Food Distribution National Policy Memorandum

United States Department of Agriculture

Food and Nutrition Service

3101 Park Center Drive

Alexandria, VA 22302-1500

DATE: January 25, 2011

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

SUBJECT: Guidance in Crediting for, and Use of, Donated Foods in Contracts with Food Service Management Companies

The purpose of this policy memorandum is to provide guidance in ensuring compliance with requirements in Subpart D of 7 CFR Part 250 with respect to crediting for, and use of, donated foods in contracts with food service management companies (FSMCs). The guidance is provided in a Q & A format. While the memorandum focuses on donated foods provided to school food authorities (SFAs) in the National School Lunch Program (NSLP), it is also applicable to donated foods provided in the Summer Food Service Program (SFSP) and in the Child and Adult Care Food Program (CACFP). This policy memorandum revises the previous FD-080, which was dated August 24, 2009.

CREDITING FOR THE VALUE OF DONATED FOODS

General

Q1. May the FSMC choose to credit the SFA for donated foods as they are used, or must it credit for all donated foods received?

A. The FSMC must credit the SFA for the value of all donated foods received in the school year, whether the donated foods are used in that year or not (250.51(a)).

Q2. Are donated foods considered "received" when they arrive at the school kitchen or storage facility, or when they arrive at a State agency storage facility, or at a processor facility, and are credited to the SFA entitlement?

A. Donated foods are considered "received" when they 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).

Q3. Must the FSMC credit the SFA for the value of donated foods used in activities outside of the meal service—e.g., for donated foods used in training or educational activities?

A. The FSMC must credit the SFA for the value of donated foods used in activities outside of the meal service if its contract with the SFA requires such crediting, or if the contract requires the FSMC to perform such activities as part of its management of the food service.

Processed End Products

Q4. Must the FSMC credit the SFA for the value of donated foods in end products that the SFA has procured from a processor and provided to the FSMC for use in the school food service?

A. No, the FSMC is not required to credit the SFA for the value of donated foods in such case 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)). Generally, the processor credits the SFA for the donated food value in such end products, in accordance with the requirements in Subpart C of Part 250. The SFA must ensure that the FSMC uses all such end products in the school food service (250.51(d)).

Q5. Must the FSMC credit the SFA for the value of donated foods that it procures from a processor on behalf of the SFA?

A. Yes. Such crediting may be by invoice reduction, discounts, refunds, or other means (250.51(b)), in accordance with its contract with the SFA (250.53(a)(2)).

Q6. If the FSMC procures end products from a processor on behalf of the SFA with a deduction for the value of donated foods in such end products, must it provide such credit to the SFA by the same means?

A. No, the FSMC's contract with the SFA may stipulate that crediting for the value of donated foods in such end products be provided to the SFA by another means.

Cost-Reimbursable Contracts

Q7. How must the FSMC credit the SFA for the value of donated foods in a cost-reimbursable contract?

A. In a cost-reimbursable contract, the FSMC charges the SFA for certain specified net costs of conducting the food service, including the cost of food purchases. Under such a contract, the FSMC may credit the SFA for the value of donated foods by disclosing the savings in food costs resulting from the receipt of donated foods (250.51(b)). The FSMC may provide such "crediting by disclosure" by detailing on its invoice the total value of foods drawn from inventory for the billing period, and show a charge for all such foods except the value of donated

foods received for that period. For example, if the FSMC uses 6 cases of string beans from inventory in a billing period, and received 4 cases of donated string beans in that period, it would show a charge for only 2 cases of string beans on its invoice. An example of such "crediting by disclosure" on the invoice is included below:

Beginning Inventory	**8 cases of string beans ($ 2,000 value)**
Donated Food Received	**4 cases of string beans ($ 1,000 value)**
Foods Used	**6 cases of string beans ($ 1,500 value)**
Ending Inventory	**6 cases of string beans ($ 1,500 value)**
Amount Billed	**2 cases of string beans ($ 500)**

The FSMC would not be required to credit the SFA for the donated food value in the month or quarter in which the donated food is received (unless the contract specifies that it must). For example, it would be difficult for the FSMC to credit the SFA for the value of donated string beans received, in accordance with the above example, if string beans were not drawn from inventory in that billing period. However, the FSMC must credit the SFA for the value of all donated foods received in the school year on at least an annual basis (250.51(b)), and the SFA must ensure, at the required annual reconciliation, that the FSMC has credited it for the value of all such donated foods (250.54(c)). If, during this reconciliation, the SFA determines that the FSMC has not provided a credit for all such donated foods by the method indicated above, it must ensure that the FSMC makes a payment to it for the value of those donated foods for which it has not been credited.

Q8. If the FSMC bills the SFA for foods as they are purchased, rather than as they are drawn from inventory, can it provide credit by disclosure for donated foods in its billing?

A. Yes. In such case, the FSMC must show the total value of foods purchased and the total value of donated foods received for the billing period, and show a charge for all such foods except the value of donated foods received for that period. As stated in Q7, the FSMC must credit the SFA for the value of all donated foods received in the school year on at least an annual basis (250.51(b)), and the SFA must ensure, at the required annual reconciliation, that the FSMC has credited it for the value of all such donated foods (250.54(c)). If, during this reconciliation, the SFA determines that the FSMC has not provided a credit for all such donated foods by the method indicated above, it must ensure that the FSMC makes a payment to it for the value of those donated foods for which it has not been credited. In this method of crediting (unlike the method described in Q7), it is also important for the SFA to ensure that the total value of foods purchased and value of donated foods received align closely with the total value of foods used in the food service, in order to ensure that the FSMC's charge for food costs is not excessive, and that the SFA is receiving the full value of donated foods.

Q9. How must the FSMC credit the SFA for the value of donated foods in end products that it procures from a processor on the SFA's behalf in a cost-reimbursable contract?

A. The FSMC may also credit by disclosure for the value of donated foods in processed end products in a cost-reimbursable contract. Such crediting may be indicated by showing the charge for end products with a discount for the donated food value, for example. If procurement was 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. 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)). If the FSMC purchases such end products from the processor at the commercial or gross price and receives a rebate or refund from the processor for the value of donated foods in the end product, it must remit the rebate or refund to the SFA, or otherwise disclose its crediting for such donated foods on its invoice.

Q10. Can the SFA specify the frequency with which it will receive credit for donated food value in a cost-reimbursable contract? Can that frequency be as little as one time per year?

A. Yes, the SFA may specify the frequency at which the FSMC must credit it for the donated food value in its contract with the FSMC. The SFA may specify that such crediting be provided one time per year (i.e., at the end of the year), as long as credit is provided for the value of all donated foods received for the school year.

Fixed-Price Contracts

Q11. In a fixed-price contract that includes a $0.20 per meal "pre-credit" for the donated food value (as delineated in solicitation documents), can the FSMC increase its per-meal charge if all donated foods received have been credited by this means, and other meals are still to be served?

A. It would depend on the language in the solicitation and resulting contract. If the contract explicitly indicates that the fixed per meal charge to the SFA is subject to increase as a result of the "pre-crediting" methodology used, then it would be acceptable. However, if the contract does not indicate this, such change might be considered a material change, in which case it would not be acceptable.

Q12. In a fixed-price contract that includes a $0.20 per meal "pre-credit" for the donated food value (as delineated in solicitation documents), must the FSMC provide an additional credit for the value of bonus foods, or additional entitlement foods, received by the SFA?

A. Yes, the FSMC must provide an additional credit for the value of any donated foods not accounted for in the fixed price per meal, which would include bonus foods or any additional entitlement foods received. The solicitation and resulting contract should have specifically addressed the crediting of such donated foods.

VALUE OF DONATED FOODS USED IN CREDITING

Q13. What method of determining the value of donated foods to be credited to the SFA should be used if the contract does not specify such methodology or value?

A. The SFA must use the donated food value methodology determined by the distributing agency, in accordance with 250.58(e), and, for donated foods in processed end products, must use the processing agreement value.

Q14. May the distributing agency require that all SFAs use the donated food value methodology determined by the distributing agency, in accordance with 250.58(e), in their contracts with FSMCs, and not an alternate value, as permitted in 250.51(c)?

A. Yes.

Q15. Is there a specific value that must be used in crediting for the value of donated foods in processed end products?

A. Yes, the FSMC must use the processing agreement value in crediting for donated foods in processed end products (250.50(d)), as established in the distributing agency's State Processing Agreement.

Q16. 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 the donated food value must be achieved at least annually (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.

USE OF DONATED FOODS

Q17. Does the SFA retain title to donated foods that are provided to the FSMC for use in the school food service?

A. Yes.

Q18. Does provision of credit for the value of donated foods mean that the FSMC owns the donated foods?

A. No, the FSMC does not "own" such 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's food service--or that commercial substitutes, of the same generic identity, of U.S. origin, and of equal or better quality are used, as permitted in 250.51(d)). If commercial substitutes are used in place of donated foods, then the FSMC may be considered the "owner" of such donated foods, and may use them without restriction.

Q19. 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.

Q20. May the FSMC 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. The FSMC is not prohibited from selling on the open market donated foods that have been substituted with commercially purchased foods, in accordance with the requirements in 250.51(d)). However, the FSMC must credit the SFA for the value of all donated foods received (250.51(a)), including those that are substituted with commercially purchased foods.

Q21. In accordance with 250.51(d), the FSMC must use all "processed end products" in the school food service without substitution. Does this requirement include only end products processed from donated foods by processors, in accordance with Subpart C of Part 250, or does it also include processed items made available to SFAs 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).

Q22. Why must the contract provide that the FSMC ensure that donated ground beef and ground pork, and all processed end products, are used without substitution (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.

Q23. May the FSMC use donated foods in a la carte food sales, as a self-operating SFA may?

A. Yes, unless the SFA specifies in its contract with the FSMC that donated foods must only be used in the reimbursable meals. The FSMC must credit the SFA for the value of donated foods in a la carte sales, just as they must for donated foods in the reimbursable meals.

Q24. How should donated foods be treated if their safety is in question, or if they are beyond the "best-if-used-by" or "use by" date on the product label?

A. Donated foods are subject to the same safeguards and effective management practices as other foods and must be treated as other foods when safety is in question. Consequently, the SFA must ensure compliance with applicable State or local laws or regulations in determining the safety of foods. Donated foods (or other foods) must not be used if the SFA, or State or local health authorities, determine that they are not safe to eat.

If donated foods are determined to be safe, but are beyond the "best-if-used-by" or "use by" date, the SFA must ensure use or other disposition of such foods in accordance with the same procedures the SFA applies to other foods, and in accordance with applicable State or local laws or regulations.

STORAGE AND INVENTORY MANAGEMENT

Q25. Is the State distributing agency or State administering agency required to initiate a claim against the SFA, or against the FSMC managing the SFA's food service, for donated foods that go out-of-condition as a result of inadequate storage procedures?

A. No. The FSMC must credit the SFA for the value of all donated foods received for use in the SFA's food service in a school year (250.51(a)). In this manner, the value of all donated foods accrues to the nonprofit school food service, even if such foods go out-of-condition and are not used. The FSMC must, in effect, replace out-of-condition donated foods in the course of meeting its contractual obligation to provide the meal service. The SFA must ensure that the FSMC's storage procedures meet applicable State and local regulations (210.16(a)(7)).

Q26. Must the SFA provide reimbursement to the FSMC for the value of donated foods that go out-of-condition, or for donated foods that are subject to a recall and are not replaced?

A. No. In most cases, inventory management will be the responsibility of the FSMC. However, if the contract indicates that the SFA is responsible for storage and inventory management, the contract may also provide for reimbursement to the FSMC for donated foods that go out-of-condition and for which the FSMC has already credited the SFA. This would also apply to donated foods that are subject to a recall and are not replaced, and for which the FSMC has already credited the SFA.

Q27. May the FSMC choose to manage donated food inventories separate from other foods, in accordance with its contract with the SFA? Must the FSMC still credit the SFA for the value of donated foods received under such a system?

A. Yes, the FSMC may manage donated food inventories separate from other foods, in accordance with its contract with the SFA. However, the FSMC must credit the SFA for the value of all donated foods received in the school year, regardless of the system of inventory management utilized (250.51(a)).

Q28. In accordance with 250.51(d), the FSMC must use all donated ground beef and ground pork, and all processed end products, in the school food service, and may not use like commercial substitutes in their place. How would this work in a single inventory management system?

A. The FSMC must have a means of separately identifying such donated foods and end products, through their inventory recordkeeping system, or through markings on the cases or packages of the donated foods, in order to ensure their use in the school food service.

Q29. In a cost-reimbursable contract, must the SFA ensure that the FSMC does not charge it for commercially purchased foods substituted for donated foods?

A. Yes. The FSMC, under a cost-reimbursable contract, must ensure that its system of inventory management does not result in the SFA being charged for donated foods (250.52(b)). 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 (210.16(a)), and in the required annual reconciliation (250.54(c)).

Q30. May donated foods be transferred from one SFA to another SFA? Must crediting for the value of such donated foods also be transferred?

A. Donated foods may be transferred from one SFA to another SFA only at the initiation, or with the approval, of the SFA that originally received the donated foods. However, credit for the value of such donated foods must remain with the SFA that originally received the donated foods; the FSMC may not transfer such credit to another SFA.

RECORDS AND REVIEWS

Q31. What documentation would the SFA use to verify receipt of donated foods in the required annual reconciliation (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 the value of 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 receipt of donated food shipments through its electronic records, or by contacting the State distributing agency or processor, and should not rely solely on the FSMC records.

Q32. Who is responsible for ensuring 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 (250.51(d))?

A. The SFA must ensure this in the course of its required monitoring of the FSMC food service (210.16(a)).

Q33. Is the State administering agency or the State distributing agency responsible for ensuring compliance with requirements for crediting and use of donated foods under FSMC contracts?

A. In accordance with policy memorandum FD-089, the State administering agency is responsible for ensuring compliance with all requirements relating to FSMC contracts, including crediting for, and use of, donated foods. It is recommended that the State administering agency include a review of the SFA's compliance with such requirements as part of the required on-site administrative review (210.18(c)). However, the State administering agency may request assistance from the State distributing agency in performing some review activities.

FSMCs AND PROCESSORS

Q34. In accordance with the definitions of "processor" and "processing" in 250.3, a commercial enterprise that uses donated foods to prepare meals at a commercial facility is considered a processor, and is subject to the processing requirements in Subpart C of

Part 250. Does this apply, for example, to a commercial enterprise that prepares meals at its commercial facility for a charter school or other small school that does not have its own kitchen facilities?

A. Yes. The processing requirements ensure that SFAs receive the full benefit and value of the donated foods sent to such commercial enterprises for processing into end products, or in the preparation of meals, at their commercial facilities. Such requirements include, for example, a processing agreement with the distributing agency, the submission of end product data schedules for approval, submission of monthly performance reports, and assurance, through USDA graders, that the processing of donated beef, pork, and poultry meets substitution and yield requirements. As a result, it may be more feasible for small schools without kitchen facilities to enter into agreements with other SFAs to receive donated foods, and to provide the meal service, on their behalf.

Q35. Can the FSMC send donated foods to a processor for processing into end products for use in the SFA's food service?

A. The FSMC may send donated foods from the SFA's storage facility to a processor for processing into end products for use in the SFA's food service, in accordance with its contract with the SFA. The FSMC must credit the SFA for the value of such donated foods (250.51), at the value established in accordance with 250.53. Such donated foods are not subject to the processing requirements in Subpart C of Part 250.

The FSMC may also order donated foods, in coordination with the SFA, for delivery to a processor (250.50(d)(2)), and procure end products processed from such donated foods on behalf of the SFA(250.50(d)), in accordance with its contract with the SFA. Such donated foods are subject to the processing requirements in Subpart C of Part 250, and the FSMC must credit the SFA for the value of such donated foods at the processing agreement value (i.e., in accordance with the distributing agency's agreement with the processor).

Q36. Is the FSMC required to use end products procured by the SFA from a processor in the SFA's school food service?

A. Yes. As indicated in Q4, the FSMC would not be required to credit the SFA for the value of donated foods in such end products, unless its contract with the SFA requires it to act as an intermediary between the processor and SFA in passing along the donated food value.

Q37. Can the SFA require the FSMC to procure end products from a processor on its behalf?

A. The SFA may require the FSMC to procure (i.e., purchase) end products from a processor only if it has included such activity in its solicitation of the FSMC's service, and its contract with the FSMC (250.50(d)). This includes procurement of end products from a processor with inventories of donated foods that the SFA previously ordered for delivery to the processor's facility for processing into end products.

Q38. If the SFA has not included provision for FSMC procurement of end products from a processor on its behalf in its solicitation and contract, what options does the SFA have if it has previously ordered donated foods for delivery to a processor's facility for processing into end products?

A. In such case, the SFA may take one or more of the following actions:

- **Reach an agreement with the FSMC to procure such end products, as an amendment to the contract. In such case, the FSMC would be required to credit the SFA for the value of donated foods in the end products, at the processing agreement value, and would be required to use such end products in the SFA's food service.**

- **Work with the distributing agency to have the donated foods (or commercially purchased foods that meet substitution requirements in Subpart C of Part 250) delivered, unprocessed, to the SFA or FSMC storage facility. The FSMC would be required to credit the SFA for the value of such donated foods or commercial substitutes (250.51), at the value established in accordance with 250.53, and must use such foods in the SFA's food service.**

- **Procure end products from the processor directly. The FSMC would be required to use such end products in the SFA's food service, but would not be required to credit the SFA for the value of the donated foods in the end products (the SFA would receive such credit from the processor). However, any procurement of end products (or other foods) by the SFA should also be included in the solicitation, so as to reduce the FSMC charge (i.e., in a fixed-price contract) for providing the food service.**

- **Voluntarily give up its inventory of donated foods at the processor. The distributing agency may approve processing of the donated foods for delivery to another SFA that has procured such service from the processor, and that may efficiently use such foods. The distributing agency may also approve a transfer of the donated foods to another distributing agency, or to another processor, for processing of the donated foods and delivery of the end products to other SFAs.**

Cathie McCullough
Director
Food Distribution Division