods as charitable institutions. Since we received no comments in response to the proposals, they are retained in 7 CFR 250.67(a) and (b) of this final rule.

We proposed to include the appropriate data for the distributing agency to use in determining if an institution or organization serves predominantly needy persons, which is a requirement to meet the revised definition of "Charitable institution" in this final rule. The distributing agency may use, for example, socioeconomic data on the area in which the organization is located, or on the clientele served by the organization. We received one comment indicating that the proposal seems cumbersome considering the amount of donated foods provided to charitable institutions; for example, summer camps are often located in remote economically poor areas, but some participants may be from financially secure families. However, such a summer camp would be eligible to receive donated foods under the proposed requirements. The wide array of data permitted to determine if an institution serves predominantly needy persons would be considerably less of a burden on a distributing agency than the currently required submission and review of data on meals and participants served, or, for summer camps, data on the number of adults compared to the number of children at the camp. Thus, the proposals are retained in 7 CFR 250.67(c) of this final rule without change.

We proposed to include the types of donated foods that charitable institutions are eligible to receive—i.e., surplus donated foods, as available, which may be purchased under section 4(a), 32, 416, or 709. We proposed to include the requirement that the distributing agency distribute donated foods to charitable institutions based on the amounts that they may effectively utilize without waste, and the total amounts available for distribution to such institutions. Since we received no comments in response to the proposals, they are retained in 7 CFR 250.67(d) of this final rule.

Lastly, we proposed to include the option that a charitable institution may use donated foods in a contract with a food service management company, which must ensure that all donated foods received for use by the charitable institution in a fiscal year are used to benefit the charitable institution's food service. We did not receive any comments in response to this proposal. However, in accordance with the amended requirement in7 CFR 250.50(a) of this final rule, we have amended 7 CFR 250.67(e) in this final rule to require that all such donated foods must be used in (instead of benefit) the charitable institution's food service.

2. Nutrition Services Incentive Program (NSIP), 7 CFR 250.68

As described in the proposed rule, amendments to the Older Americans Act of 1965 (42 U.S.C. 3030a) in 2000 and 2003 made changes in the allocation of resources in, and the administration of, NSIP. In order to incorporate the legislative changes, we proposed to revise current requirements to indicate the role of the DHHS Administration on Aging (AoA) in administering the allocation of resources in NSIP, and the USDA role in purchasing and providing donated foods to those State Agencies on Aging requesting them as part of their NSIP grant. However, since the publication of the proposed rule, further amendments to the Older Americans Act of 1965 have been made. The Older Americans Act Amendments of 2006 (Pub. L. 109–365), enacted on October 17, 2006, removed the option for State Agencies on Aging to receive all or part of their NSIP grant as donated foods for fiscal year 2007. The enactment of the Older Americans Reauthorization Technical Corrections Act (Pub. L. 110–19), on April 23, 2007, restored this option for fiscal year 2008 and subsequent years. The latter legislation also requires a transfer of funds from AoA to FNS for the cost of purchasing donated foods and for expenses related to such purchases, rather than provide for reimbursement for such expenses. Lastly, the legislation authorizes FNS to carry over unused funds to make donated food purchases for the appropriate State Agencies on Aging in the subsequent fiscal year, rather than require the return of such funds to AoA for disbursal to State Agencies on Aging. Other procedures for the purchase and distribution of donated foods in NSIP were not changed by legislation, nor did we receive any comments in response to the clarification of such procedures in the proposed rule. Accordingly, 7 CFR 250.68, as finalized in this rule, incorporates the nondiscretionary legislative changes, as follows:

(1) 7 CFR 250.68(a) describes the transfer of funds from AoA to FNS for the purpose of purchasing donated foods and for related expenses; and

(2) 7 CFR 250.68(e) describes the carryover of any unused funds that have been transferred, to make donated food purchases in the following fiscal year, rather than the return of such funds to AoA.

I. Implementation of New Requirements

We received ten comments indicating that FNS should provide adequate time for implementation of new requirements, for updating of program information, and for amendment of agreements between distributing and recipient agencies. We received two comments indicating that extensive training will be needed to ensure effective implementation of the requirements. We agree that the requirements imposed by this final rule may necessitate some changes in procedures, including those related to recordkeeping and reviews, for distributing and recipient agencies, as well as amendments to agreements. Therefore, we have made this final rule effective 90 days after its publication in the **Federal Register**, rather than the more common 30- or 60-day period, to provide additional time to implement new procedures and agreement provisions. We are also committed to providing any necessary training to ensure effective implementation of the new requirements, and will work closely with distributing agencies, FNS Regional Offices, and with other parties, as appropriate, to ensure that such training is provided.

We received seven comments questioning how the proposed changes in food service management company contract requirements would affect existing contracts and contract

extensions. In a final rule published in the **Federal Register** on October 31, 2007 at 72 FR 61479, an implementation schedule was established to balance the need for prompt implementation of new food service management company contract requirements established in that rule with consideration of the need to honor existing contracts and procurements. The schedule was established in accordance with the one-year duration of food service management company contracts, with an option for up to four additional one-year renewals. In the interest of consistency, we will use the same basic implementation schedule for the new contract requirements established in this final rule, as follows:

(1) The requirements will be applicable for all new procurement solicitations initiated on or after the effective date of this final rule.

(2) For all procurement solicitations for contracts issued prior to the effective date of this final rule:

a. Recipient agencies and State agencies with contracts with a term of 12 months or fewer remaining are exempt from applying the provisions of this rulemaking to those contracts; and

b. With State administering agency approval, recipient agencies with contracts that have annual renewal provisions may delay implementation until expiration of the current contract plus one 12-month renewal period.

As in the final rule referenced in the previous paragraph, the State administering agency may choose to establish shorter time frames for implementation, or may require some recipient agencies to implement the requirements sooner than others. However, in no case may a recipient agency be permitted to delay implementation beyond the timeframes specified above.

III. Procedural Matters

A. Executive Order 12866

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

B. Regulatory Impact Analysis

1. Need for Action

This action is needed to respond to an OIG audit, which found that, in contracting with food service management companies, school food authorities did not always receive the full value of the donated foods provided for use in the NSLP. It also incorporates amendments to the Older Americans Act of 1965 (42 U.S.C. 3030a) that affect the NSIP, and revises and clarifies other requirements to ensure the efficient and effective management and use of donated foods.

2. Benefits

The regulatory changes help to ensure that recipient agencies receive the full benefit and value of donated foods provided to food service management companies for use in the recipient agencies' meals programs. The changes also remove reporting requirements used to determine the amount of surplus donated foods that charitable institutions may receive for service to needy persons. FNS quantified these benefits using audit results reported by the OIG. If the size and nature of the accounting problems uncovered by the OIG are indicative of problems with FSMC contracts nationwide, then an effective rule could generate benefits as high as $36 million over five years. However, given that the OIG did not choose a nationally representative sample for audit, this estimate is subject to considerable uncertainty.

3. Costs

This action is not expected to significantly increase costs of State and local agencies, or their commercial contractors, in using donated foods. FNS estimates five-year costs of roughly $243,000. Despite uncertainty with the estimate of potential benefits, the rule is undoubtedly cost-effective.

C. Regulatory Flexibility Act

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

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under Section 202 of the UMRA, FNS generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, or tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires FNS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) that impose costs on State, local, or tribal governments or the private sector of $100 million or more in any one year. This rule is, therefore, not subject to the requirements of sections 202 and 205 of the UMRA.

E. Executive Order 12372

The donation of foods in USDA food distribution and child nutrition programs, and to charitable institutions and elderly nutrition projects in NSIP, is included in the Catalog of Federal Domestic Assistance under 10.550. For the reasons set forth in the final rule in 7 CFR part 3015, subpart V and related Notice published at 48 FR 29114, June 24, 1983, the donation of foods in such programs is included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

F. Federalism Summary Impact Statement

In accordance with Executive Order 13132, FNS has considered the impact of the regulatory actions on State and local governments. The following paragraphs describe FNS's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13132.

1. Prior Consultation With State Officials

The programs affected by the regulatory proposals in this rule are all State-administered, Federally-funded programs. FNS headquarters and regional offices have formal and informal discussions with State and local officials on an ongoing basis regarding program issues relating to the distribution of donated foods. FNS meets annually with the American Commodity Distribution Association, a national group with State, local, and industry representation, and the School Nutrition Association, to discuss issues relating to donated foods.

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

The rule addresses concerns identified in an OIG audit with respect to the benefit and value of donated foods received by recipient agencies in their contracts with food service management companies. While the regulatory requirements imposed by this rule may increase the workload of State and local agencies to a certain extent, the provisions will help to ensure that recipient agencies receive the benefit and value of the donated foods provided for their use.

3. Extent to Which We Meet those Concerns

FNS has considered the impact of this final rule on State and local agencies. FNS has established compliance timeframes that give due consideration to the need for changes in contract requirements and in the procedures necessary to assure compliance with such requirements.

G. Executive Order 12988

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

H. Civil Rights Impact Analysis

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

I. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; see 5 CFR part 1320) requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency before they can be implemented. In the publication of the proposed rule on June 8, 2006, FNS solicited comments on the burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility and clarity; and ways to minimize the burden on respondents, including the use of automated collection techniques or other forms of information technology. Although FNS sought public comments specific to the estimated reporting and recordkeeping burden detailed in the proposed rule, no comments were received and the information collection burden associated with the proposed rule, OMB No. 0584–0293, was approved on August 8, 2006. However, since the publication of the proposed rule, FNS has found that the total estimated annual burden for OMB No. 0584–0293 should reflect a decrease to 1,070,452 hours, rather than the decrease to 1,085,814 hours included in the proposed rule. The discrepancy is a result of mathematical errors in calculating the burden hours. Additionally, in the most recent survey of school food authorities (SFAs) conducted in school year 2003–04, it was estimated that 13.4 percent of SFAs had contracts with FSMCs. Hence, for school year 2005–06, it is estimated that 2,783 of the 20,770 SFAs participating in NSLP had such contracts, rather than the 1,765 included in the proposed rule. This adjustment results in an increase of 1,272 burden hours for this particular activity, making the total estimated annual burden for OMB No. 0584–0293 1,071,724 hours, which is still a decrease from the proposed rule. The resulting changes in the reporting and recordkeeping burdens associated with food service management contracts, from both current levels, and those included in the proposed rule, are shown in the following table.

Section		Number of respondents	Number responses per respondent	Total annual responses	Hours per response	Total hours
Reporting						
250.12(d)	Current	300	0.25	75	0.33	24.75
250.54	Proposed	1,765	1	1,765	1	1,765
250.53	Final	2,783	1	2,783	1	2,783
Recordkeeping						
250.12(d)	Current	300			0.08	24
250.54/250.55	Proposed	1,765			0.25	442
250.53/250.54	Final	2,783			0.25	696

Estimated total number of respondents: 18,552.

Estimated total annual responses: 1,160,746.

Estimated annual burden: 1,071,724.

FNS will request an adjustment in the total annual burden associated with OMB No. 0584–0293 to reflect the changes indicated above. Additionally, these requirements will not become effective until approved by OMB. When these information collection requirements have been approved, FNS will publish separate action in the **Federal Register** announcing OMB's approval.

J. E-Government Act Compliance

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

List of Subjects in 7 CFR Part 250

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

■ Accordingly, 7 CFR part 250 is amended as follows:

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

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

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

■ 2. In § 250.3:

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

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

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

The revisions and additions read as follows:

§ 250.3 Definitions.

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

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

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

CACFP means the Child and Adult Care Food Program, 7 CFR part 226.

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

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

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

* * * * *

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

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

* * * * *

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

* * * * *

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

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

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

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

* * * * *

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

* * * * *

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

* * * * *

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

* * * * *

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

NSIP means the Nutrition Services Incentive Program, which is administered by the United States Department of Health and Human Services, in accordance with Section 311 of the Older Americans Act of 1965 (42 U.S.C. 3030a).

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

* * * * *

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

(a) Convert donated foods into an end product;

(b) Repackage donated foods; or

(c) Use donated foods in the preparation of meals.

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

Recipient agencies means agencies or organizations that receive donated foods, in accordance with agreements signed with a distributing agency, or with another recipient agency.

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

* * * * *

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

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

* * * * *

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

* * * * *

Service institutions means recipient agencies that participate in SFSP.

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

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

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

* * * * *

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

* * * * *

State Agency on Aging means:

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

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

* * * * *

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

* * * * *

■ 3. In § 250.12:

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

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

■ c. Remove paragraphs (d), (e), and (f).

The revision reads as follows:

§ 250.12 Agreements.

* * * * *

■ 4. In § 250.19:

■ a. Revise the introductory text of paragraph (b)(1).

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

■ c. Revise newly redesignated paragraph (b)(1)(i).

■ d. Remove paragraph (d).

The revision reads as follows:

§ 250.19 Reviews.

* * * * *

(b) * * * (1) As part of its review system, each distributing agency must establish procedures to ensure compliance with the requirements of this part, and with other Federal regulations, as applicable. Such procedures must include, for example, requirements relating to eligibility of recipient agencies and recipients, ordering, storage, and inventory of donated foods, reporting and recordkeeping, and civil rights, as they apply to specific programs. They must also include:

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

* * * * *

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

§ 250.24 Distributing agency performance standards.

* * * * *

(d) * * *

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

(9) Offering school food authorities participating in NSLP, or as commodity schools, the commodity offer value of donated food assistance, at a minimum, and determining an adjusted assistance level in consultation with school food authorities, as appropriate, in accordance with § 250.58; and

(10) Ensuring that all school food authorities in NSLP are aware of the full list of available donated foods, have the opportunity to provide input at least annually in determining the donated foods from the full list that they may select for their food service, and receive all such selected donated foods that may be cost-effectively distributed to them.

* * * * *

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

Subpart F—Household Programs

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

■ 8. Add a new subpart G, consisting of §§ 250.67 and 250.68, to read as follows:

Subpart G—Other Donated Food Outlets

§ 250.67 Charitable institutions.

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

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

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

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

(1) Hospitals or retirement homes;

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

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

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

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

(c) *Determining service to predominantly needy persons.* To determine if a charitable institution

serves predominantly needy persons, the distributing agency must use:

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

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

(3) Other similar data.

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

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

§ 250.68 Nutrition Services Incentive Program (NSIP).

(a) *Distribution of donated foods in NSIP.* The Department provides donated foods in NSIP to State Agencies on Aging and their selected elderly nutrition projects, for use in providing meals to elderly persons. NSIP is administered at the Federal level by DHHS' Administration on Aging (AoA), which provides an NSIP grant each year to State Agencies on Aging. The State agencies may choose to receive all, or part, of the grant as donated foods, on behalf of its elderly nutrition projects. The Department is responsible for the purchase of the donated foods and their delivery to State Agencies on Aging. AoA is responsible for transferring funds to the Department for the cost of donated food purchases and for expenses related to such purchases.

(b) *Types and quantities of donated foods distributed.* Each State Agency on Aging, and its elderly nutrition projects, may receive any types of donated foods available in food distribution or child nutrition programs, to the extent that such foods may be distributed cost-effectively. Each State Agency on Aging may receive donated foods with a value equal to its NSIP grant. Each State Agency on Aging and elderly nutrition projects may also receive donated foods under Section 32, Section 416, and Section 709, as available, and under Section 14 (42 U.S.C. 1762(a)).

(c) *Role of distributing agency.* The Department delivers NSIP donated foods to distributing agencies, which distribute them to elderly nutrition projects selected by each State or Area Agency on Aging. The distributing agency may only distribute donated foods to elderly nutrition projects with which they have signed agreements. The agreements must contain provisions that describe the roles of each party in ensuring that the desired donated foods are ordered, stored, and distributed in an effective manner.

(d) *Donated food values used in crediting a State Agency on Aging's NSIP grant.* FNS uses the average price (cost per pound) for USDA purchases of a donated food made in a contract period in crediting a State Agency on Aging's NSIP grant.

(e) *Coordination between FNS and AoA.* FNS and AoA coordinate their respective roles in NSIP through the execution of annual agreements. The agreement ensures that AoA transfers funds to FNS sufficient to purchase the donated foods requested by State Agencies on Aging, and to meet expenses related to such purchases. The agreement also authorizes FNS to carry over any such funds that are not used in the current fiscal year to make purchases of donated foods for the appropriate State Agencies on Aging in the following fiscal year.

§§ 250.43 and 250.44 [Redesignated as §§ 250.69 and 250.70]

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

■ 10. Revise subparts D and E to read as follows:

Subpart D—Donated Foods in Contracts with Food Service Management Companies

250.50 Contract requirements and procurement.
250.51 Crediting for, and use of, donated foods.
250.52 Storage and inventory management of donated foods.
250.53 Contract provisions.
250.54 Recordkeeping and reviews.

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

250.56 Provision of donated foods in NSLP.
250.57 Commodity schools.
250.58 Ordering donated foods and their provision to school food authorities.
250.59 Storage and inventory management of donated foods.
250.60 Use of donated foods in the school food service.
250.61 Child and Adult Care Food Program (CACFP).
250.62 Summer Food Service Program (SFSP).

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

§ 250.50 Contract requirements and procurement.

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

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

(c) *Procurement requirements.* The recipient agency must meet Departmental procurement requirements in 7 CFR parts 3016 or 3019, as applicable, in obtaining the services of a food service management company, as well as applicable requirements in 7 CFR parts 210, 220, 225, or 226. The recipient agency must ensure that procurement documents, as well as contract provisions, include any donated food activities that a food service management company is to perform, such as those activities listed in paragraph (d) of this section. The procurement and contract must also specify the method used to determine the donated food values to be used in

crediting, or the actual values assigned, in accordance with § 250.51. The method used to determine the donated food values may not be established through a post-award negotiation, or by any other method that may directly or indirectly alter the terms and conditions of the procurement or contract.

(d) *Activities relating to donated foods.* A food service management company may perform specific activities relating to donated foods, such as those listed in this paragraph (d), in accordance with procurement documents and its contract with the recipient agency. Such activities may also include the procurement of processed end products on behalf of the recipient agency. Such procurement must ensure compliance with the requirements in subpart C of this part and with the provisions of the distributing or recipient agency's processing agreements, and must ensure crediting of the recipient agency for the value of donated foods contained in such end products at the processing agreement value. Although the food service management company may procure processed end products on behalf of the recipient agency, it may not itself enter into the processing agreement with the processor required in subpart C of this part. Other donated food activities that the food service management company may perform include:

(1) Preparing and serving meals;

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

(3) Storage and inventory management of donated foods, in accordance with § 250.52; and

(4) Payment of processing fees or submittal of refund requests to a processor on behalf of the recipient agency, or remittance of refunds for the value of donated foods in processed end products to the recipient agency, in accordance with the requirements in subpart C of this part.

§ 250.51 Crediting for, and use of, donated foods.

(a) *Crediting for donated foods.* In both fixed-price and cost-reimbursable contracts, the food service management company must credit the recipient agency for the value of all donated foods received for use in the recipient agency's meal service in a school year or fiscal year (including both entitlement and bonus foods). Such requirement includes crediting for the value of donated foods contained in processed end products if the food service management company's contract requires it to:

(1) Procure processed end products on behalf of the recipient agency; or

(2) Act as an intermediary in passing the donated food value in processed end products on to the recipient agency.

(b) *Method and frequency of crediting.* The recipient agency may permit crediting for the value of donated foods through invoice reductions, refunds, discounts, or other means. However, all forms of crediting must provide clear documentation of the value received from the donated foods—e.g., by separate line item entries on invoices. If provided for in a fixed-price contract, the recipient agency may permit a food service management company to pre-credit for donated foods. In pre-crediting, a deduction for the value of donated foods is included in the established fixed price per meal. However, the recipient agency must ensure that the food service management company provides an additional credit for any donated foods not accounted for in the fixed price per meal—e.g., for donated foods that are not made available until later in the year. In cost-reimbursable contracts, crediting may be performed by disclosure; i.e., the food service management company credits the recipient agency for the value of donated foods by disclosing, in its billing for food costs submitted to the recipient agency, the savings resulting from the receipt of donated foods for the billing period. In all cases, the recipient agency must require crediting to be performed not less frequently than annually, and must ensure that the specified method of valuation of donated foods permits crediting to be achieved in the required time period. A school food authority must also ensure that the method, and timing, of crediting does not cause its cash resources to exceed the limits established in 7 CFR 210.9(b)(2).

(c) *Donated food values required in crediting.* The recipient agency must ensure that, in crediting it for the value of donated foods, the food service management company uses the donated food values determined by the distributing agency, in accordance with § 250.58(e), or, if approved by the distributing agency, donated food values determined by an alternate means of the recipient agency's choosing. For example, the recipient agency may, with the approval of the distributing agency, specify that the value will be the average price per pound for a food, or for a group or category of foods (e.g., all frozen foods or cereal products), as listed in market journals over a specified period of time. However, the method of determining the donated food values to be used in crediting must be included in procurement documents and in the contract, and must result in the determination of actual values; e.g., the average USDA purchase price for the period of the contract with the food vendor, or the average price per pound listed in market journals over a specified period of time. Negotiation of such values is not permitted. Additionally, the method of valuation must ensure that crediting may be achieved in accordance with paragraph (b) of this section, and at the specific frequency established in procurement documents and in the contract.

(d) *Use of donated foods.* The food service management company must use all donated ground beef, donated ground pork, and all processed end products, in the recipient agency's food service, and must use all other donated foods, or commercially purchased foods of the same generic identity, of U.S. origin, and of equal or better quality than the donated foods, in the recipient agency's food service (unless the contract specifically stipulates that the donated foods, and not such commercial substitutes, be used).

§ 250.52 Storage and inventory management of donated foods.

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

(b) *Storage and inventory with commercially purchased foods.* The food service management company may store and inventory donated foods together with foods it has purchased commercially for the school food authority's use (unless specifically prohibited in the contract). It may store and inventory such foods together with other commercially purchased foods only to the extent that such a system ensures compliance with the requirements for the use of donated foods in § 250.51(d)—i.e., use all donated ground beef and ground pork, and all end products in the food service, and use all other donated foods or commercially purchased foods of the same generic identity, of U.S. origin, and of equal or better quality than the donated foods, in the food service. Additionally, under cost-reimbursable contracts, the food service management company must ensure that its system of inventory management does not result in the recipient agency being charged for donated foods.

(c) *Disposition of donated foods and credit reconciliation upon termination*

of the contract. When a contract terminates, and is not extended or renewed, the food service management company must return all unused donated ground beef, donated ground pork, and processed end products, and must, at the recipient agency's discretion, return other unused donated foods. The recipient agency must ensure that the food service management company has credited it for the value of all donated foods received for use in the recipient agency's meal service in a school year or fiscal year, as applicable.

§ 250.53 Contract provisions.

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

(1) A statement that the food service management company must credit the recipient agency for the value of all donated foods received for use in the recipient agency's meal service in the school year or fiscal year (including both entitlement and bonus foods), and including the value of donated foods contained in processed end products, in accordance with the contingencies in § 250.51(a);

(2) The method and frequency by which crediting will occur, and the means of documentation to be utilized to verify that the value of all donated foods has been credited;

(3) The method of determining the donated food values to be used in crediting, in accordance with § 250.51(c), or the actual donated food values;

(4) Any activities relating to donated foods that the food service management company will be responsible for, in accordance with § 250.50(d), and assurance that such activities will be performed in accordance with the applicable requirements in 7 CFR part 250;

(5) A statement that the food service management company will use all donated ground beef and ground pork products, and all processed end products, in the recipient agency's food service;

(6) A statement that the food service management company will use all other donated foods, or will use commercially purchased foods of the same generic identity, of U.S. origin, and of equal of better quality than the donated foods, in the recipient agency's food service;

(7) Assurance that the procurement of processed end products on behalf of the recipient agency, as applicable, will ensure compliance with the requirements in subpart C of 7 CFR part 250 and with the provisions of distributing or recipient agency processing agreements, and will ensure crediting of the recipient agency for the value of donated foods contained in such end products at the processing agreement value;

(8) Assurance that the food service management company will not itself enter into the processing agreement with the processor required in subpart C of 7 CFR part 250;

(9) Assurance that the food service management company will comply with the storage and inventory requirements for donated foods;

(10) A statement that the distributing agency, subdistributing agency, or recipient agency, the Comptroller General, the Department of Agriculture, or their duly authorized representatives, may perform onsite reviews of the food service management company's food service operation, including the review of records, to ensure compliance with requirements for the management and use of donated foods;

(11) A statement that the food service management company will maintain records to document its compliance with requirements relating to donated foods, in accordance with § 250.54(b); and

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

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

§ 250.54 Recordkeeping and reviews.

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

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

(2) Documentation that the food service management company has credited it for the value of all donated foods received for use in the recipient agency's food service in the school or fiscal year, including, in accordance with the requirements in § 250.51(a), the value of donated foods contained in processed end products; and

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

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

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

(2) Documentation that it has credited the recipient agency for the value of all donated foods received for use in the recipient agency's food service in the school or fiscal year, including, in accordance with the requirements in § 250.51(a), the value of donated foods contained in processed end products; and

(3) Documentation of its procurement of processed end products on behalf of the recipient agency, as applicable.

(c) *Review requirements for the recipient agency.* The recipient agency must ensure that the food service management company is in compliance with the requirements of this part through its monitoring of the food service operation, as required in 7 CFR parts 210, 225, or 226, as applicable. The recipient agency must also conduct a reconciliation at least annually (and upon termination of the contract) to ensure that the food service management company has credited it for the value of all donated foods received for use in the recipient agency's food service in the school or fiscal year, including, in accordance with the requirements in § 250.51(a), the value of donated foods contained in processed end products.

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

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

§ 250.56 Provision of donated foods in NSLP.

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

(b) *Types of donated foods distributed.* The Department purchases a wide variety of foods for distribution in NSLP each school year. A list of available foods is posted on the FNS Web site, for access by distributing agencies and school food authorities. In addition to Section 6 foods (42 U.S.C. 1755) as described in paragraph (c) of this section, the distributing agency may also receive Section 14 donated foods (42 U.S.C. 1762(a)), and donated foods under Section 32 (7 U.S.C. 612c), Section 416 (7 U.S.C. 1431), or Section 709 (7 U.S.C. 1446a–1), as available.

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

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

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

§ 250.57 Commodity schools.

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

(b) *Value of donated foods for commodity schools.* For participating commodity schools, the distributing agency receives donated foods valued at the sum of the national per-meal value and the value of the general cash payment available to it under Section 4 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1753), multiplied by the number of reimbursable lunches served by commodity schools in the previous school year. From the total value of donated food assistance for which it is eligible, a commodity school may elect to receive up to 5 cents per meal in cash to cover processing and handling expenses related to the use of donated foods. In addition to Section 6 and Section 14 foods under the Richard B. Russell National School Lunch Act (42 U.S.C. 1755 and 1762(a)), the distributing agency may also receive donated foods under Section 32 (7 U.S.C. 612c), Section 416 (7 U.S.C. 1431), or Section 709 (7 U.S.C. 1446a–1), as available, for commodity schools.

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

(a) *Ordering and distribution of donated foods.* The distributing agency orders donated foods through a Web-based system called the Electronic Commodity Ordering System (ECOS). Through ECOS, the distributing agency places orders directly into a centralized computer system. Before submitting orders for donated foods to FNS, the distributing agency must ensure that all school food authorities are aware of the full list of available donated foods, and have the opportunity to provide input at least annually in determining the donated foods from the full list that are made available to them for ordering or selection. The distributing agency must ensure distribution to school food authorities of all such selected donated foods that may be cost-effectively distributed to them, and may not prohibit the use of split shipments in determining such cost-effectiveness.

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

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

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

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

(d) *Receipt of more donated foods than the commodity offer value.* The school food authority may receive more donated foods than the commodity offer value if the distributing agency, in consultation with the school food authority, determines that the school food authority may efficiently utilize more donated foods than the commodity offer value, and more donated foods are available for distribution. This may occur, for example, if other school food

authorities receive less than the commodity offer value of donated foods for one of the reasons described in paragraph (c) of this section.

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

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

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

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

§ 250.59 Storage and inventory management of donated foods.

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

(b) *Storage at distributing agency level.* The distributing or subdistributing agency, or storage facilities with which they have contracts, must store donated foods in a manner that permits them to be distinguished from commercially purchased foods or other foods, in order to ensure compliance with the requirements for the distribution and control of donated foods in this part.

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

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

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

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

(1) School breakfasts or other meals served in child nutrition programs;

(2) A la carte foods sold to children;

(3) Meals served to adults directly involved in the operation and administration of the nonprofit food service, and to other school staff; and

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

(b) *Use of donated foods outside of the nonprofit school food service.* The school food authority should not use donated foods in meals or food service activities that do not benefit primarily schoolchildren, such as banquets or catered events. However, their use in such meals or activities may not always be avoided, e.g, for a school food authority utilizing single inventory management. In all cases, the school food authority must ensure reimbursement to the nonprofit school food service account for the value of donated foods used in such activities, in addition to reimbursement for other resources utilized from that account. Since school food authorities utilizing single inventory management cannot reimburse the nonprofit school food service account based on actual usage of donated foods outside of the nonprofit school food service, they must establish an alternate method—e.g., by including the current per-meal value of donated food reimbursement in the price charged for the food service activities.

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

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

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

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

(b) *Types and quantities of donated foods distributed.* For each school year, the distributing agency receives, at a minimum, the national per-meal value of donated food assistance (or cash in lieu of donated foods) multiplied by the number of reimbursable lunches and suppers served in the State in the previous school year, as established in Section 6(c) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1755(c)). The national per-meal value is adjusted each year to reflect changes in the Bureau of Labor Statistic's Producer Price Index for Foods Used in Schools and Institutions. The adjusted per-meal value is published in a notice in the **Federal Register** in July of each year. Reimbursable lunches and suppers are those meeting the nutritional standards established in 7 CFR part 226. The number of reimbursable lunches and suppers may be adjusted during, or at the end of the school year, in accordance with 7 CFR part 226. In addition to Section 6 entitlement foods (42 U.S.C. 1755(c)), the distributing agency may also receive Section 14 donated foods (42 U.S.C. 1762(a)), and donated foods under Section 32 (7 U.S.C. 612c), Section 416 (7 U.S.C. 1431), or Section 709 (7 U.S.C. 1446a–1), as available, for distribution to child care and adult care institutions participating in CACFP.

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

(d) *Use of donated foods in a contract with a food service management company.* A child care or adult care institution may use donated foods in a contract with a food service management company to conduct its food service. The contract must meet the requirements in Subpart D of this part with respect to donated foods, and must also meet requirements in 7 CFR part 226 and 7 CFR parts 3016 or 3019, as applicable, with respect to the procurement of such contracts.

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

§ 250.62 Summer Food Service Program (SFSP).

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

(b) *Types and quantities of donated foods distributed.* The distributing agency receives donated foods available under Section 6 and Section 14 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1755 and 1762), and may also receive donated foods under Section 32 (7 U.S.C. 612c), Section 416 (7 U.S.C. 1431), or Section 709(7 U.S.C. 1446a–1), as available, for distribution to eligible service institutions participating in SFSP. Section 6 donated foods are provided to distributing agencies in accordance with the number of meals served in the State in the previous school year that are eligible for donated food support, in accordance with 7 CFR part 225.

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

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

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

Dated: July 31, 2008.

Nancy Montanez Johner,

Under Secretary, Food, Nutrition, and Consumer Services.

[FR Doc. E8–18230 Filed 8–7–08; 8:45 am]

BILLING CODE 3410–30–P

FEDERAL RESERVE SYSTEM

12 CFR Part 226

[Regulation Z; Docket No. R–1320]

Truth in Lending

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule; staff commentary.

SUMMARY: The Board is publishing a final rule amending the staff commentary that interprets the requirements of Regulation Z (Truth in Lending). The Board is required to adjust annually the dollar amount that triggers requirements for certain home mortgage loans bearing fees above a certain amount. The Home Ownership and Equity Protection Act of 1994 (HOEPA) sets forth rules for home-secured loans in which the total points and fees payable by the consumer at or before loan consummation exceed the greater of $400 or 8 percent of the total loan amount. In keeping with the statute, the Board has annually adjusted the $400 amount based on the annual percentage change reflected in the Consumer Price Index that is in effect on June 1. The adjusted dollar amount for 2009 is $583. This adjustment does not affect the new rules for "higher-priced mortgage loans" adopted by the Board in July 2008.

EFFECTIVE DATE: January 1, 2009.

FOR FURTHER INFORMATION CONTACT: Dana Miller, Attorney, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, at (202) 452–3667. For the users of Telecommunications Device for the Deaf ("TDD") only, contact (202) 263–4869.

SUPPLEMENTARY INFORMATION:

I. Background

The Truth in Lending Act (TILA; 15 U.S.C. 1601–1666j) requires creditors to disclose credit terms and the cost of consumer credit as an annual percentage rate. The act requires additional disclosures for loans secured by a consumer's home, and permits consumers to cancel certain transactions that involve their principal dwelling. TILA is implemented by the Board's Regulation Z (12 CFR part 226). The Board's official staff commentary (12 CFR part 226 (Supp. I)) interprets the regulation, and provides guidance to creditors in applying the regulation to specific transactions.

HOEPA was contained in the Riegle Community Development and Regulatory Improvement Act of 1994 and was enacted as an amendment to TILA. Public Law 103–325, 108 Stat. 2160 (60 FR 15463). In 1995, the Board amended Regulation Z to implement HOEPA. These amendments, contained in §§ 226.32 and 226.34 of the regulation, impose substantive limitations and additional disclosure requirements on certain closed-end home mortgage loans bearing rates or fees above a certain percentage or amount. As enacted, the statute requires creditors to comply with HOEPA's requirements if the total points and fees payable by the consumer at or before loan consummation exceed the greater of $400 or 8 percent of the total loan amount. The statute requires the Board to adjust the $400 figure annually on January 1 based on the annual percentage change in the Consumer Price Index (CPI) that was reported on the preceding June 1. 15 U.S.C.