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or use of donated foods or for any loss of, or damage to, donated foods caused by their fault or negligence,

(3) Subdistributing agencies and recipient agencies have and preserve a right to assert claims against other persons to whom donated foods are delivered for care, handling or distribution, and

(4) Subdistributing agencies and recipient agencies will take action to obtain restitution in connection with claims for improper distribution, use or loss of, or damage to, donated foods.

(c) *Duration of distributing agency agreements.*—(1) Recipient agencies. Distributing agency agreements with recipient agencies shall be considered permanent, with amendments to be made as necessary. Distributing agencies shall ensure that recipient agencies provide, on a timely basis, by amendment to the agreement, any changed information, including, but not limited to, any changes resulting from amendments to Federal regulatory requirements and policy and changes in site locations, and number of meals or needy persons to be served.

(2) *Subdistributing agencies, carriers, and other entities.* Distributing agency agreements with subdistributing agencies (as defined in §250.3) that are not recipient agencies, carriers, and other entities shall be in effect for not longer than one year, and shall provide that they may be extended at the option of both parties for two additional one-year periods. The party contracting with the distributing agency shall update all pertinent information and demonstrate that all donated food received during the period of the previous agreement has been accounted for, before an agreement is extended.

(3) *Termination of agreements.* Agreements may be terminated for cause by either party upon 30 days notice.

(d) *Food service management company contracts.* Food service management companies may be employed to conduct the food service operations of nonprofit summer camps for children, charitable institutions, nutrition programs for the elderly, schools, nonresidential child care institutions, and service institutions. When a food service management company is employed to provide such services, the recipient

agency shall enter into a written contract with the food service management company. The contract shall expressly provide that any donated foods received by the recipient agency and made available to the food service management company shall be utilized solely for the purpose of providing benefits for the employing agency's food service operation, and it shall be the responsibility of the recipient agency to demonstrate that the full value of all donated foods is used solely for the benefit of the recipient agency. All food service management companies shall be subject to review by the distributing agency for compliance with contractual requirements, in accordance with §250.19(b)(1). In the case of nonprofit summer camps for children, charitable institutions, and nutrition programs for the elderly, the contract shall be in effect for no longer than one year, and may provide that it be extended at the option of both parties for not more than four additional one-year periods. Contracts shall provide that they may be terminated for cause by either party upon 30 days notice. Prior to extension of the contract, the nonprofit summer camp for children, charitable institution, or nutrition program for the elderly shall update all pertinent information and demonstrate that all donated food received during the previous contract period has been accounted for.

(e) *Storage facility contracts.* When contracting for storage facilities, distributing agencies and subdistributing agencies shall enter into a written contract, in accordance with §250.14(d).

(f) *Processing contracts.* When contracting for the processing of donated foods, contracting agencies shall enter into agreements with processors in accordance with §250.30(c).

[53 FR 20426, June 3, 1988, as amended at 62 FR 53729, Oct. 16, 1997]

§ 250.13 Distribution and control of donated foods.

(a) *Availability and use of donated foods*—(1) *General.* (i) Donated foods shall be available only for distribution and use in accordance with the provisions of this part and, with respect to distribution to households on all or

part of an Indian reservation, of parts 253 and 254 of this chapter.

(ii) Donated foods shall not be sold, exchanged or otherwise disposed of without the approval of the Department.

(iii) Donated foods which are provided as part of an approved food package or authorized level of assistance may be transferred between like recipient agencies only with prior authorization of the distributing agency. Donated foods which are provided in addition to the State's authorized level of assistance may be transferred between recipient agencies which are eligible to receive such foods with the prior authorization of the distributing agency. However, the transfer of donated foods between unlike recipient agencies (e.g., from schools to charitable institutions), which have been provided as part of an approved food package or authorized level of assistance, must be approved by the appropriate FNSRO.

(iv) Food donated under section 32 of Public Law 74-320 (7 U.S.C. 612c) may also be transferred by recipient agencies to eligible recipient agencies which are distributing donated foods under part 251 of this chapter. A transfer between recipient agencies and eligible recipient agencies may be made only with the prior approval of the distributing agency and the State agency responsible for administering TEFAP.

(v) All transfers of donated foods shall be documented. Such documentation shall be maintained in accordance with the recordkeeping requirements in §§ 250.16 and 251.10(a) of this chapter.

(2) *Quantities.* (i) The quantity of donated foods to be made available for donation under this part shall be determined in accordance with the pertinent legislation and the program obligations of the Department, and shall be such as can be effectively distributed to further the objectives of the pertinent legislation.

(ii) Donated foods shall be requested and distributed only in quantities which can be consumed without waste in providing food assistance for persons eligible under this part. Distributing agencies shall impose similar restrictions on recipient agencies.

(3) *Minimum donations.* Foods shall be donated only in such quantities as will

protect the lower truck load freight rate, except as the Department determines to be in the best interest of the program.

(4) *Allocations.* As foods become available for donation, FNS shall notify distributing agencies regarding the donated foods, the class or classes of recipient agencies or recipients eligible to receive them, and any special terms and conditions of donation and distribution which attach to a particular donated food, in addition to the general terms and conditions set forth herein.

When a commodity is available in limited quantities, the Department shall allocate such commodities among the States using allocation percentages which are based on appropriate participation data for the program designated to receive the commodity.

(5) *Commodity value.* Distributing agencies shall establish a value for each commodity for school food authorities and nonresidential child and adult care institutions for purposes of offering and crediting each recipient agency with the correct amount of commodities to fulfill planned commodity assistance levels (i.e., volume of commodities expected to be needed in order to meet the anticipated assistance at the local level, as determined by the distributing agency). Each commodity value shall be used consistently throughout the State to value commodities. The distributing agencies shall document and maintain on file for FNS review the method used to determine commodity values. Distributing agencies shall notify recipient agencies of the cost-per-pound used to value commodities at the time a commodity is offered to recipient agencies. If the cost used to credit a commodity differs from the cost used to offer a commodity, distributing agencies shall also advise recipient agencies of the cost used to credit a commodity. To value a commodity offered to a recipient agency and to credit a commodity towards a recipient agency's planned commodity assistance level, distributing agencies shall use one of the following: The actual cost-per-pound data used to charge a State's commodity entitlement; the estimated cost-per-pound data provided by the Department; or the USDA commodity file

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cost as of a specified date. Actual cost data shall be defined as the cost-per-pound for an individual commodity charged to a State's entitlement on the Entitlement Food Order Report, which is based on the USDA purchase cost. Estimated cost data shall be defined as the cost provided by USDA on commodity survey memoranda. The USDA commodity file cost shall be defined as the cost that is listed for a commodity as of a date specified by the distributing agency.

(6) *Announcement and delivery of commodities.* The Department shall make every reasonable effort to arrange commodity deliveries based on information obtained from distributing agencies. However, the Department shall not be held fiscally responsible for any delay in delivering or for nondelivery of donated foods due to any cause. Distributing agencies shall maintain monthly distribution schedules which provide for equitable and reliable deliveries to recipient agencies, recognize local hours of operation, holidays and vacations and, whenever possible, other special needs of recipient agencies. Upon request by the recipient agency, the distributing agency may make deliveries less frequent than monthly when the distributing agency determines that monthly service is not cost effective, due to distance or the size of a food order, or other necessary reasons, such as seasonal school closures. Distributing agencies shall notify recipient agencies of:

(i) General USDA purchase information at least quarterly;

(ii) Anticipated State delivery schedules at least quarterly, including the types and quantities of commodities available; and

(iii) Changes in delivery schedules when such changes affect the recipient agency.

(7) *Demonstrations and tests.* Notwithstanding any other provision of this part, a quantity of any food donated for use by any recipient agency or recipient may be transferred by the distributing agency or by the recipient agency to bona fide experimental or testing agencies, or for use in workshops, or for demonstrations or tests relating to the utilization of such donated food by the recipient agency or

recipient. No such transfer by any recipient agency shall be made without the approval of the appropriate distributing agency.

(b) *Processing and other costs.* The Department shall pay such processing, reprocessing, transporting, handling and other charges accruing up to the time of transfer of title to distributing agencies as is deemed in the best interest of the Department.

(c) *Transfer of title.* Title to donated foods shall pass to distributing agencies upon their acceptance of donated foods at time and place of delivery, limited, however, by the obligation of the distributing agency to use such donated foods for the purposes and upon the terms and conditions set forth in this part.

(d) *Distribution of donated foods to recipient agencies or recipients—(1) Distribution.* Donated foods shall be distributed only to recipient agencies and recipients eligible to receive them under this part (see subpart D). Distributing agencies shall require that welfare agencies and disaster organizations distribute donated foods only to recipients eligible to receive them under this part. It shall not be deemed a failure to comply with the provisions of this part if recipient agencies serve meals containing donated foods to persons other than those who are eligible under this part, when such persons share common preparation, serving or dining facilities with eligible persons (needy persons, children, participants in nutrition programs for the elderly) and at least one of the following is true:

(i) Such other persons are common beneficiaries with the eligible persons of the program of the recipient agency, or

(ii) Such other persons are few in number compared to the eligible persons and receive their meals as an incident of their service to the eligible persons.

Such other persons include, but are not limited to teachers, disaster relief workers, and staff members. Nothing in this paragraph shall be construed as authorizing allocation or issuance of donated foods to recipient agencies in greater quantity than that authorized

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for the assistance of persons eligible under this part.

(2) *Normal food expenditures.* Section 416 donated foods shall not be distributed to any recipient agencies or recipients whose normal food expenditures are reduced because of the receipt of donated foods.

(e) *Improper distribution, loss of or damage to donated foods.* (1) If a distributing agency improperly distributes or uses any donated foods or causes loss of or damage to a donated food through its failure to provide proper storage, care or handling, the provisions set forth in § 250.15(c) shall apply.

(2) In instances when it is determined by a distributing agency that a claim exists against a subdistributing agency, recipient agency, warehouse, carrier, processor or other person, the distributing agency shall pursue claims in accordance with § 250.15(c).

(f) *Disposition of damaged or out-of-condition foods.* Donated foods which are found to be damaged or out-of-condition and are declared unfit for human consumption by Federal, State or local health officials, or by other inspection services or persons deemed competent by the Department, shall be disposed of in accordance with instructions of the Department. Such instructions may direct that unfit donated food be:

(1) Sold in a manner prescribed by the Department with the net proceeds thereof remitted to the Department;

(2) Sold in a manner prescribed by the Department with the proceeds thereof retained for use in accordance with the provisions of § 250.15(f);

(3) Used in such manner as will serve a useful purpose as determined by the Department; or

(4) Destroyed in accordance with applicable sanitation laws and regulations.

Upon a finding by the Department that donated food are unfit for human consumption at the time of delivery to the distributing agency and when the Department or appropriate health officials require that such donated foods be destroyed, the Department may pay to the distributing agency any expenses incurred in connection with such donated foods as determined by the Department. The Department may,

in any event, repossess damaged or out-of-condition donated foods.

(g) *Replacement of damaged commodities.* (1) The Department shall replace donated foods received by distributing or recipient agencies when:

(i) The distributing agency documents that the donated foods were stale, spoiled, out of condition or not in compliance with USDA specifications at the time they were delivered by the Department;

(ii) The donated foods have been provided as part of the State's authorized level of assistance (entitlement) as established by law; or, when the donated foods have been provided in addition to the State's entitlement, but the total amount of the specific donated food which the distributing agency can order is limited by the Department;

(iii) The loss is reported to the FNSRO within three months of the date the donated foods were received in the State, except that for canned commodities the reporting deadline shall be six months after receipt;

(iv) A signed consignee receipt or acceptable written documentation of delivery is submitted to the FNSRO; and

(v) At the request of the Department, the product has been reinspected and has been determined to be stale, spoiled, out of condition or not in compliance with USDA specifications.

(2) In instances in which a recipient agency seeks replacement of donated foods, the recipient agency shall submit the information listed above to its distributing agency. The distributing agency shall promptly submit the information to the FNSRO.

(3) Replacement by the vendor shall be made with either the same or similar food agreed to by the Department. Physical replacement shall be on a per-pound or per-case basis. In rare instances, and only with the approval of the Department, distributing agency and recipient agency, vendor replacement will be made with a cash payment to the recipient or distributing agency. Any such cash payments shall be used to purchase replacement commodities which are the same or similar to the original commodities. Cash payments shall be made on the basis of the dollar value established by the Department of the donated food at the time

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the product was delivered or the cost to the Department for replacement, whichever is higher.

(4) Replacement by the Department shall be with either the same or similar food or by crediting the State's entitlement or cap. Physical replacement shall be on a per-pound or per-case basis. Entitlement or cap crediting shall be equal to the dollar value or the number of pounds which was deducted from the State's entitlement or cap for that shipment. The Department shall arrange for delivery of the replacement donated foods when the quantities to be delivered are sufficient to make it cost effective. Once the Department has replaced the donated foods, the distributing agency shall make arrangements for providing replacement donated foods to the recipient agency which incurred the loss.

(5) In instances in which it is determined that the donated foods were in good condition at the time they were delivered by the Department, the cost of the reinspection shall be borne by the distributing agency and the distributing agency shall follow the claims procedures contained in §250.15(c) of this part and FNS Instruction 410-1, Non-Audit Claims—FNS Distribution Program.

(h) *Redonations.* Whenever a distributing agency has any donated food on hand which it cannot efficiently utilize, it shall immediately make a request to the appropriate FNSRO, in writing, for instructions as to the disposition of such donated food. Distributing agencies requesting authority from the Department to make redonation of any donated foods shall, upon the Department's request, have such donated foods federally inspected. Expenditures incurred by the distributing agency as a result of redonation shall be handled in accordance with §250.15(e).

(i) *Embezzlement, misuse, theft, or obtainment by fraud of donated foods and donated food-related funds, assets, or property.* Notwithstanding paragraph (c) of this section concerning transfer of title to donated foods, whoever embezzles, willfully misapplies, steals, or obtains by fraud, donated foods or any funds, assets, or property deriving from donated foods or whoever receives, con-

ceals, or retains such donated foods, funds, assets, or property for his/her own use or gain, knowing such donated foods, funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud shall be subject to Federal criminal prosecution under section 12(g) of the National School Lunch Act, as amended (42 U.S.C. 1760(g)) or section 4(c) of the Agriculture and Consumer Protection Act of 1973, as amended (7 U.S.C. 612c note). For the purpose of this paragraph "funds, assets, or property" include, but are not limited to funds accruing from the sources identified in §250.15(f) (1) and (2), donated foods which have been processed into different end products as provided for under subpart C of this part, and the containers in which donated foods have been received from the Department. Distributing agencies shall immediately notify FNSRO of any suspected violation of section 12(g) or section 4(c) to allow the Department, in conjunction with the U.S. Department of Justice, to determine whether Federal criminal prosecution under section 12(g) or section 4(c) is warranted. Prosecution of violations by the Federal Government shall not relieve any distributing agency of its obligation to obtain recovery for improperly distributed or lost donated foods, as required by §250.15(c).

(j) *Commodity specifications.* Distributing agencies shall make summaries of commodity specifications available to recipient agencies upon request.

(k) *Commodity acceptability reports.* To ensure that the Department is kept apprised of the commodities and packaging that are preferred by recipients and participating agencies, information shall be collected as follows:

(1) *Information collection.* Distributing agencies shall obtain information from recipient agencies which reflects:

(i) The types and forms of donated foods that are most useful to recipients;

(ii) Commodity specification recommendations; and

(iii) Requests for options regarding package sizes and forms of commodities.

(2) *Samples and representation.* The distributing agency shall collect information from recipient agencies from

each of the following program categories: The National School Lunch Program, the Child and Adult Care Food Program, the Nutrition Program for the Elderly, the Commodity Supplemental Food Program, and the Food Distribution Program on Indian Reservations. At a minimum, distributing agencies shall obtain this information from a sample of at least 10 percent or 100 recipient agencies in each program category, whichever is less. To ensure that the sample is representative of all recipient agencies, distributing agencies shall consider the size and geographic location of all recipient agencies within the State and alternate among them so that over time each recipient agency is provided an opportunity to express its views. Distributing agencies are encouraged to extract information regarding commodity acceptability from all available sources.

(3) *Timeframes for submission.* Distributing agencies shall submit commodity acceptability reports to the appropriate FNSRO by April 30th of each year on form FNS-663.

[53 FR 20426, June 3, 1988, as amended at 53 FR 22469, June 16, 1988; 53 FR 27475, July 21, 1988; 58 FR 39120, July 22, 1993; 62 FR 53730, Oct. 16, 1997; 64 FR 72902, Dec. 29, 1999]

§ 250.14 Warehousing, distribution and storage of donated foods.

(a) *Standards for Warehousing and Distribution Systems*—(1) *Use of cost efficient and effective facilities.* Distributing agencies shall use the most cost effective and efficient system for providing warehousing and distribution services to recipient agencies. For the purpose of this part, commercial facilities are defined as enterprises that provide commercial warehousing services or commercial delivery services, or those commercial enterprises that provide both warehousing and delivery services.

(2) *Timeframes for evaluation.* All distributing agencies shall evaluate their current warehousing and distribution systems. Initial evaluations shall be submitted to the FNSRO by June 30, 1990. Subsequent evaluations of non-commercial systems shall, at a minimum, be submitted to FNS every three years by March 31.

(3) *Evaluation of current systems.* The evaluation of the system in place shall, at a minimum, include the following information:

(i) A description of the principal warehousing/delivery techniques used by the distributing agency. The description should include:

(A) The frequency of delivery available;

(B) The timeframes for making deliveries;

(C) The type of delivery service offered (to the loading dock or placement in the storeroom); and

(D) The system for recipient agencies to order specific amounts of food from available inventory; and

(ii) An estimate of all costs that will be incurred in administering the Food Distribution Program for the upcoming school year. These costs include transportation, storage and handling of donated foods (if the current distributing agency system does not include delivery to recipient agencies, identification of costs incurred by recipient agencies to pick up commodities at a warehouse and to deliver the food to a centralized storage facility or the individual preparation sites), salaries of persons directly connected with the administration of the program and other program related expenses. These expenses shall include fringe benefits, travel expenses, rent, utilities, accounting/auditing services to recipient agencies such as the costs for administering and monitoring the State's processing program, and technical assistance workshops.

(4) *Comparison of existing system with commercial systems.* All distributing agencies which do not use commercial facilities for a basic level of warehousing and distribution services shall compare the cost of warehousing and distributing commodities under their current system with the cost of comparable services under a commercial system for the upcoming school year.

(i) The cost comparison shall be made between the cost of providing a basic level of service under its current system and the cost of obtaining an equivalent level of service from commercial facilities. This basic level of