

will be available under the NCP Program. Only commodities made available without charge or credit under any nutrition program administered by USDA will be available under NCP. FNS will act as the distributing agency and the contracting agency under the NCP Program. The Department will pay costs for delivering donated commodities to participating NCP Program processors.

(b) *Food orders.* When NCP Program processors request donated food, FNS will determine whether the quantities ordered are consistent with the processor's ability to sell end products and/or the processor's past demonstrated performance under the Program. If the quantities are appropriate, FNS will request from CCC the donated food for transfer of title to FNS and delivery to a mutually agreed upon location for use by the NCP Program processor. The title to these commodities transfers to FNS upon their acceptance by the processor. FNS retains title to such commodities until:

(1) They are distributed to eligible recipient agencies in processed form, at which time the recipient agency takes title;

(2) They are disposed of because they are damaged or out-of-condition; or

(3) Title is transferred to the NCP Program processor upon termination of the agreement.

(c) *Substituted food.* When the processor substitutes commercial food for donated food in accordance with § 252.4(c)(7) of this part, title to the substituted food shall transfer to FNS upon the initiation of the processing of the end product containing the substituted food. Title to the equivalent amount of donated food shall transfer to the processor at the same time (except when the substitution is necessary to meet the 100 percent yield requirement or to otherwise replace missing or out-of-condition donated food). Once title has transferred, the processor shall use the substituted food in accordance with the terms and conditions of this part.

(d) *Inventory levels.* FNS will monitor the inventory of each food processor to ensure that the quantity of donated food for which a processor is accountable is at the lowest cost-efficient

level. In no event shall a processor hold in inventory more than a six-month supply, based on average monthly usage under the NCP Program, unless a higher level has been specifically approved by FNS on the basis of justification submitted by the processor. Under no circumstances should the amount of donated food requested by the processor be more than the processor can accept and store at any one time. FNS will make no further distribution to a processor whose inventory exceeds these limits until such time as the inventory is reduced.

(e) *Recipient agency registration.* FNS will register, upon request, eligible recipient agencies. FNS will make available to food processors a listing of registered eligible recipient agencies for marketing purposes. Any processor desiring additional listings will be charged a fee for the listing which is commensurate with the Department's policy on user fees.

[51 FR 23518, June 30, 1986, as amended at 52 FR 24978, July 2, 1987; 59 FR 62986, Dec. 7, 1994]

#### **§ 252.4 Application to participate and agreement.**

(a) *Application by processors to participate.* Any food processor is eligible to apply for participation in the NCP Program. Agreement applications may be filed with FNS at any time on an FNS-approved form. FNS will accept or reject the application of each individual food processor within 30 days from the date of receipt, except that FNS may, at its discretion, extend such period if it needs more information in order to make its determination. In determining whether to accept or reject an application, FNS shall take into consideration at least the following matters: the financial responsibility of the applicant; the ability of the applicant to meet the terms and conditions of the regulations and the NCP agreement; ability to accept and store commodities in minimum truckload quantities; historical performance under the State and NCP processing programs; anticipated new markets for NCP end products; geographic areas served by the processor; the ability of the applicant to distribute processed products to eligible recipient agencies; and a

satisfactory record of integrity, business ethics and performance. In addition, the processors must demonstrate their ability to sell end products under NCP by submitting supporting documentation such as written intent to purchase, bids awarded, or historical sales performance. FNS will make a final determination based on all available documentation submitted.

(b) *Agreement between FNS and Participating Food Processors.* Upon approval of an application for participating in the NCP Program, FNS shall enter into an agreement with the applicant food processor. All agreements under the NCP Program will terminate on the June 30th following the agreement approval date. However, FNS may extend processing contracts for two 1-year periods, provided that any changed information must be updated before any contract extension is granted, including the information in paragraphs (c)(1) and (c)(5) of this section.

(c) *Processor requirements and responsibilities.* In accordance with the following provisions and the NCP agreement, any processor participating in the NCP Program may sell to any eligible recipient agency nationwide a processed product containing the donated food received from FNS.

(1) The processor shall submit to FNS end product data schedules which include a description of each end product to be processed, the quantity of each donated food and any other ingredient which is needed to yield a specific number of units of each end product. FNS may permit processors to specify the total quantity of any flavorings or seasonings which may be used without identifying the ingredients which are, or may be, components of seasonings or flavorings. The end product data schedule shall provide pricing information supplied by the processor as requested by FNS and a thorough explanation of what this pricing information represents. The end product data schedule shall be made a part of the NCP agreement.

(2) When determining the value of the donated food, the processor shall use the agreement value of the donated food which shall be the price assigned by the Department to a donated food which reflects the Department's cur-

rent acquisition price, transportation and, if applicable, processing costs related to the food.

(3) The processor shall demonstrate to the satisfaction of FNS that internal controls are in place to insure that duplicate reporting of sales under the NCP Program and any other food distribution program does not occur.

(4) The processor shall use a method of selling end products to recipient agencies which ensures that the price of each case of end product is reduced by the agreement value of the donated commodity and ensures proper accountability. In line with FNS guidelines and subject to FNS approval, the processor shall select one or more of the following donated food value return systems to use during the term of the agreement. Regardless of the method used, processors shall provide pricing information summaries to recipient agencies as soon as possible after contract approval by FNS. If the pricing information changes during the contract period, processors shall provide updated pricing information to FNS and the recipient agencies 30 days prior to the effective date. Regardless of the method chosen for selling end products, the processor shall reduce his inventory only by the amount of donated food represented by the discount or refund placed on the end product.

(i) *Direct sale.* A direct sale is a sale by the processor directly to the eligible recipient agency. The following two methods of direct sales are allowed:

(A) *Discount system.* When the recipient agency pays the processor directly for an end product purchased, the processor shall invoice the recipient agency at the net case price which shall reflect the value of the discount established in the agreement.

(B) *Refund system.* The processor shall invoice the recipient agency for the commercial/gross price of the end product. The recipient agency shall submit a refund application to the processor within 30 days of receipt of the processed end product, except that recipient agencies may submit refund applications to a single processor on a Federal fiscal quarterly basis if the total anticipated refund due for all purchases of end product from that processor during the quarter is 25 dollars or

less. The processor shall pay directly to the eligible recipient agency within 30 days of receipt of the refund application from the recipient agency, an amount equal to the established agreement value of donated food per case of end product multiplied by the number of cases delivered to and accepted by the recipient agency, except that processors may group together refund applications for a single recipient agency on a Federal fiscal quarterly basis if the total anticipated refund due that recipient agency during the quarter is 25 dollars or less. In no event shall refund applications for purchases during the period of agreement be accepted by the processor later than 60 days after the close of the agreement period.

(ii) *Indirect sale.* An indirect sale is a sale by the processor through a distributor to an eligible recipient agency. Indirect sales can be made with or without dual billing. Dual billing involves the processor billing the recipient agency for the end product and the distributor billing the recipient agency for the cost of services rendered in the handling and delivery of the end product. The following three methods of indirect sales are allowed:

(A) *Sale through distributor with dual billing.* When end products are sold to recipient agencies through a distributor under a system utilizing dual billing, the processor shall invoice the recipient agencies directly for the end products purchased at the net case price which reflects the value of the discount established in the agreement. The processor shall ensure that the distributor bills the recipient agencies only for the services rendered in the handling and delivery of the end product. The processor shall maintain delivery and/or billing invoices to substantiate the quantity of end product delivered to each recipient agency and the net case price charged by the processor which reflects the discount established by the agreement.

(B) *Sale through distributor without dual billing.* When end products are sold to recipient agencies through a distributor without dual billing, processors shall provide refunds to the distributor and ensure that the distributor provides discounts of equal value to recipient agencies. Under this

system, the processor shall sell end products to a distributor at the processor's commercial/gross price for the end product. The processor's invoice shall reflect the value of commodities contained in the end product as established by the agreement. The processor shall ensure that the distributor submits a refund application to the processor within 30 days after the eligible recipient agency receives the processed end product. The processor shall ensure that the refund application includes documentation of the purchase of end products by the eligible recipient agency through substantiating invoices and that the recipient agency has purchased the end product at the net case price which reflects the value of the discount established by the agreement. Within 30 days of the receipt of the refund application, the processor shall issue payment directly to the distributor in an amount equal to the stated agreement value of the donated food contained in the purchased end products covered by the application. In no event shall refund applications for purchases during the period of agreement be accepted by the processors later than 60 days after the close of the agreement period. The processor shall verify a statistically valid sample of discount sales made by distributors without dual billing in a manner which ensures a 95 percent confidence level. All such sales reported during a quarter shall be verified at the end of that quarter. Processors shall verify that sales were made only to eligible recipient agencies and that the value of donated commodities was passed through to those recipient agencies. The processor shall report to FNS the level of invalid or inaccurate sales identified in each quarter within 60 days after the close of each quarter. At the same time such report is submitted, the processor shall submit to FNS a corrective action plan designed to correct problems identified in the verification effort. The processor shall adjust performance reports to reflect the invalid sales identified during the verification effort required by this paragraph. If, as a result of this verification, FNS determines that the value of donated food has not been passed on the recipient agencies or that end products have

been improperly distributed, FNS may assert a claim against the processor.

(C) *Sale through distributor with a refund.* Under the refund system, processors shall sell end products to distributors at the commercial/gross price of the end product. Distributors shall sell end products to recipient agencies at the commercial/gross price of the end products. Processors shall ensure that their invoices and the invoices of distributors identify the discount established by the agreement. Recipient agencies shall submit refund applications to processors within 30 days of receipt of the processed end product. Within 30 days of the receipt of the refund application from the recipient agency certifying actual purchases of end product from substantiating invoices maintained by the recipient agency, the processor shall compute the amount and issue payment of the refund directly to the recipient agency. In no event shall refund applications for purchases during the period of the agreement be accepted by the processor later than 60 days after the close of the agreement period.

(iii) *Other value pass-through systems.* Processors may submit to FNS for approval any proposed value pass-through (VPT) system not identified in this section. The “other” VPT system must, in the judgment of FNS, be verifiable and easily monitored. Any VPT system approved under this part must comply with the sales verification requirements specified in paragraph (c)(4)(ii)(B) of this section or an alternative system approved by FNS. If an alternative system is approved, FNS will notify the States in which the system will be used. The Department retains the authority to inspect and review all pertinent records under all VPT systems, including the verification of a required statistically valid sample of sales. FNS may consider the paperwork and resource burden associated with alternative value pass-through systems when considering approval and reserves the right to deny approval of systems which are labor-intensive and provide no greater accountability than those systems permitted under paragraph (c)(4) of this section.

(5) The processor shall furnish to FNS prior to the ordering of any do-

nated food for processing, a performance supply and surety bond obtained from surety companies listed in the current Department of Treasury Circular 570 or an irrevocable letter of credit to cover the amount of inventory on hand and on order.

(6) The processor shall draw down inventory only for the amount of donated food used to produce the end product. In instances in which concentrated skim milk is substituted for nonfat dry milk, the processor shall draw down donated nonfat dry milk inventory only in an amount equal to the amount of concentrated skim milk, based on milk solids content, used to produce the end product. Processors shall ensure that an amount equivalent to 100 percent of the donated food provided to the processor under the NCP Program is physically contained in end products. Additional commodities required to account for loss of donated food during production shall be obtained from non-donated food.

(7)(i) Only butter, cheese, corn grits, cornmeal, flour, macaroni, nonfat dry milk, peanut butter, peanut granules, roasted peanuts, rice, rolled oats, rolled wheat, shortening, vegetable oil, and spaghetti may be substituted as defined in §252.2 and such other food as FNS specifically approves as substitutable under paragraph (c)(7)(i)(A) of this section (substitution of meat and poultry items shall not be permitted).

(A) Processors may request approval to substitute commercial foods for donated foods not listed in paragraph (c)(7)(i) of this section by submitting such request to FNS in writing and satisfying the requirements of paragraph (c)(7) of this section. FNS will notify the processor in writing of authorization to substitute commercial foods for donated foods not listed in paragraph (c)(7)(i) of this section and such authorization shall apply for the duration of all current contracts entered into by the processor pursuant to this section.

(B) The processor shall maintain records to substantiate that it continues to acquire on the commercial market amounts of substitutable food consistent with their levels of non-NCP Program production and to document the receipt and disposition of the donated food.

(C) FNS shall withhold deliveries of donated food from processors that FNS determines have reduced their level of non-NCP Program production because of participation in the NCP Program.

(ii) When the processor seeks FNS approval to substitute donated nonfat dry milk with concentrated skim milk under paragraph (c)(7)(i)(A) of this section, an addendum must be added to the request which states:

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

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

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

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

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

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

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

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

(iii) Substitution must not be made solely for the purpose of selling or disposing of the donated commodity in commercial channels for profit.

(8) The processor shall be liable for all donated food provided under the agreement. The processor shall immediately report to FNS any loss or damage to donated food and shall dispose of damaged or out-of-condition food in accordance with § 250.7.

(9) The processor shall submit to FNS monthly performance reports reflecting the sale and delivery of end products during the month.

(i) The processor shall ensure that the monthly performance report is postmarked no later than the last day of the month following the month being reported. The processor shall identify the month of delivery for each sale reported. The sale and delivery of end products for any prior month may be included on the monthly performance report. The processor monthly performance report shall include:

(A) The donated food inventory at the beginning of the reporting month;

(B) Amount of donated food received from the Department during the reporting month;

(C) Amount of donated food transferred to and/or from existing inventory;

(D) A list of all recipient agencies purchasing end products and the number of units of end products delivered to each during the report month;

(E) The net price paid for each unit of end product and whether the sale was made under a discount or refund system;

(F) When the sale is made through a distributor, the name of the distributor;

(G) The amount of inventory draw-down represented by reported sales; and

(H) The donated food inventory at the end of the reporting month.

(ii) In addition to reporting the information identified in paragraph (c)(9)(i) of this section, processors substituting concentrated skim milk for donated nonfat dry milk shall report the following information for the reporting period:

(A) The number of pounds of nonfat dry milk used in commercial products sold to outlets which are not recipient agencies; and

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

(iii) At the end of each agreement period, there will be a final 90 day reconciliation period in which processors may adjust NCP sales for any month.

(10) The processor shall maintain complete and accurate records of the receipt, disposal and inventory of donated food including end products processed from donated food.

(i) The processor shall keep production records, formulae, recipes, daily or batch production records, loadout sheets, bills of lading, and other processing and shipping records to substantiate the use of the donated food and the subsequent redelivery to an eligible recipient agency.

(ii) The processor shall document that sales reported on monthly performance reports, specified in paragraph (c)(9) of this section were made only to eligible recipient agencies and that the normal wholesale price of the product was discounted or a refund payment made for the agreement value of the donated commodity.

(iii) When donated food is commingled with commercial food, the processor shall maintain records which will permit an accurate determination of the donated commodity inventory.

(iv) The processor shall make all pertinent records available for inspection and review upon request by FNS, its representatives and the General Accounting Office (GAO). All records must be retained for a period of three years from the close of the Federal fiscal year to which they pertain. Longer retention may be required for resolution of an audit or of any litigation.

(11) The processor shall obtain, upon FNS request, Federal acceptance service grading and review of processing activities and shall be bound by the terms and conditions of the grading and/or review.

(12) The processor shall indemnify and save FNS and the recipient agency free and harmless from any claims, damages, judgments, expenses, attorney's fees, and compensation arising out of physical injury, death, and/or property damage sustained or alleged to have been sustained in whole or in part by any and all persons whatsoever as a result of or arising out of any act or omission of the processor, his/her agents or employees, or caused or resulting from any deleterious substance, including bacteria, in any of the products produced from donated food.

(13) The processor shall be liable for payment for all uncommitted food inventory remaining at agreement termination.

(i) When agreements are terminated at the request of the processor or at

FNS' request because there has been noncompliance on the part of the processor with the terms and conditions of the agreement, or if any right of FNS is threatened or jeopardized by the processor, the processor shall pay FNS an amount equal to the CCC unrestricted sales price, the cost CCC of replacement on the date the agreement is terminated, or the agreement value of donated commodities, whichever is highest, for the inventory, plus any expenses incurred by FNS.

(ii) When the agreements are terminated at FNS' request where there has been no fault or negligence on the part of the processor, the processor shall pay FNS an amount equal to the CCC unrestricted sales price, the cost to CCC of replacement on the date the agreement is terminated, or the agreement value of the donated commodities, whichever is highest, for the inventory, unless FNS and the processor mutually agree on another value.

(14) The processor shall not assign the processing contract or delegate any aspect of processing under a subcontract or other arrangement without the written consent of FNS. The subcontractor shall be required to become a party to the processing contract and conform to all conditions contained in that contract.

(15) The processor shall comply fully with the provisions of the NCP agreement and all Federal regulations and instructions relevant to the NCP Program.

(16) The processor shall label end products in accordance with §250.15(j) and, when end products contain vegetable protein products, in accordance with 7 CFR part 210, 225, or 226 appendix A.

(17) The processor shall return to FNS any funds received from the sale of donated food containers and the market value or the price received from the sale of any by-products of donated food or commercial food which has been substituted for donated food.

(18) For any year in which a processor receives more than \$250,000 in donated food, the processor shall obtain an independent audit conducted by a Certified Public Accountant (CPA) for that year. Processors receiving \$75,000 to \$250,000 in donated food each year

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shall obtain an independent audit conducted by a CPA every two years and those receiving less than \$75,000 in donated food each year shall obtain an independent audit conducted by a CPA every three years. Processors in the three year audit cycle shall move into the two year audit cycle when the value of donated food received reaches \$75,000. If the Department determines that the audit is not acceptable or that the audit has disclosed serious deficiencies, the processor shall be subject to additional audits by OIG at the request of FNS.

(i) Audits shall be conducted in accordance with the auditing provisions set forth under the *Standards for Audit of Government Organizations, Programs, Activities and Functions*, and the FNS Audit Guide for Multi-State Processors.

(ii) The costs of the audits shall be borne by the processor.

(iii) Audit findings shall be submitted by the processors to FNS.

(iv) Noncompliance with the audit requirement contained in this part will render the processor ineligible to enter into another processing contract until the required audit has been conducted and deficiencies corrected.

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### § 252.5 Recipient agency responsibilities.

(a) *Registration.* Recipient agencies that have approved agreements with State distributing agencies to receive donated food may register with FNS on an FNS approved form to participate in the NCP Program. Upon request, FNS will provide recipient agencies with registration forms. Recipient agencies shall notify FNS when they are no longer eligible to receive donated food under an agreement. Failure to notify FNS shall result in claim action.

(b) *Recipient agency records.* Each recipient agency shall maintain accurate and complete records with respect to the receipt, disposal, and inventory of donated food, including products processed from donated food, and with respect to any funds which arise from the operation of the distribution program.

(c) *Refunds.* A recipient agency purchasing end products under the NCP Program from a processor utilizing a refund system shall submit a refund application supplied by the processor to the processor within 30 days of receipt of the end products, except that recipient agencies may submit refund applications to a single processor on a Federal fiscal quarterly basis if the total anticipated refund due for all purchases of end product from that processor during the quarter is 25 dollars or less. Recipient agencies must insure that any funds received as a result of refund payments be designated for use by the food service department.

(d) *Verification.* If requested by FNS, each recipient agency shall cooperate in the verification of end product sales reported by processors under the NCP Program. The recipient agency may be requested to verify actual purchases of end products as substantiated by the recipient agency's invoices and may also be requested to verify that the invoice correctly identifies the discount included or refund due for the value of the donated ingredient contained in the end product.

[51 FR 23518, June 30, 1986, as amended at 59 FR 62987, Dec. 7, 1994]

### § 252.6 Miscellaneous provisions.

(a) *Improper distribution or loss of or damage to donated food.* If a processor improperly distributes or uses any donated food, or causes loss of or damage to a donated food through its failure to provide proper storage, care, or handling, FNS shall require the processor to pay to the Department the value of the donated food as determined by the Department.

(b) *Disposition of damaged or out-of-condition food.* Donated food which is found to be damaged or out-of-condition and is declared unfit for human consumption by Federal, State, or local health officials, or by any other inspection services or persons deemed competent by the Department, shall be disposed of in accordance with instructions of the Department. This instruction shall direct that unfit donated food be sold in a manner prescribed by the Department with the net proceeds thereof remitted to the Department. Upon a finding by the Department that