Food Distribution
National Policy Memorandum

United States Department of Agriculture

Food and Nutrition Service

3101 Park Center Drive

Alexandria, VA 22302-1500

DATE: November 17, 2008

POLICY NO: FD-080: National School Lunch Program (NSLP), Summer Food Service Program (SFSP), Child and Adult Care Food Program (CACFP), and Charitable Institutions

SUBJECT: Clarification of Requirements in the FSMC Final Rule

The purpose of this policy memorandum is to clarify requirements in 7 CFR Part 250 established in the final rule, "Management of Donated Foods in Child Nutrition Programs, the Nutrition Services Incentive Program, and Charitable Institutions" (the FSMC final rule), which was published in the Federal Register on August 8, 2008. The memorandum utilizes a Q & A format, and includes questions and input submitted by FNS Regional Offices and outside parties. FNS will utilize the same format to address additional questions and consider further input, as appropriate.

Implementation

Q1. If FSMC contracts were just re-bid for SY 2009 (i.e., the school year that extends from July 1, 2008 to June 30, 2009) in accordance with the implementation schedule in the final rule, "Procurement Requirements for the National School Lunch, School Breakfast, and Special Milk Programs" (as published in the Federal Register on October 31, 2007), must they be re-bid again for SY 2010 to comply with the implementation schedule in the FSMC final rule?

A. School food authorities (SFAs) must re-bid contracts expiring at the end of SY 2009 (i.e., in June 2009), except in the following cases:

1) **The contract already includes provisions relating to crediting for and use of donated foods, the method of determining the value of donated foods used in crediting, and recordkeeping requirements, that ensure compliance with the requirements of the final rule; or**
2) **The contract has an annual renewal provision that would permit it, with State administering agency approval, to extend the contract for one more 12-month period (i.e., through SY 2010).**

Crediting and Value of Donated Foods

Q2. It is our understanding the FSMC will be required to credit the SFA for donated foods when they are RECEIVED in the SFA for use. Is that correct? Historically, credit for donated foods has been based on usage, not when received. Will the FSMC still be permitted to credit donated foods when used or only when received?

A. In accordance with new regulations in 250.51(a), the FSMC must credit the SFA for the value of all donated foods received for use in the school food service in the school year, whether the donated foods are used in that year or not.

Q3. In accordance with 250.51(a), the FSMC must credit the SFA for the value of all donated foods received for use in the food service in a school year, as provided in its contract. However, when is a donated food considered "received"? Is it when the donated food arrives at the school kitchen or storage facility? Or, is it when it arrives at a State storage facility, or at a processor facility, and is credited to the SFA entitlement?

A. Donated foods that will be used by the FSMC as part of its contract with the SFA are considered "received" when the foods arrive at the school kitchen, or SFA or FSMC storage facility, in either raw form or in processed end products. The fact that the State distributing agency may credit the SFA entitlement at a different time—e.g., upon delivery of the donated foods to a processor's facility—is not directly related to the crediting requirement imposed on the FSMC in 250.51(a).

Q4. What are the requirements for the FSMC in crediting the SFA for the value of donated foods (250.51(a)) in the following situations:

(1) When the FSMC procures end products from a processor on behalf of the SFA on a fee-for-service basis.

A. The FSMC must credit the SFA for the value of donated foods contained in end products that the FSMC procures from a processor on behalf of the SFA, in accordance with 250.51(a), regardless of the method of sales used in its procurement. The specific method of crediting utilized, which may be by invoice reductions, discounts, refunds, or another means (in accordance with 250.51(b)), must be indicated in the SFA's contract with the FSMC (in accordance with 250.53(a)(2)). The method utilized may depend on the type of contract: e.g., in a cost-reimbursable contract, the FSMC may simply bill the SFA for its food purchases and disclose, in its billing, the savings resulting from donated foods contained in its purchase of processed end products. If such purchase was made on a fee-for-service basis, indication of such method of purchase in its billing would provide the required disclosure, since, by definition, the fee-for-service excludes the donated food value in the fee charged. Crediting for donated foods in processed end products must be at the processing agreement value (250.50(d)), in accordance with the distributing agency's State Participation Agreement or State Processing Agreement with the processor. All methods of crediting must provide clear documentation of the value received by the SFA for the donated foods in such end products (250.51(b)).

(2) When the FSMC procures end products from a processor on behalf of the SFA under a rebate system.

A. Same answer as above. However, it should be noted that, in a cost-reimbursable contract, as described above, the FSMC must remit the rebate or refund to the SFA, or otherwise credit the SFA for the value of donated foods in end products it purchases from the processor and charges to the SFA at the commercial, or gross, price.

(3) When the SFA procures end products from the processor and provides them to the FSMC for use in the school food service.

A. The FSMC is not required to credit the SFA for the value of donated foods in end products that the SFA procures from the processor and provides to the FSMC for use in the school food service--unless, in accordance with its contract, the FSMC acts as an intermediary between the processor and SFA in passing along the donated food value (e.g., in receiving refunds from the processor and remitting them to the SFA) (250.51(a)). The processor must credit the SFA for the donated food value in end products procured by the SFA, in accordance with processing requirements in Subpart C of Part 250. The SFA must ensure that the FSMC uses such end products in the school food service, in accordance with 250.51(d). It also must ensure that the FSMC does not charge it for such end products, and may choose to include a provision in its contract to assure this (as it might choose to do for other foods the SFA has procured and provided to the FSMC for use in the food service).

Q5. It is our understanding that under cost-reimbursable contracts, the SFA can specify the frequency with which they will receive credit for commodities and that frequency can be as little as one time per year. Is that correct?

A. Yes, that is correct for both cost-reimbursable and fixed-price contracts.

Q6. Please clarify/provide examples of the requirement in 250.51(b) for the recipient agency to ensure that the specified method of valuation of donated foods permits crediting to be achieved in the required time period.

A. For example, since crediting for donated food value must be achieved at least annually (as permitted in 250.51(b)), the method of valuation may not use an average price for that food for a period of time extending beyond the current school year.

Q7. Can the distributing agency prohibit the use of "donated food values determined by an alternate means of the recipient agency's choosing" (250.51(c)) – and simply

require that all recipient agencies use the donated food values determined by the distributing agency in accordance with 250.58(e)?

A. Yes, the distributing agency may require recipient agencies to use the donated food values established by the distributing agency, in accordance with 250.58(e), and may prohibit the use of alternate values.

Use of Donated Foods

Q8. The requirement in 250.50(a) for the contract to "ensure that all donated foods received for use by the recipient agency for the school or fiscal year ***are used in*** the recipient agency's food service" (emphasis added) doesn't acknowledge that 250.51(d) and 250.53(a)(6) provide for substitution of donated foods.

A. That is correct. In the third Part 250 rule, we will amend 250.50(a) to clarify that the contract must ensure the use of donated foods or, as permitted in 250.51(d), the use of commercial substitutes of the same generic identity, of U.S. origin, and of equal or better quality in place of donated foods.

Q9. If, in accordance with 250.50(a), the "other requirements of this subpart" are not applicable to non-child nutrition program recipient agencies (e.g., charitable institutions), what are the specific requirements that do apply to such agencies?

A. Other recipient agencies must simply ensure, in their contracts with an FSMC, that all donated foods are used in the recipient agency's food service (e.g., as indicated in 250.67(e) for charitable institutions), and are not subject to the other requirements in Subpart D of Part 250.

Q10. Who is responsible for ensuring, in accordance with the requirements in 250.51(d), that commercially purchased foods used in the SFA's food service in place of donated foods are "of the same generic identify, of U.S. origin, and of equal or better quality" than the donated foods?

A. The SFA must ensure that commercially purchased foods used in place of donated foods are of the same generic identity, of U.S. origin, and of equal or better quality than the donated foods (in accordance with 250.51(d)), in the course of its monitoring of the FSMC food service, as required in 210.16(a).

Q11. Will the provision in 250.51(d) requiring the use of donated ground beef and donated ground pork without substitution be changed upon publication of the Processing final rule to mirror the full substitution policy expected in that rule?

A. No, because, unlike processors, FSMCs are not subject to the grading requirements that ensure substitution of donated foods with commercial foods of equal or better quality than the donated foods.

Q12. Does the SFA retain title to donated foods that are provided to the FSMC for use in the school food service?

A. Yes, the SFA retains title to donated foods provided to the FSMC for use in the school food service.

Q13. If credit for donated foods is provided upon receipt, does this mean that the FSMC owns the donated foods until they are used in the school food service program?

A. It is not accurate to say the FSMC "owns" the donated foods, since ownership implies that the FSMC is free to use them as they please. The FSMC must "manage" the donated foods to ensure that they are used in the SFA food service, or that commercial substitutes of the same generic identity, of U.S. origin, and of equal or better quality are used in their place (except that donated ground beef and ground pork, and all processed end products must be used without substitution). When commercial substitutes are used in place of donated foods, the FSMC may then use the donated foods without restriction.

Q14. May FSMCs sell on the open market donated foods that have been substituted with commercially purchased foods (in accordance with the substitution option in 250.51(d))?

A. FSMCs are not prohibited from selling donated foods that have been substituted with commercially purchased foods (in accordance with 250.51(d)) on the open market.

Q15. Please clarify if the requirement in 250.51(d) to "use all donated ground beef, donated ground pork, and all ***processed end products***, in the recipient agency's food service" (emphasis added) refers only to processed end products produced under the State Participation Agreement/processing program – or also to further processed items made available by USDA, such as chicken fajita strips and turkey taco filling.

A. In accordance with the definitions of "end product" and "processing" in 250.3, "processed end product" refers to a product containing donated food processed by a commercial processor in accordance with Subpart C of Part 250, and does not include a donated food provided by USDA in a processed form (which would simply be another type of donated food).

Storage and Inventory Management

Q16. What happens to existing, or slow-moving, donated food inventory carried over from a previous contract, some of which may already have exceeded the best-if-used-by date, or with donated food inventory that cannot be efficiently utilized in the SFA food service?

A. The FSMC must use all donated foods and processed end products in inventory carried over from a previous contract in the school food service, unless the SFA determines that such foods are out-of-condition, in which case they must not be used.

Q17. Is the State distributing agency required to initiate a claim against the SFA, or against the FSMC conducting the food service on behalf of the SFA, for donated foods that go out-of-condition as a result of inadequate storage procedures?

A. No. In accordance with 250.52(a), the FSMC must meet the requirements that ensure safe storage of donated foods in 250.14(b); and, in accordance with 210.13(a), the SFA must ensure that food storage, preparation, and service comply with the sanitation and health standards established under State laws and regulations. However, the SFA, or the FSMC conducting the food service on behalf of the SFA, may commingle donated foods with other foods purchased for the school food service, in a single inventory management system (in accordance with 250.52(b) and 250.59(c)). Under such a system, it is difficult to distinguish donated foods from other foods, and all foods are managed in a like manner. The SFA must, however, ensure that the FSMC has credited it for the value of all donated foods received for use in the SFA's food service in a school year, irrespective of the actual use of the foods (250.51(a)).

Q18. Is it correct that the FSMC may continue to manage donated food inventories separate from other foods if it works best for the FSMC and continues to ensure that appropriate credit is given to the SFA?

A. Yes, that is correct.

Q19. In cost-reimbursable contracts, must the SFA ensure that the FSMC does not charge it for commercially purchased foods substituted for donated foods?

A. Yes. In accordance with 250.52(b), the FSMC, under its cost-reimbursable contract, must ensure that its system of inventory management does not result in the SFA being charged for donated foods. This requirement also applies to commercially purchased foods substituted for donated foods. The SFA must ensure FSMC compliance with this requirement in the course of its required

monitoring of the FSMC food service, in accordance with 210.16(a), and in the annual reconciliation required in 250.54(c).

Termination of Contract

Q20. Is the SFA required to refund any credit already received to the FSMC for donated foods that remain with the SFA at termination of a contract? If they are not required to refund any credit, how will those donated foods be handled when they are turned over to the "successor" FSMC? It would not seem appropriate that the successor FSMC must also provide credit for the value of such donated foods. What are the requirements for the successor FSMC?

A. The SFA may not refund any credit to the FSMC for the value of any donated foods that remain unused when a contract terminates, and is not extended or renewed. The "successor" FSMC must ensure use of such donated foods in the SFA food service, but would not have to credit the SFA for the value of such donated foods, as that value would already have accrued to the school food service.

Q21. Does the FSMC have to credit the SFA for existing donated food inventory carried over from a previous contract that operated under the old rules (i.e., in which the value of donated foods was usually credited as the foods were used rather than received)? If so, at what value must such donated foods be credited? What about such donated foods that are determined to be out-of-condition?

A. The FSMC must credit the SFA for the value of donated foods carried over from a previous contract if the value of such foods has not already accrued to the school food service (i.e., if the value was not credited to the SFA by the previous FSMC). The value used to credit the SFA for such donated foods must be the value determined in accordance with 250.51(c). However, the FSMC is not required to credit the SFA for the value of such donated foods that are determined to be out-of- condition, and the SFA must ensure that such out-of-condition foods are not used in the school food service.

Q22. Must the FSMC return other unused donated foods, in addition to unused donated ground beef, ground pork, and processed end products, when a contract terminates, and is not extended or renewed? If so, is the SFA required to refund any credit received to the FSMC for such returned donated foods?

A. When the contract terminates, and is not extended or renewed, the FSMC must return unused donated ground beef, ground pork, and all processed end products, and must return other unused donated foods at the discretion of the

SFA (i.e., in accordance with the contract). As indicated in the answer to Q20, the SFA may not refund any credit received to the FSMC for the value of any donated foods that remain unused when the contract terminates and is not extended or renewed.

Contract Provisions

Q23. Please clarify the meaning of contract provisions (5) and (6) in 250.53(a).

A. The contract must ensure that donated ground beef and ground pork are used without substitution because USDA specifications for those products include more stringent standards for exclusion of microbial pathogens than like commercial products. The contract must ensure that all processed end products are used without substitution because the SFA should receive the turkey sausage (for example) procured and not another product that may be of inferior quality. The contract must ensure use of all other donated foods or commercial substitutes of the same generic identity, of U.S. origin, and of equal or better quality than the donated foods.

Records and Reviews

Q24. Is the State administering agency expected to monitor SFA compliance with the provisions in Subpart D of Part 250 during its on-site reviews? If so, will it be necessary to revise the Regional Office's ME guidance and/or the State agency's review forms?

A. Yes. The State administering agency is the only State agency that is required to perform on-site reviews of SFAs (in accordance with Part 210), and SFA compliance with provisions in Subpart D of Part 250 would be part of this review. There is no on-site review requirement of SFAs for the State distributing agency in Part 250. CND is in the process of updating its ME guidance for Regional Offices.

Q25. What documentation would the SFA use to verify receipt of donated foods in its annual reconciliation (as required in 250.54(c))? In some situations, would it have to rely on FSMC records of receipt to ensure that the FSMC has credited it for all donated foods received in the school year?

A. If the FSMC is responsible for receiving shipments on behalf of the SFA, and retaining records of receipt of donated foods and end products (in accordance with 250.54(b)), the SFA should verify delivery of donated food shipments through ECOS, or by contacting the State distributing agency or processor, and should not rely solely on the FSMC records.

Ordering and Use of Donated Foods by SFAs

Q26. In accordance with 250.58(a), before submitting orders for donated foods to FNS, the distributing agency must ensure that all SFAs 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. Can the requirement for all SFAs to have the opportunity to provide input be met through the use of a State Advisory Council or similar group whose members represent SFAs throughout the State?

A. Yes. However, the distributing agency must use another means of soliciting input if, through SFA input or other means, it is determined that such a State Advisory Council or other group is not effectively representing all SFAs.

Q27. 250.60 incorporates Policy Memo FD-060 (Use of Donated Foods in NSLP and Other Child Nutrition Programs) almost verbatim. Will that policy memo be rescinded now that the policy has been incorporated into Part 250?

A. Yes, the policy memo will be rescinded when the provisions of the final rule become effective on November 6, 2008.

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