

# Section 14a, USDA Foods Processors

## Update Guide

- August 12, 2020 Updated Administrator's Reference Manual (ARM), *Section 14a, USDA Foods* to update the *Administrator's Reference Manual (ARM)* sections references.
- October 25, 2019 Updated *Section 21A, USDA Foods Processors* to clarify information on the following topics:
- Carryover USDA Foods
  - Conflict of interests and duplication of services
  - Definitions: backhauling and entitlement
  - Resources
- May 21, 2019 Created a new section, *Section 21A, USDA Foods Processors*, to incorporate the following United States Department of Agriculture (USDA) memos and guidance:
- *USDA Memo FD-064: Processing (Revised), Management of USDA Food Inventories at Processors* (April 2, 2019)
  - *Revisions and Clarifications in Requirements for Processing of Donated Foods, Final Rule for 7 CFR Part 250, Federal Register Vol. 83, No. 84* (May 1, 2018)

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## Contact Information for the

### Texas Department of Agriculture (TDA), Food and Nutrition

When contacting TDA by phone, Contracting Entities (CEs) need to have their CE Identification Number (CE ID) (and site ID, if applicable). CEs should include their name and CE ID (and the site name and ID if applicable) in all communication or documentation.

#### General Contact Information

Physical Address		Mailing Address	
1700 N. Congress, 11th Floor, Austin, TX 78701		PO Box 12847, Austin, TX 78711-2847	
Phone	877-TEX-MEAL, (877) 839-6325	Email Contact	<a href="mailto:SquareMeals@TexasAgriculture.gov">SquareMeals@TexasAgriculture.gov</a>
Fax	(888) 203-6593	Website	<a href="http://www.SquareMeals.org">www.SquareMeals.org</a>

#### Questions about Program Applications

##### Child & Adult Care Food Program

[CACFP.BOps@TexasAgriculture.gov](mailto:CACFP.BOps@TexasAgriculture.gov)

##### National School Lunch Program, School Breakfast Program, & Special Milk Program

[NSLP-SBP.BOps@TexasAgriculture.gov](mailto:NSLP-SBP.BOps@TexasAgriculture.gov)

##### Seamless Summer Option

[SSO.BOps@TexasAgriculture.gov](mailto:SSO.BOps@TexasAgriculture.gov)

##### Summer Food Service Program

[SFSP.BOps@TexasAgriculture.gov](mailto:SFSP.BOps@TexasAgriculture.gov)

#### Questions about Program Flexibility

[SNPWaivers@TexasAgriculture.gov](mailto:SNPWaivers@TexasAgriculture.gov) for questions about

- Breakfast Waiver
- Child Nutrition Program Requirement Waivers
- Gender Exception
- Hiring Standards, CEs with Less Than 500 Students
- Lunch Mealtime
- Paid Lunch Equity (not currently available)
- RCCI Age/Grade Group Meal Pattern
- Seamless Summer Operation (SSO) Age/Grade
- Summer Mandate
- Technology-Based Confirmation
- Universal Breakfast Mandate
- Vending Machine to Dispense Reimbursable Meals

[Nutrition@TexasAgriculture.gov](mailto:Nutrition@TexasAgriculture.gov) for questions about

- Milk Substitute Notification

#### Questions about Program Operation

##### USDA Foods Operations

[CommodityOperations@TexasAgriculture.gov](mailto:CommodityOperations@TexasAgriculture.gov)

##### Community Operations (Child & Adult Care Food Program & Summer Food Service Program)

[Community.Ops@TexasAgriculture.gov](mailto:Community.Ops@TexasAgriculture.gov)

##### School Operations (National School Lunch Program, School Breakfast Program, & Special Milk Program)

[School.Operations@TexasAgriculture.gov](mailto:School.Operations@TexasAgriculture.gov)

##### Texas Eligibility List Management System (Texas ELMS)

[DirectCertification@TexasAgriculture.gov](mailto:DirectCertification@TexasAgriculture.gov)

##### Farm Fresh Initiative (Local Products)

[FarmFresh@TexasAgriculture.gov](mailto:FarmFresh@TexasAgriculture.gov)

#### Questions about Financial Issues

##### Capital Expenditures

[NSLP-SBP.BOps@TexasAgriculture.gov](mailto:NSLP-SBP.BOps@TexasAgriculture.gov)

##### Claims

[BCT.BOps@TexasAgriculture.gov](mailto:BCT.BOps@TexasAgriculture.gov)

##### Procurement, Including Sole Source and Emergency Procurement

[CE.ProcurementReviews.BOps@TexasAgriculture.gov](mailto:CE.ProcurementReviews.BOps@TexasAgriculture.gov)

##### Excessive Balance Plan

[School.Operations@TexasAgriculture.gov](mailto:School.Operations@TexasAgriculture.gov)

#### Questions about USDA Foods

##### USDA Foods Carryover Inventory

[CommodityOperations@TexasAgriculture.gov](mailto:CommodityOperations@TexasAgriculture.gov)

##### USDA Foods Transfer

[CommodityOperations@TexasAgriculture.gov](mailto:CommodityOperations@TexasAgriculture.gov)

June 22, 2020

# USDA Foods Processors

USDA Foods are distributed to state agencies for use by eligible organizations, including contracting entities (recipient agencies) that operate the National School Lunch Program (NSLP) and/or the School Breakfast Program (SBP).

[Note: The Texas Department of Agriculture (TDA) commonly uses the term contracting entities or CEs when providing guidance. However, for this document, the term recipient agency will be used.]

USDA Foods received by recipient agencies must be used as directed by federal regulations. USDA Foods cannot be sold, exchanged, or disposed of in any manner not allowed by regulation.

The guidance in this section is intended to be used by processors and recipient agencies to ensure compliance with all applicable regulations when recipient agencies use processors to convert USDA Foods into finished end products.

## Roles and Responsibilities for USDA Foods Incorporated into Finished End Products

Each recipient agency with a *USDA Foods Agreement Between Contracting Entity and Texas Department of Agriculture* is awarded an amount of funds—entitlement—that is used to obtain USDA Foods products. The Texas Department of Agriculture (TDA), then, allocates specific USDA Foods products to recipient agencies based on periodic surveys of available USDA Foods. These surveys are available in the Texas Unified Nutrition Programs System (TX-UNPS).

Recipient agencies may divert bulk USDA Foods to commercial food processors who will convert the USDA Foods into ready-to-use/finished end products. Processing USDA Foods can be a cost-effective option to increase the variety of food products offered for the meal program and reduce costs. The processor produces finished end products that are created in controlled conditions to ensure standardized quantity and quality as well as meet food safety standards.

The *Summary of USDA Foods Distribution Process Roles and Responsibilities Chart* outlines the roles and responsibilities in awarding USDA Foods entitlement, allocation of USDA Foods products, and processing bulk shipments of USDA Foods.

Summary of USDA Foods Distribution Process Roles and Responsibilities Chart	
USDA	<ul style="list-style-type: none"><li>• Announces each state’s USDA Foods entitlement.</li><li>• Works with agriculture to obtain suitable food products.</li><li>• Provides USDA Foods product information to states.</li><li>• Works with states to ship allocated USDA Foods.</li></ul>

#### **TDA**

- Announces each recipient agency's USDA Foods entitlement and posts the amounts in TX-UNPS.
- Posts USDA Foods offerings in TX-UNPS, so recipient agencies can draw down entitlement.
- Allocates specific USDA Foods items in response to the surveys located in TX-UNPS.
- Contracts with warehouses to receive, store, and deliver USDA Foods to recipient agencies.
- Monitors USDA Foods shipment and inventory to state-contracted warehouses.
- Imports and exports USDA Foods data between TX-UNPS and USDA's ordering system, Web-Based Supply Chain Management System (WBSCM).
- Monitors recipient agency use of entitlement through TX-UNPS, including bulk shipments to processors.
- Monitors USDA Foods inventory and usage at the processor through processor tracking systems.

#### **Recipient Agency**

- Completes surveys in TX-UNPS to order USDA Foods based on the allocated entitlement.
- Takes possession of (receives) USDA Foods.
- Completes appropriate online forms to ship USDA Foods to properly procured processors.
- Uses allocated USDA Foods products.
- Monitors its allocation of USDA Foods products and entitlement in TX-UNPS.
- Monitors USDA Foods shipped to processors and ensure that finished end products meet specifications and are used appropriately.
- Monitors contracts to ensure the recipient agency receives the full credit for all USDA Foods values.
- Monitor's inventory and usage at the processor through processor tracking systems.
- Reports ongoing delays for shipment receipts to TDA.

#### **Processor**

- Enters into an agreement with USDA and/or TDA to process USDA Foods as defined by USDA.
- Ensures that there is an agreement with all distributors the processor uses as defined by USDA and/or TDA.
- Secures performance bonds and surety bonds as required.
- Provides Summary End Product Data Schedule (SEPDS) and provides updated SEPDS upon USDA approval to TDA as required.
- Provides detailed product information to assist recipient agencies in meeting menu and production requirements.
- Delivers finished end products as described in the processing contract.
- Takes possession of (receives) USDA Foods to make finished end products.
- Invoices recipient agencies for processing USDA Foods as described in the contract, including crediting the recipient agency for the value of the use of its USDA Foods in the finished end products.
- Maintains an accurate inventory and tracking system for USDA Foods received and delivered.
- Provides routine (monthly) performance, inventory, and production reports to TDA and USDA 30 days after the reporting period.

- Adheres to all applicable USDA, state, and local food safety regulations for the receipt, storage, and production of USDA Foods into finished end products.
- Takes action for food product recalls as required by USDA.
- Notifies TDA and recipient agencies of prolonged production issues that will cause delivery delays and excess inventories.

#### Distributor

- Enters into an agreement, as defined by USDA, with USDA, TDA, processors, or recipient agencies for the delivery of USDA Foods finished end products.
- Stores and delivers USDA foods as stipulated in recipient agency contracts and processor agreements.
- Takes possession of (receives) USDA Foods.
- Maintains an accurate inventory and tracking system for USDA Foods received and delivered.
- Takes action in response to food product recalls as required by USDA.

## Definitions for This Section

For this section, the following definitions will be useful:

A La Carte Sales	Individually priced food and/or beverage items sold during the meal service by the school nutrition program. These items may or may not be included in a reimbursable meal.
Acting on Behalf of Recipient Agency	Entity or person who has been given the responsibility to take action for the recipient agency.
Allocation	Quantity of USDA Foods allocated (or assigned) to recipient agencies by TDA. Recipient agencies place requests for specific USDA Foods in TX-UNPS based on their total entitlement.
Backhauling	Delivery of USDA Foods to a processor for processing from a recipient agency's or distributing agency's (TDA's) storage facility.
Bonus Foods	USDA Foods that are purchased under surplus removal or price support authority and then provided to state agencies in addition to legislatively authorized levels of assistance. Bonus foods are not charged against a recipient agency's entitlement amount. A recipient agency may request as many bonus foods as it can use without waste.
Buy American	Requirement for schools to purchase, to the maximum extent practicable, domestic commodities and products. A domestic commodity or product means an agricultural commodity that is grown in the United States <u>and</u> (1) that is processed in the United States or (2) that is processed in the United States substantially using agricultural commodities that are produced in the United States.
Calendar Year	January 1 through December 31 of each year.
Carrier	Commercial enterprise that transports USDA Foods from one location to another but does not store USDA Foods.
Carryover Inventory	USDA Foods from the previous school year left with the processor.
Catering or Vended Meals	An agreement or contract with a food service management company (FSMC) to provide meals.



Commingling	Storage of USDA Foods together with commercially purchased foods.
Commercial Equivalent	Product of the same generic identity, of United States origin, <sup>1</sup> and of equal or better quality substituted for a USDA Foods product. This definition is specific to USDA Foods. For other purposes, the same definition may not apply.
Contract	Formal, legally enforceable agreement (terms and conditions) between a buyer (the recipient agency) and a seller (contractor) that clearly and accurately describes the products and/or services to be delivered or performed and sets forth the method and the compensations the contractor receives when products and/or services are provided.
Cost Reimbursable Contract	Reimbursable contract that is a formal, legally enforceable contract that reimburses the contractor for allowable costs. In a cost reimbursable contract, allowable costs will be paid from the nonprofit school nutrition account to the contractor net of all discounts, rebates, and other applicable credits accruing to or received by the contractor. In a cost reimbursable contract, the fixed price (fee) includes the contractor's direct and indirect administrative costs and profit allocable to the contract. <sup>2</sup>
Credits, Rebates, and Discounts and USDA Foods Values	Amounts given to a recipient agency by contractors, cooperatives, food service management companies, processors, and vendors that receive credits, rebates, and/or discounts for purchasing products and/or services and USDA Foods values for school nutrition programs (SNPs). The contract between the recipient agency and the processor must specify the way that all credits, rebates, and discounts and USDA Foods Values will be returned to the recipient agency.
Direct-Ship Recipient Agencies	Recipient agencies or school cooperatives that are large enough to handle a truckload—about 40,000 pounds or an estimated 912 cases of USDA Foods. Shipments go to recipient agencies' storage facilities. Direct-ship storage facilities must be approved by TDA.
Direct Delivery or Direct Diversion	Requests by the recipient agency to directly deliver or divert USDA Foods to a commercial processor to create finished end products.
Disaster	<p>Natural occurrence such as hurricanes, tornadoes, and floods or an exceptional emergency or man-made disaster. There are two types of disasters for which child nutrition resources may be used: Presidentially declared disaster (declared disaster) or situation of distress (other disaster). For both types of disasters, the recipient agency must contact TDA as soon as possible to obtain permission to use child nutrition program resources and/or alter normal operational practices to assist and supplement state and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.</p> <p>As part of the Federal Emergency Response Plan, USDA's Food and Nutrition Service's (FNS) Food Distribution Division has the primary responsibility of supplying food to disaster relief organizations such as the Red Cross and the Salvation Army for mass feeding or household distribution. Disaster organizations request food assistance through State agencies that run USDA's nutrition assistance programs. State agencies notify USDA of the types and quantities of food that relief organizations need for emergency feeding operations.</p>
Distributing Agency	State agency authorized to distribute USDA Foods in the state. For Texas this is the Texas Department of Agriculture.

<sup>1</sup> The requirement to purchase products of United States (US) origin comes from the Buy American provision.

<sup>2</sup> See *Administrator's Reference Manual (ARM), Section 14, Financial Information Concerning School Nutrition Funds; Section 17, Procurement; and Section 22, Food Service Management Company* for additional information on cost reimbursable contracts and allowable costs.

Distributor	<p>Commercial food company or handler who is independent of a processor and both sells and bills for the finished end products delivered to recipient agencies for goods and/or services provided. A recipient agency may choose to have the same distributor manage both commercial finished end products and USDA Foods finished end products.</p> <p>[NOTE: There are companies that serve dual functions: distributor and state-contracted warehouse. If this is the case, the regulations <u>must be applied based on the function the company is fulfilling for each transaction.</u>]</p>
Distribution Charge	Cumulative charge imposed by distributing agencies or recipient agencies to help cover the cost of storing and distributing USDA Foods and administrative costs related to this activity.
Diverted Products	USDA Foods procured by USDA and shipped to a commercial processor in response to a recipient agency request.
Dunnage Platforms	Structures that allow users to store food off the floor, away from walls, and at different height levels which increases ventilation and helps prevent spoilage and contamination.
End Product Data Schedule (EPDS)	Detailed processor form that includes product formulation, USDA Foods ingredients and quantity and value of USDA Foods ingredients credited for each case of finished end product sold to recipient agencies. EPDS are submitted by processors to USDA, but not publicly available.
Entitlement	<p>State Entitlement—Value of USDA Foods that USDA authorizes TDA to receive in a specific program in accordance with program legislation.</p> <p>Recipient Agency Entitlement—Value of USDA Foods that TDA authorizes the recipient agency to receive based on historical counting and claiming data for lunches served through NSLP.</p>
Fee for Service (Crediting for USDA Foods)	<p>Type of crediting method for USDA Foods.<sup>3</sup> The processor charges the recipient agency a fee for creating finished end products by the pound or case using USDA Foods. The processor does not charge for the price of the product itself.</p> <p>The processor fee—price by pound or case—includes the cost of ingredients (excluding USDA Foods), labor, packaging, overhead, and other costs incurred in the conversion of the USDA Foods into the specified finished end product.</p>
Finished or Processed End Products	<p>Product containing USDA Foods processed by a commercial processor. A finished end product is not a food provided by USDA in a processed form (such as chicken fajita strips or turkey taco filling).</p> <p>When a finished end product is created, the processor (or distributor, if applicable) sells the product to the recipient agency for a price that is less the value of the USDA Foods included in the product.</p>
Firm Fixed Price Contract (Also Called Firm Price Contract)	Contracts that provide products or services for a price not subject to adjustment other than increases or decreases tied to an economic indicator stipulated by contract. Firm fixed price contracts are usually negotiated where reasonably finite specifications are available, and costs can be estimated with reasonable accuracy. A fixed price contract places minimum administrative burden on contracting parties but subjects a contractor to maximum risk arising from full responsibility for all cost escalations.
Fixed Fee	Agreed upon amount of money that is fixed at the inception of the contract. In a cost reimbursable contract, the fixed fee includes the contractor's direct and indirect administrative costs and profit allocable to the contract.

<sup>3</sup> This definition applies only to USDA Foods. *Fee for service* is also a term used in contract services and procurement for other purposes.

Food Alert	Notice from TDA and USDA Foods about holds and recalls.
Food Recall	Action to remove food products from commerce when there is reason to believe the products may be unsafe, adulterated, or mislabeled. This action is taken to protect the public from products that may cause health problems or possible death.
Food Service Management Company (FSMC)	Any organization, whether commercial or nonprofit, that contracts with a recipient agency to manage any aspect of the school nutrition program (SNP).
Ideal City	TDA designated location in each region. TDA bases the Ideal City on shipping logistics <sup>4</sup> and volume of USDA Foods. A recipient agency's distance from its Ideal City may affect delivery charges.
In-Kind Replacement	Replacement of a loss of USDA Foods with the same type of food of US origin of equal or better quality as the USDA Foods, and of at least equal value to the lost USDA Foods.
Long-Term Storage	Storage of USDA Foods in a state-contracted warehouse that begins after 180 days. <sup>5</sup>
Manage the Contract	Procedures the recipient agency has in place to ensure that contractors perform in accordance with the terms, conditions, and technical specifications of their contracts or purchase orders.
National Processing Agreement	Agreement between USDA Food and Nutrition Service (USDA FNS) and a multi-State processor to process USDA Foods into finished end products for sale to state agencies or recipient agencies.
Net Price	Amount to be paid by the recipient agency—cost of processing USDA Foods minus the cost of the USDA Foods used in the finished end product.
Net Off Invoice (NOI) (Crediting for USDA Foods)	Type of crediting method for USDA Foods. The value of the food product is determined by the November 15 product price for the food product from the previous year established by USDA. The commercial price of the product minus the USDA Foods value equals the net price. $[\text{Commercial Price}] - [\text{USDA Foods Value}] = [\text{Net Off Invoice (NOI) Amount Owed to CE}]$
Out-of-Condition	Food products that are damaged, spoiled, or infected and cannot be salvaged.
Piggyback	Adding other purchases and/or services to a procured contract that may create a material change to the contract.
Private Storage	State-contracted warehouse where a recipient agency pays the warehouse to store USDA Foods after 45 days from the date of allocation. The date of allocation is indicated in TX-UNPS.
Procurement	Act of obtaining goods or services in exchange for money or value. [NOTE: Value may be monetary or material worth, but it may also be something that has usefulness that can be exchanged for something of worth, merit, or importance.]

<sup>4</sup> Logistics includes efficient organization of resources and geographical factors.

<sup>5</sup> This definition applies only to USDA Foods. *Long-term storage* is also a term used for other purposes.

Purchasing Cooperative	<p>Group of recipient agencies joining together to purchase products and/or services with the intention of reducing costs and improving the quality of products and/or services available to members of a group. In this reference, a purchasing cooperative consists of a group of school districts. Purchasing cooperatives are commonly called cooperatives.</p> <p>[NOTE: When a recipient agency is a member of a purchasing cooperative, the recipient agency retains responsibility for ensuring that actions taken on its behalf are in compliance with all requirements.]</p>
Rebate (Crediting for USDA Foods)	<p>Type of crediting method for USDA Foods.<sup>6</sup> After the recipient agency receives USDA Foods finished end products through a distributor, the recipient agency submits a rebate form to the processor. The processor uses the USDA November 15 price to pay the recipient agency the value of USDA Foods contained in the finished end product.</p> <p>[Value of USDA Foods Product] = [Rebate Amount Owed to recipient agency]</p>
Received USDA Foods	Date when USDA Foods arrive at the school kitchen or the recipient agency or Food Service Management Company (FSMC) storage facility in either raw form or in finished end products.
Recipient Agency (RA)	Agency or organization that receives USDA Foods through a contract with TDA or another RA. Contracting entities (recipient agencies) are one type of recipient agency.
Recipient Agency Processing Agreement/ Contract	Agreement or contract between a recipient agency or purchasing cooperative and a processor which describes the specifications, technical requirements, and terms and conditions for the processor’s activities to use USDA Foods to create finished end products.
Regular USDA Foods	Regular USDA Foods that are ready for the recipient agency to prepare and serve without processing. Regular USDA Foods were previously called Brown Box.
Reimbursable Meal	A meal that offers all of the required meal pattern food items in the required serving sizes for the student’s age/grade group. <sup>7</sup>
Replacement Value	Price assigned by USDA to a USDA Foods which must reflect the current price in the market to ensure compensation for USDA Foods lost in processing or other activities. The replacement value may be changed by USDA at any time.
Shipping Overage or Underage	Incorrect quantity delivered—overage, too much; underage, too little.
Short Term Storage	Reference to USDA Foods that are already allocated to a recipient agency and are stored at a state-contracted warehouse. Storage of USDA Foods that begins with the 46 <sup>th</sup> day of storage after the date of allocation indicated in TX-UNPS. <sup>8</sup>
Solicitation	Process of notifying prospective or qualified bidders about the specifications and technical requirements for purchase of products and/or services.
State-Contracted Warehouse	<p>Warehouses that receive, store, and distribute USDA Foods. TDA selects state-contracted warehouses through competitive bids for service to specific regions of the state.</p> <p>[NOTE: There are companies that serve dual functions: distributor and state-contracted warehouse. If this is the case, the regulations must be applied based on the function the company is fulfilling for each transaction.]</p>

<sup>6</sup> This definition applies only to USDA Foods. *Rebate* is a common term used in contract services and procurement for other purposes.

<sup>7</sup> See the *Administrator’s Reference Manual (ARM)*, Section 8, *Breakfast*; Section 9, *Lunch*; Section 10, *Afterschool Care Program*; and Section 26, *Residential Child Care Institutions* for additional information on a reimbursable meal.

<sup>8</sup> This definition applies only to USDA Foods. *Short-term storage* is also a term used for other purposes.

State Participation Agreement (SPA)	Agreement between the distributing agency (TDA) and a multi-state processor to permit the sale of finished end products produced under the processor's National Processing Agreement to eligible recipient agencies in the state.
Substitution	Product of the same generic identity, of United State origin, <sup>9</sup> and of equal or better quality (commercial equivalent) substituted for a USDA Foods product.
Summary End Product Data Schedule (SEPDS)	Processor's description of its processing of USDA Foods into finished end product which includes the following: description of the finished end product, types and quantities of USDA Foods included in the finished end product, types and quantities of other ingredients in the finished end product, quantity of end product produced, processing yield information, and crediting information. This document is submitted to and approved by USDA.
USDA Foods Survey	List of USDA Foods that TDA makes available to recipient agencies several times each year in TX-UNPS. Using TX-UNPS, recipient agencies request USDA Foods from the USDA Foods Survey up to the amount of their entitlement.
USDA Foods Value	Credit, rebates, or discounts for the value of the recipient agency's USDA Foods entitlement returned to the recipient agency by processors or food service management companies that receive finished end products on behalf of the recipient agency. The contract between the recipient agency and the processor specifies the way that entitlement will be returned to the recipient agency.
Weekly Commodity Bulletin (Bulletin)	Screen in TX-UNPS that provides recipient agencies with the following information: beginning entitlement, processing balances, Department of Defense Fresh Fruit and Vegetable Program <sup>10</sup> allocations, value of unfilled requests, bonus foods, and entitlement balance. This report also includes allocation of USDA Food and date of allocation including storage categories. TDA encourages each recipient agency to check its bulletin weekly, each Friday morning.
Weighted Average	Type of cost applied to USDA Foods during the weekly allocation. The weighted average is determined by calculating the USDA Foods value divided by total units received to date for each USDA Foods product. $[\text{USDA Foods Value}] \div [\text{Total Unit}] = [\text{Weighted Average}]$

## Processors Agreements and Contracts

Each processor must have a national processor agreement with the United States Department of Agriculture (USDA) or a state processing agreement with the Texas Department of Agriculture (TDA) in order to provide these services.

### USDA (Food and Nutrition Service or FNS) Multi-State Processing Agreement

A processor that provides processing services in multiple states must have a National Processing Agreement with USDA in order to process USDA Foods into finished end products. This agreement must address, but is not limited to, the following:

- Finished end product schedules
- Performance bond or letter of credit
- Requirements for participation in state processing agreement

<sup>9</sup> The requirement to purchase products of US origin comes from the Buy American provision.

<sup>10</sup> This program is not the same program as the NSLP/SBP Fresh Fruit and Vegetable Program (FFVP).

A processor cannot assign any processing activities under its processor agreement to another entity to perform any aspect of the process without specific written consent of the other party to the agreement.

#### **TDA Multi-State or Single-State Processing Agreement**

The state agreement for multi-state or single state processors must address, but is not limited to, the following:

- Nutritional contribution provided by the finished end products.
- Marketability or acceptability of the finished end products.
- Method for distributing the finished end products.
- Price competitiveness of the finished end products.
- Processing yields of the USDA Foods.
- Labeling requirements.<sup>11</sup>
- Processor’s record of ethics and integrity and capacity to meet the regulatory requirements.
- Performance bond or irrevocable letter of credit to protect the value of the USDA Foods to be received for processing which must be provided to USDA, TDA, or recipient agency. The performance bond or letter of credit must be received prior to receipt of USDA Foods for processing. For multi-state processor the following bond requirements apply:

For Processors in Their First Year of Participation: The minimum amount of the performance bond or irrevocable letter of credit must be sufficient to cover at least 100% of the value of the USDA Foods in the processor’s annual physical or book inventory and at the discretion of USDA Food and Nutrition Service (USDA FNS). The surety company from which a bond is obtained must be listed in the most current Department of Treasury’s Listing of Approved Sureties (Department Circular 570).

For Processors Past Their First Year of Participation: The minimum amount of the performance bond or irrevocable letter of credit must be sufficient to cover at least 75% of the value of the USDA Foods in the processor’s annual physical or book inventory. The surety company from which a bond is obtained must be listed in the most current Department of Treasury’s Listing of Approved Sureties (Department Circular 570).

A processor cannot assign any processing activities under its processor agreement to another entity to perform any aspect of the process without specific written consent of the other party to the agreement.

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<sup>11</sup> See *Administrator's Reference Manual (ARM), Section 23, Food Product Documentation* for additional information on required labeling information and product labeling guidance specific to Child Nutrition Programs (CNPs).

## Distributor Agreement

If the recipient agency procures a distributor to deliver finished end products, the processor and the distributor must also have an agreement that ensures compliance with all regulations and describes the process for control and use of USDA Foods. Processor/distributor agreements have a duration of no more than five years.

The processor/distributor agreement must address, but is not limited to, the following:

- Statement of financial liability, specifically who must pay for the replacement value of USDA Foods.
- Description of the reporting process to be used for finished end products which includes a report frequency of no less than monthly.
- Description of the method to be used to credit the recipient agency for the value of the USDA Foods that are included in finished end products.
- Process for transferring title to USDA Foods from the processor to the distributor.

The processor/distributor agreement must ensure that adequate data sharing, reporting, and crediting of USDA Foods occurs when finished end products are delivered.

A processor cannot assign any processing activities under its processor agreement to another entity to perform any aspect of the process without specific written consent of the other party to the agreement.

## Processor Contracts with Recipient Agencies

Processor contracts with recipient agencies must be properly procured in accordance with TDA and USDA regulations before the processor can receive the recipient agency's USDA Foods and create finished end products. Moreover, a processor cannot assign any processing activities under its processor contract to another entity to perform any aspect of the process without specific written consent of the other party to the contract.

Processing contracts must address, but are not limited to, the following:

- Proper procurement practices<sup>12</sup> as defined by USDA as well as applicable state and local regulations or law.
- Specifications, technical requirements, and terms and conditions for the services and products to be provided to the recipient agency.
- Quantity for each product to be provided to the recipient agency.
- Price to be charged for the finished end product and processing services as applicable.
- Method used to credit the recipient agency with the value of the USDA Foods, frequency of credits, and reporting of credits.

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<sup>12</sup> See *Administrator's Reference Manual (ARM), Section 17, Procurement* for additional information on procurement requirements.

- Location for the delivery of the finished end products, including, if applicable, use of a distributor.
- Performance bond or irrevocable letter of credit to protect the value of the USDA Foods to be received for processing. The performance bond or letter of credit must be received prior to receipt of USDA Foods for processing.

For Processors in Their First Year of Participation: The minimum amount of the performance bond or irrevocable letter of credit must be sufficient to cover at least 100% of the value of the USDA Foods in the processor's physical or book inventory and at the discretion of USDA FNS. The surety company from which a bond is obtained must be listed in the most current Department of Treasury's Listing of Approved Sureties (Department Circular 570).

For Processors Past Their First Year of Participation: The minimum amount of the performance bond or irrevocable letter of credit must be sufficient to cover at least 75% of the value of the USDA Foods in the processor's physical or book inventory. The surety company from which a bond is obtained must be listed in the most current Department of Treasury's Listing of Approved Sureties (Department Circular 570).

#### Assurances

A processor/recipient agency contract must include the following assurances:

- Processor will provide a performance bond or irrevocable letter of credit to protect the value of USDA Foods it is expected to maintain in inventory.
- Processor will meet processing yields for USDA Foods.
- Processor will compensate the recipient agency, as appropriate, for any loss of USDA Foods.
- Processor will meet requirements for the substitution of commercially purchased foods for USDA Foods, including grading requirements.
- Processor will not substitute or commingle backhauled USDA Foods and will provide finished end products processed from such USDA Foods only to the recipient agency from which the foods were received.
- Processor will provide for the safe and effective storage of USDA Foods, meet inspection requirements, and maintain an effective quality control system at its processing facilities.
- Processor will report USDA Foods inventory activity and maintain inventories within approved levels.
- Processor will return USDA Foods to TDA, transfer the USDA Foods as directed by TDA, or pay for USDA Foods inventories remaining upon termination of the agreement.

#### Payment for USDA Foods

- Pay TDA an amount equal to USDA's most recent cost information on acquiring and delivering replacement food



relative to the time of determination that a substitute is not allowed or available.

- Pay TDA current per pound value established by the Processor Agreement or the Commodity Credit Corporation (CCC) unrestricted sales price.
- Processor will credit recipient agencies for the value of all USDA Foods.
- Processor will obtain independent CPA audits and will correct any deficiencies identified in such audits.

## Terms and Conditions

A processor/recipient agency contract must include the following terms and conditions:

### Accountability and Monitoring

- Distributing agency, sub-distributing agency, or recipient agency, the Comptroller General, the Department of Agriculture, or their duly authorized representatives may perform onsite reviews of the processor's operation to ensure that all activities relating to USDA Foods are performed in accordance with the requirements.

### Credits, Rebates, and Discounts

- Crediting method(s) for the value of the USDA Foods used in the finished end product sales—rebate, direct discount or net off invoice (indirect discount), or fee-for-service.

### Duration of Contract

- Effective dates of the agreement.
- Description of the conditions for the termination of the contract, including immediate termination if the processor has not complied with its terms and conditions.
- Extensions or renewals of the agreement, if applicable, are contingent upon the fulfillment of all agreement provisions. Processors may be procured for a one-year contract with three additional renewals for a total of four years.<sup>13</sup> Processor contracts are subject to the material change provisions as described in *Administrator's Reference Manual (ARM), Section 17, Procurement*.

### Finished End Products

- Description of finished end products to be created and the grading requirements.
- Finished end product data schedules, with all required information which includes, but is not limited to, the following:
  - Description of the types and quantities of finished end products made from USDA Foods, including specifications or technical requirements.

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<sup>13</sup> Texas law limits contracts to one year plus three renewals if all parties agree to the renewal.

- Types and quantities of the other ingredients included in the finished end products made from the USDA Foods.
- Processing yield of USDA Foods, which may be expressed as the quantity (pounds or cases) of the USDA Foods needed to produce a specific quantity of a finished end product or as the percentage of raw USDA Foods versus the quantity returned in the finished end product.
- Description of allowed substitutions and process for informing the recipient agency about allowable substitutions.
  - [NOTE: Substitutions are not allowed for backhauled USDA Foods.]
- Applicable labeling requirements.<sup>14</sup>

#### General

- Contact information for all appropriate parties to the agreement, including participating members of a purchasing cooperative.

#### Processor/Distributor Agreements

- Processor must enter into an agreement with any and all distributors delivering finished end products to recipient agencies that ensures adequate data sharing, reporting, and crediting of USDA Foods.

#### Reporting

- Method and timeline for reporting the following information to the recipient agency:
  - Quantity of USDA Foods the recipient agency has in the processor's inventory.
  - Quantity of USDA Foods transferred to the recipient agency or other entity if appropriate.
  - Quantity of USDA Foods losses.

#### Subcontracting

- Description of allowed subcontracting processor activities if permitted.
  - [NOTE: A recipient agency may prohibit subcontracting.]

#### Other Regulatory Contract Requirements

Compliance with all applicable laws, rules, regulations, policies, and instructions including, but not limited to the following:

- **Buy American** [7 CFR 250.17(e); 7 CFR 250.34(a)]

Applies to all finished end food products: all USDA Foods and allowable substitutions for USDA Foods must be domestic products; over 51% of the

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<sup>14</sup> See *Administrator's Reference Manual (ARM), Section 23, Food Product Documentation* for additional information on product labeling requirements. All USDA Foods finished end products must meet the requirements for the Buy American provisions. See *Administrator's Reference Manual (ARM), Section 17, Procurement* for additional information on the Buy American provisions.

final processed food product must consist of agricultural commodities that are grown domestically.

[NOTE: Domestic food products include food products from the United States territories: Guam, American Samoa, Virgin Island, Puerto Rico, and the Northern Marian Islands.

- **Byrd, Anti-Lobbing** [31 U.S.C. 1352]  
Applies to contracts exceeding \$100,000 using Federal funds; requires contractor to complete specific forms related to lobbying (influencing or attempting to influence) in connection with obtaining a contract.
- **Civil Rights/Discrimination** [Title IV of the Civil Rights Act of 1964; Title VI of the Education Amendments of 1972; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; Title 7 CFR Parts 15, 15a, and 15b; the Americans with Disabilities Act; and FNS Instruction 113-1, Civil Rights Compliance and Enforcement–Nutrition Programs and Activities]  
Applies to contracts using Federal funds; prohibits the discrimination on the basis of age, color, disability, national origin, race, and sex.
- **Clean Air and Water Act and Federal Water Pollution Control Act** [Clean Water Act, 42 U.S.C. 7401-7671q; Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387); and Executive Order 11738, and Environmental Protection Agency regulations (40 CFR Part 15)]  
Applies to contracts exceeding \$150,000 using Federal funds; requires compliance with all applicable standards, orders, and regulations; prohibits the award of contracts to contractors that are in violation of Clean Air Act. Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).
- **Contract Work Hours and Safety Standards Act** [40 U.S.C. 327-330 Sections 103 and 107 as supplemented by Department of Labor regulations (29 CFR Part 5)]  
Applies to contracts that involve mechanics or laborers exceeding \$100,000 using Federal funds; establishes standards for hourly and salaried employees related to workweek and overtime.
- **Energy Policy and Conservation Act** [Public Law 94-163, 89 Statute 871]  
Applies to contracts using Federal funds; establishes standards for the promotion of energy and water conservation methods when feasibly obtainable.
- **Solid Waste Disposal Act** [Section 6002 as amended by the Resource Conservation and Recovery Act]  
Applies to contracts exceeding \$10,000 using Federal funds; requires contractors to maximize energy and resource recovery by using recycled

materials and/or recycling waste products when reasonable, cost appropriate, and available.

- **Small and Minority Firms, Women’s Business Enterprise, and Labor Surplus Area Firms** [2 CFR Part 200.321]

Applies to contracts using Federal funds; requires contractors to encourage and facilitate participation by small businesses, minority-owned firms, and women’s business enterprises whenever to the maximum extent possible.

If the recipient agency procures a processor contract that is separate from the recipient agency’s FSMC contract and if the recipient agency arranges for finished end products made from USDA Foods outside of the FSMC contract, the processor must credit the value of USDA Foods directly to the recipient agency. In these cases, the recipient agency (not the FSMC) will receive the invoice for the finished end products, and the recipient agency will pay processor costs.

At the end of the year, the recipient agency must be able to reconcile the total pounds and dollar amount for all USDA Foods allocated to the recipient agency and total pounds and dollar amount for all USDA Foods received, including products received by the FSMC. The processor must provide documentation to the recipient agency to support the reconciliation of total pounds and dollar amount of finished end products.

Recipient agencies and FSMCs should work collaboratively to ensure that all allocated USDA Foods are used during the school year (July 1 to June 30) and to manage USDA Foods inventories.

#### **Food Service Management Contracts (FSMCs) and Processing Activities**

A recipient agency may allow an FSMC to assist in procuring a processor for USDA Foods to be used by the FSMC. However, an FSMC cannot contract directly with a USDA Foods processor. The recipient agency must award and sign the processor contract.

The procured processing contract must address, but is not limited to, the following:

- Compliance with the provisions of the recipient agency’s processing agreements.
- Proper procurement practices<sup>15</sup> as defined by USDA as well as applicable state and local regulations or law, including, but not limited to, avoiding conflicts of interest by not awarding contracts to FSMC-owned or affiliated vendors.
- Specifications, technical requirements, and terms and conditions for the services and products to be provided to the recipient agency.
- Quantity for each product to be provided to the recipient agency.

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<sup>15</sup> See *Administrator's Reference Manual (ARM), Section 17, Procurement* for additional information on procurement requirements.

- Price to be charged for the finished end product and processing services as applicable.
- Method used to credit the recipient agency with the value of the USDA Foods, frequency of credits, and reporting of credits.
- Location for the delivery of the finished end products, including, if applicable, use of distributor.
- Performance bond or irrevocable letter of credit to protect the value of the USDA Foods to be received for processing. The performance bond or letter of credit must be received prior to receipt of USDA Foods for processing.
- Other regulatory contract requirements as described in the *Other Regulatory Contract Requirements* subsection in this section.

### Distributor Contract with Recipient Agencies

When a recipient agency procures a distributor, the resulting contract must meet federal, state, and local requirements for procurement and contracting. These contracts must address, but are not limited to, the following:

- Price to be charged for the finished end products and other processing services.
- Value of the USDA Foods contained in each finished end product.
- Method of finished end product sales that will be used.
- Method to be used to provide the recipient agency with credit for the value of the USDA Foods.
- Location for the delivery of finished end products.
- Compensation of recipient agencies for substandard, lost, or damaged finished end products made from USDA Foods.

A recipient agency may choose to have the same distributor manage both commercial finished end products and USDA Foods finished end products. A distributor that delivers finished end products must also have an agreement with processors used by the recipient agency. See the *Processor/Distributor Agreement* topic in the *Processor Agreements and Contracts* subsection in this section for more information on this topic.

When the recipient agency procures storage and distribution of finished end products separately from the processing of USDA Foods, the recipient agency may provide the distributor written approval to act as the recipient agency's authorized agent for the total case price (i.e., including the fee-for-service and the delivery charge).

## Recipient Agency-Created Purchasing Cooperatives

Recipient agencies that participate in a purchasing cooperative must have a written cooperative agreement or contract that defines scope of the actions the purchasing cooperative will take on behalf of the cooperative members.

When cooperatives are used by recipient agencies in purchasing finished end products created by processors, the processor must be properly procured. In all cases, the recipient agency is responsible for ensuring that all contractors, including processors, are in compliance with all regulations.

## Performance Bond or Irrevocable Letter of Credit

Performance bond or irrevocable letter of credit to protect the value of the USDA Foods to be received for processing. The performance bond or letter of credit must be received prior to receipt of USDA Foods for processing.

### Calling in a Processor's Performance Bond or Irrevocable Letter of Credit

TDA or recipient agency must call in a processor's performance bond or letter of credit in the following circumstances:

- The processor is not in compliance with the terms and conditions of the state or recipient agency processing agreement.
- Processor actions result in a loss of USDA Foods to a distributing or recipient agency and the processor fails to make restitution or respond to a claim action initiated to recover the loss.

USDA FNS will call in a processor's performance bond or irrevocable letter of credit in the following circumstances:

- The processor is not in compliance with the terms and conditions of the national processing agreement.
- Processor actions result in a loss of USDA Foods to a distributing or recipient agency and the processor fails to make restitution or respond to a claim action initiated to recover the loss.

## Finished End Product Data Schedule

Finished end product data schedules (EPDS) provide accurate information on the finished end product, USDA Foods used in the product, and yield in a standard electronic format dictated by USDA FNS. Finished end product data schedules must be approved before the processor can process USDA Foods into finished end products.

To achieve consistency in yields, processors use standardized processes and internal controls as overseen by USDA.

## National Processing Agreements

The finished end product data schedule must be approved by USDA.

## In-State Processing Agreements

The finished end product data schedule must be approved by TDA with the exception of beef, pork, and poultry which are subject to approval by the Agricultural Marketing Service (AMS).

On the finished end product data schedule, the processor must describe its processing of USDA Foods into a finished end product, including the following information:

- Description of the finished end product
- Types and quantities of USDA Foods included
- Types and quantities of other ingredients included
- Quantity of finished end product produced
- Processing yield of USDA Foods, which may be expressed as the quantity (pounds or cases) of USDA Foods needed to produce a specific quantity of finished end product or as the percentage of the raw USDA Foods versus the quantity returned in the finished end product

## Processing Yields for USDA Foods

Processing yield options are limited to (1) 100 percent yield, (2) guaranteed yield, and (3) standard yield.

### 100 Percent Yield

The processor must ensure that 100 percent of the raw USDA Foods is returned in the finished end product.

#### Insufficient Product

If there is any loss of USDA Foods, the processor must replace the loss with commercially purchased food of the same generic identity, of U.S. origin, and equal or better in all USDA procurement specifications than the USDA Food.

The processor must demonstrate such replacement by reporting reductions in USDA Foods inventories on performance reports by the amount of USDA Foods contained in the finished end product rather than the amount that went into production.

[NOTE: USDA may approve an exception if a processor experiences a significant manufacturing loss.]

### Guaranteed Yield

The processor must ensure that a specific quantity of finished end product (i.e., number of cases) will be produced from a specific quantity of USDA Foods (i.e., pounds), as determined by the parties to the processing agreement, and, for In-State Processing Agreements, approved by TDA.

### Insufficient Product

If necessary, the processor must use commercially purchased food of the same generic identity, of U.S. origin, and equal or better in all USDA procurement specifications than the USDA Foods to provide the guaranteed number of cases of finished end product to the distributing or recipient agency, as appropriate.

### Standard Yield

The processor must ensure that a specific quantity of finished end product (i.e., number of cases), as determined by USDA, will be produced from a specific quantity of USDA Foods. The established standard yield is higher than the yield the processor could achieve under normal commercial production and serves to reward those processors that can process USDA Foods most efficiently.

### Insufficient Product

If necessary, the processor must use commercially purchased food of the same generic identity, of U.S. origin, and equal or better in all USDA procurement specifications than the USDA Foods to provide the number of cases required to meet the standard yield to the distributing or recipient agency, as appropriate.

## Labeling

The processor must ensure that all finished end product labels meet Federal labeling requirements. A processor that claims finished end products fulfill meal pattern requirements for a Child Nutrition Program (CNP) must comply with the procedures required for approval of labels of such finished end products.<sup>16</sup> Moreover, all finished end products made with USDA Foods must meet the Buy American provisions.

## Buy American

When USDA Foods<sup>17</sup> items are manufactured into finished end products, 51% of the final processed food product must consist of agricultural commodities that were grown domestically (sometimes, referred to as processed *substantially* using domestic agricultural commodities). The products must be manufactured/processed in the United States. Products grown in another country and processed in the United States do not meet the Buy American provisions. Products grown in the United States and processed in another country do not meet the Buy American provisions.

[NOTE: Domestic food products include food products from the United States territories: Guam, American Samoa, Virgin Island, Puerto Rico, and the Northern Marian Islands.]

If a recipient agency receives USDA Foods products that do not meet these requirements, the recipient agency must refuse delivery and report the issue to TDA immediately.

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<sup>16</sup> See *Administrator's Reference Manual (ARM), Section 23, Food Product Documentation* for additional information on the requirements for product labeling.

<sup>17</sup> See *Administrator's Reference Manual (ARM), Section 21, USDA Foods* for additional information on the Buy American requirements for processing USDA Foods.



## Substitutions

Unless the processor agreement/contract specifically stipulates that the USDA Foods must be used in processing, the processor may substitute commercially purchased foods for USDA Foods. The commercially purchased food must be of the same generic identity, of U.S. origin, and equal or better in all USDA procurement specifications than the USDA Foods.

Commercially purchased beef, pork, or poultry must meet the same specifications as donated product, including inspection, grading, testing, and humane handling standards and must be approved by USDA in advance of substitution.

Commercially purchased food substituted for USDA Foods must meet the same processing yield requirements as the USDA Foods.

The processor may also choose to make the substitution before the actual receipt of the USDA Foods. However, the processor assumes all risk and liability if, due to changing market conditions or other reasons, the USDA's purchase of USDA Foods and their delivery to the processor does not occur.

### Substitution for Backhauled USDA Foods

The processor cannot substitute or commingle USDA Foods that are backhauled from a distributor's or recipient agency's storage facility. The processor must process the backhauled USDA Foods into finished end products for sale and delivery to the distributor or recipient agency using the USDA Foods that have been backhauled to the processor. The processor cannot substitute food products that have been provided by any other agency for the backhauled USDA Foods.

Distributors or recipient agencies must purchase the finished end products utilizing USDA Foods backhauled to their contracted processor. The processor also cannot provide payment for backhauled USDA Foods in lieu of processing.

### Substitutions Not Allowed or Available

In cases where a substitution is not allowed or a suitable substitution is not available, the processor must take one of the following actions:<sup>18</sup>

1. Return the USDA Foods to TDA.
2. Pay TDA an amount equal to USDA's most recent cost information on acquiring and delivering replacement food relative to the time of determination that a substitute is not allowed or available.
3. Pay TDA current per pound value established by the Processor Agreement or the Commodity Credit Corporation (CCC) unrestricted sales price.

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<sup>18</sup> Processors who have questions about this process should contact TDA. See the Contact Information for the Texas Department of Agriculture page which follows the table of contents in this section.

## Credit for Sale of By-Products Resulting from Processing USDA Foods

The processor must credit the recipient agency for the sale of any by-products produced in the processing of USDA Foods. The processor must credit for the net value of such sales, or the market value of the by-products, after subtraction of any documented expense incurred in preparing the by-product for sale. Crediting must be achieved through invoice reduction or by another acceptable means of crediting, including the methods described in the *Providing Credit for USDA Food Values* subsection in this section. In all cases, the processor must provide documentation that demonstrates that the recipient agency received appropriate credit amount.

## Providing Credit for USDA Foods Values

The processor must provide credit for the USDA Foods value in the finished end products using one of the following acceptable crediting methods.

### Direct Discount

With this method, the processor must sell finished end products to the distributor or recipient agency, as appropriate, at a net price that incorporates a discount from the commercial case price for the value of USDA Foods contained in the finished end products.

### Fee for Service

For this method, the processor charges the distributor or recipient agency a fee<sup>19</sup> for creating finished end products not for the price of the product itself. A fee for service method includes all costs to produce the ending products and excludes the value of the USDA Foods used in the finished end product. There are three types of fee for services used:

- Direct shipment and invoicing from the processor to the recipient agency.
- Multiple pallets of finished end products are shipped to the distributor with a list of which recipient agencies own what products.
- Authorized agent bills the recipient agency for the total case price.

The processor must identify any delivery charge for finished end products separately from the fee for service on invoicing. If the finished end products are delivered to a distributor, any delivery costs the distributor charges must also be identified separately on processor invoicing or billed separately by the distributor.

[NOTE: If delivery is made to state-contracted warehouse, recipient agency orders finished end products from state-contracted warehouse. State-contracted warehouse charges recipient agency storage and delivery fees.]

### Net Off Invoice (NOI, Also Called Indirect Discount)

With this method, the value of the food product is credited when the commercial distributor invoices the recipient agency for the net price—commercial price of the product minus the USDA Foods value equals the net price. The processor must require the distributor to notify the processor of these sales at least on a monthly basis.

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<sup>19</sup> This definition applies only to USDA Foods. *Fee for service* is also a term used in contract services and procurement for other purposes.

Notification may be made through automated sales reports or other electronic or written submission. With this information, the processor compensates the distributor for the discount provided for the value of the USDA Foods. Recipient agencies must closely monitor invoices to ensure that correct discounts are applied.

$$[\text{Commercial Price}] - [\text{USDA Foods Value}] = \frac{[\text{Net Off Invoice (NOI)}]}{\text{Amount Owed to CE}}$$

### Rebate

When the rebate method is used, the processor sells the finished end products containing USDA Foods to the distributing or recipient agency, as appropriate, at the commercial or gross price. After the recipient agency or distributor receives the finished end products, the recipient agency submits a rebate<sup>20</sup> form to the processor. The processor credits or sends a payment to the recipient agency for the credit value within 30 days of receiving a request. Refund requests must be in writing and may be transmitted by email or other electronic method.

$$[\text{Value of USDA Foods Product}] = [\text{Rebate Amount Owed to CE}]$$

## Transfer of Title for USDA Foods

When USDA Foods are processed into finished end products, title to the USDA Foods transfers to the recipient agency at the time and place delivery of the finished end products occurs. It is the responsibility of the agency that receives the products to ensure quality and proper handling.

For distributors and multi-state processors, title to USDA Foods transfers as follows:

#### Distributor Acting on Behalf of the Recipient Agency

When a recipient agency contracts with a distributor to act as the authorized agent, title to finished end products transfers from a multi-state processor with a national processing agreement to the recipient agency at the time and place the contracted distributor accepts the delivery of the food products.

#### Multi-State Processor with a National Processing Agreement

When a multi-state processor delivers USDA Foods as described in the national processing agreement, title to the USDA Foods transfers to the recipient agency on acceptance of the finished end products at the time and place of the delivery.

When a recipient agency contracts with a distributor to store or transfer finished end products that utilize USDA Foods, the distributor must notify the processor of its sales of the finished end products to the recipient agency in a timely manner, so that the processor may report such sales and reductions of the USDA Foods inventories to the TDA in its monthly performance reports. Such notification may be provided by electronic means—e.g., through sales velocity reports or other automated sales reports.

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<sup>20</sup> This definition applies only to USDA Foods. *Rebate* is a common term used in contract services and procurement for other purposes.

## Inspection of USDA Foods on Delivery or Pickup

Before taking possession of and signing for USDA Foods (whether delivered or picked up), the processor, distributor, or recipient agency must inspect the bill of lading (BOL) or invoice to ensure that the following requirements are met:

- High-security seal is intact.
- Temperature of product is acceptable for frozen and refrigerated foods.
- Delivered product belongs to the recipient agency.
- Quantity is correct.
- Products are in good condition.

### Products That Are Not in Good Condition

When the processor, distributor, or recipient agency discovers that USDA Foods or finished end products are not in good condition (commonly called *out-of-condition*) at the time of delivery or pickup, the processor, distributor, or recipient agency must use the following guidance.

#### Accept the USDA Foods of Finished End Products

The processor, distributor, or recipient agency may accept the USDA Foods or finished end products delivered if

1. some, but not a major portion, of the delivered products are out-of-condition, and
2. the delivered products have only minor quantity discrepancies from quantity ordered.

In this case, the processor, distributor, or recipient agency must take the following actions:

- Segregate the out-of-condition foods.
- Notify<sup>21</sup> TDA about the out-of-condition foods.

#### Refuse to Accept Some or All of the USDA Foods or Finished End Products

The processor, distributor, or recipient agency is not required to accept USDA Foods or finished end products delivered in the following conditions:

- Unsafe for consumption based on evidence of odors.
- Signs of infestation (dead insects or nesting materials).
- Damage to inner or outer containers.
- Unsafe storage or transportation temperatures.

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<sup>21</sup> See the Contact Information for the Texas Department of Agriculture page which follows the table of contents in this section.

When food products exhibit any of these conditions, the processor, distributor, or recipient agency may refuse delivery of all or some of the USDA Foods or finished end products in the delivery order.

Before refusing or accepting delivery of out-of-condition USDA Foods or finished end products, the processor, distributor, or recipient agency must call TDA immediately.

#### Replacement for Out-of-Condition USDA Foods or Finished End Products

In all cases, the processor or distributor is responsible for replacement of the USDA Foods or the finished end products when delivered out-of-condition. This includes entitlement and bonus foods. The processor or distributor may reimburse the recipient agency for the value of the USDA Foods at the time of delivery (or another value as determined by USDA) or credit the recipient agencies entitlement.

#### Non-U.S. Food Products

If the food items delivered are not U.S. products or the finished end products do not meet the Buy American standards,<sup>22</sup> the processor, distributor, or recipient agency cannot accept delivery.<sup>23</sup>

When this occurs, the receiving agency must report this circumstance to TDA immediately.

## Storage and Inventory Management for USDA Foods

Processors, distributors, and recipient agencies must maintain an inventory of USDA Foods which allows for reporting of the following information:

- Whether a food product is sourced from USDA Foods or commercially sourced food products substituted for USDA Foods
- Location of the USDA Foods product (including, but not limited to, a recipient agency facility, processor, distributor, or state-contracted warehouse)
- Value of each USDA Foods product
- Quantity for USDA Foods products or commercially sourced food products substituted for USDA Foods. This includes amount received by date and amount used by date.

If the food product is sourced from both USDA Foods and another source, the system must be able to report the quantity for each source.

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<sup>22</sup> See the *Administrator's Reference Manual (ARM)*, Section 23, *Food Product Documentation* for additional information on food product labeling requirements and Section 17, *Procurement* for more information on Buy American.

<sup>23</sup> For additional information on Buy American standards see *Administrator's Reference Manual (ARM)*, Section 17, *Procurement*.

- Tracking system to assist the recipient agency in managing the timely use of USDA Foods in order to address the following concerns:
  - Limit additional costs associated with short-term storage or long-term storage.
  - Avoid exceeding the 180-day limit for storage.
- Documentation demonstrating that all inventoried foods are stored in a manner that meets all state and local health and safety requirements.

## Storage of USDA Foods

### Comingle USDA Foods and Commercially Purchased Foods

The processor may commingle USDA Foods and commercially purchased foods, unless the processing agreement specifically stipulates that the USDA Foods must be used in processing, and not substituted, or the USDA Foods have been backhauled from a recipient agency. However, such commingling must be performed in a manner that ensures the safe and efficient use of USDA Foods, as well as compliance with substitution requirements or the reporting information about USDA Foods inventories. The processor must also ensure that commingling of finished end products and other food products, either at its facility or at the facility of a commercial distributor, ensures the sale and delivery of finished end products that meet the processing requirements including affixing the applicable USDA certification stamp to the exterior shipping containers of finished end products.

### Excessive Inventory Limitations

Inventories of USDA Foods at processors may not exceed a six-month supply, based on an average amount of USDA Foods used by recipient agencies or expected to be used unless the processor submits a written justification to TDA and TDA grants approval.<sup>24</sup>

### Future Orders

If a processor reports no sales activity during the prior year's contract period, TDA is not permitted to submit food orders to this processor unless the processor submits documentation of the processor's plan for USDA Foods drawdown, product promotion, or sales expansion to TDA and TDA approves.

[NOTE: USDA may require the transfer of inventory and/or entitlement to another State or processor to ensure utilization prior to the end of the school year.]

### End of Year Reconciliation

If the processor has USDA Foods inventories in excess of a six-month supply based on an average amount of USDA Foods used by recipient

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<sup>24</sup> TDA will forward the request to USDA for approval once all needed information is submitted if required.

agencies at the end of the school year, TDA may take one of the following actions:<sup>25</sup>

- Permit the processor to carry over specified inventory of USDA Foods into the next school year if TDA determines the processor is able to efficiently store and process the quantity of USDA Foods.
- Direct the processor to transfer the specified inventory of USDA Foods to other recipient agencies, the Texas State Account, or to another state distributing agency.
- Require the processor to pay TDA for the replacement value of the USDA Foods.

#### Disposition of USDA Foods on Termination of a Processor Agreement

When a processor agreement is terminated, the processor must take one of the following actions with respect to remaining USDA Foods:<sup>26</sup>

- Return the USDA Foods or commercially purchased foods that meet the substitution requirements to TDA or the recipient agency as appropriate.
- Pay TDA or the recipient agency with USDA approval, as appropriate, for the USDA Foods at the contract or replacement value of the USDA Foods whichever is higher.
- Transfer the USDA Foods or commercially purchased foods that meet the substitution requirements to another state distributing agency or recipient agency with which it has a processing agreement.

The processor must pay the cost of transporting any USDA Foods when the agreement is terminated at the processor's request or as a result of the processor's failure to comply with agreement requirements.

#### Excess Carryover Inventory at the Processors

Unused recipient agency USDA Foods inventory that is left with the processor on June 30 is called carryover inventory. Any carryover inventory remaining in a processor's inventory on July 1 is excess carryover inventory and will be transferred to the state agency (TDA) for redistribution.<sup>27</sup> When the excess inventory is transferred to the state, processors must update their tracking system to indicate the transfer of the USDA Foods to TDA.

#### Transfer of USDA Foods—Recipient Agency to Recipient Agency

Before a recipient agency can transfer unused USDA Foods to another recipient agency, TDA **must approve** the transfer. TDA will provide processors with a copy of the approved transfer request for the recipient agency to recipient agency transfer. Once the processor

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<sup>25</sup> Processors who have questions about this process should contact TDA. See the Contact Information for the Texas Department of Agriculture page which follows the table of contents in this section.

<sup>26</sup> Transfer the USDA Foods or commercially purchased foods that meet the substitution requirements to another state distributing agency or recipient agency with which it has a processing agreement.

<sup>27</sup> There is no longer an exception which allows a CE to retain an excess carryover balance.

receives the transfer form, the processor will make the transfer as approved. TDA will require corrective action from the processor for any transfers that occur without TDA approval. Any transactions that occur prior to the implementation of the corrective action will be at the expense of the processor.

## Care of USDA Foods

Processors, distributors, and recipient agencies receiving USDA Foods should take watchful and reasonable upkeep of these products. This includes, but is not limited, to the following:<sup>28</sup>

### Food Delivery or Pickup

Check each delivery or pickup of food for possible shortages and damage before the foods are accepted.

- The product and the quantity in the delivery or pickup must be the same as described on the delivery document (such as the bill of lading or the invoice) unless exceptions are noted.<sup>29</sup>
- Refrigerated products must be examined to ensure the temperature of the product is adequate, and the products are in good condition. This is especially essential for frozen foods.
- Canned foods must be examined to determine if there are any damaged, disfigured, or discolored cases or cans, which might indicate spoilage or deterioration.
- Foods that commonly have insect infestation must be thoroughly inspected to ensure that there is no infestation.
- Foods found to be out-of-condition must be segregated from other foods and handled in accordance with the applicable Hazard Analysis and Critical Control Points (HACCP) procedures for managing unsafe or infested food.

### Protecting USDA Foods from Infestation

Adequate safeguards must be taken to protect USDA Foods from infestation in the storage facility.

- Facilities must be inspected routinely to ensure that there are no external openings in the structure of the building where foods are stored, which would allow rodent and insect infestation. TDA recommends that USDA Foods be inspected monthly.
- Facilities must use a method to prevent infestation. This may include pesticide, traps, or other food safe method of eradication. Because some pesticides and extermination chemicals may not be safe for foods, agencies should ensure that food safe products are used.

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<sup>28</sup> USDA Foods, as with all other food used in the SNP, must comply with the school food safety program. Refer to *Administrator's Reference Manual (ARM), Section 26, Food Safety*, for information regarding the school food safety program and Hazard Analysis Critical Control Point (HACCP) requirements.

<sup>29</sup> See the *Inspection of USDA Foods on Delivery or Pickup* subsection in this section for additional information on this topic.



The United States Environmental Protection Agency (EPA) has developed the following resources about protecting foods from infestation that provide information specific to school food service operations as well as general food service operations:

- *Keeping Rodents Out of Your School* available at [www.epa.gov/managing-pests-schools/keeping-rodents-out-your-school](http://www.epa.gov/managing-pests-schools/keeping-rodents-out-your-school)
- *The Basics of School IPM (Integrated Pest Management)* available at <https://www.epa.gov/managing-pests-schools/basics-school-ipm>
- *Integrated Pest Management in Child Care Centers: Protecting our Children from Pests and Pesticides* available at [www.epa.gov/childcare/integrated-pest-management-child-care-centers-protecting-our-children-pests-and-pesticides](http://www.epa.gov/childcare/integrated-pest-management-child-care-centers-protecting-our-children-pests-and-pesticides)

### Food Safety

Processors and distributors must ensure the safe and effective storage of USDA Foods, including compliance with the general storage requirements as required by federal, state, and local food safety and health laws and regulations. This includes, but is not limited to, maintaining sanitary conditions, keeping foods at the proper temperature and humidity, and ensuring adequate air circulation.

Processors and distributors must also ensure appropriate control procedures are in place to protect USDA Foods against theft, spoilage, damage, or other loss.

- Store foods in freezers and coolers that are thoroughly cleaned and dried, operating properly, and in good repair.
- Monitor the temperature of freezers and coolers routinely. Temperatures in the refrigerators and freezers should be taken and recorded daily and recorded in a temperature log. Equipping freezers and coolers with an alarm system for easy detection of high temperatures and power failures may also help to prevent food spoilage.
- Check freezers and coolers after a power failure to make sure the units are operating properly, and stored foods are still in good condition.
- Place foods on shelves with a one- or two-inches of space left between the walls and other food containers to ensure proper air circulation. In walk-in units, place foods on dunnage platforms<sup>30</sup> rather than directly on the floor and stack foods properly to prevent falling and possible damage.
- Repair or replace malfunctioning equipment.
- Place locks on freezers and coolers and all building doors where USDA Foods are stored. This will help prevent theft and vandalism.
- Limit ordering to quantities that can be properly stored and utilized without waste.

<b>Information Box 1</b>	
<b>Food Storage Temperatures</b>	
Cooler/Refrigerator Temperature	36° to 40°
Freezer Temperature	0° or below
Dry Storage	50° to 70 °, less than 70% humidity

<sup>30</sup> Structures that allow users to store food off the floor, away from walls, and at different height levels which increases ventilation and helps prevent spoilage and contamination.

## Maintaining the Quality of Grains and Grain Products

As with all foods, use first in, first out (FIFO) principles when storing whole-grain items. Because whole-grain ingredients (e.g., whole-wheat flour, brown rice) retain the bran and the oil-rich germ, these food items may turn rancid when stored in warm areas and have a shorter shelf life than their refined counterparts.

To increase shelf life, store these products in a cool, dry place in airtight containers. From May through September, grain products must be refrigerated. At other times of the year, if products will not be used within a short period of time, they should be stored in the refrigerator or freezer.

## Loss of USDA Foods

The processor must compensate the recipient agency, as appropriate, for the loss of USDA Foods, or for the loss of commercially purchased foods substituted for USDA Foods. Such loss may occur (1) if the processor fails to meet the required processing yield of USDA Foods or fails to produce finished end products that meet required specifications; (2) if USDA Foods are spoiled, damaged, or otherwise adulterated at a processing facility; or (3) if finished end products are improperly distributed.

If losses are due to an infestation, the processor must work directly with USDA to report the loss and final outcome of the infestation. This **report** will include temperature logs, shipment numbers and delivery dates, documentation of a professional exterminator visit, current condition of the affected product, and storage location. USDA will provide guidance to the processor for how to handle the product based on their evaluation and determinations.

To compensate for such loss, the processor must take one of the following actions:

1. The processor must replace the lost USDA Foods or commercial substitute with commercially purchased food of the same generic identity, of U. S. origin, and equal or better in all USDA procurement specifications than the USDA Foods.
2. The processor must return finished end products that are wholesome but do not meet required specifications to production for processing into the requisite quantity of finished end products that meet the required specifications (commonly called rework products).
3. The processor may pay the recipient agency for the replacement value of the USDA Foods or provide a commercial substitute with approval from TDA.<sup>31</sup>

## Determining the Value of USDA Foods When There Is a Loss

Once a distributing or recipient agency has selected a method of assigning value to USDA Foods, it must use that method consistently in all audit activities and must maintain a record of the means of valuing USDA Foods for such purpose.

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<sup>31</sup> If the processor cannot take Action 1 or 2 and is requesting Action 3, contact TDA for assistance and approval.

The distributing agency (TDA) or recipient agency must use one of the following methods to determine the value of USDA Foods:

1. Fair Market Value (FMV) of USDA Foods at the time of their receipt, FMV must exclude non-food items from the value of the USDA Foods.
2. Cost-per-pound of USDA Foods prices posted annually by the USDA, Food and Nutrition Service.
3. Most recently published cost-per-pound price in the USDA Foods catalog, found in the FNS electronic USDA Foods Food and Nutrition Service ordering system, Web-Based Supply Chain Management (WBSCM).
4. Rolling average of the USDA Foods prices (average cost per pound), based on each State distributing agency's USDA Foods sales orders in WBSCM. To calculate the rolling average, all prices that a particular material has been sold at for the current fiscal year are averaged together to get an average cost per pound for the material.

## Food Recall

Detailed information on food alerts is provided by USDA on the USDA Food Safety website.<sup>32</sup>

[NOTE: Systems for addressing food safety issues, particularly in the event of recalls may change frequently; processors and distributors are expected to check the USDA website regularly to keep up to date.]

In the food alerts, USDA FNS will determine whether a recalled product should be held or disposed of. TDA will communicate this information to processors, recipient agencies, and USDA Foods distributors.

- Hold—If the USDA Foods are on hold, the agency must segregate the product until USDA either releases the hold or provides further information.
- Dispose—If the USDA Foods are recalled, TDA will instruct recipient agencies ways to dispose of the product. Processors and recipient agencies are encouraged to avoid disposing of the product until notified by TDA.

In the event a USDA Foods product is subject to a recall, USDA has developed a notification system for automated email alerts.<sup>33</sup>

Because processors are the only entities that know if a recipient agency or USDA Foods distributor has received a recalled food product or if a product contains a food item that has been recalled, processors are responsible for maintaining records for all food products sent to all recipient agencies or USDA Foods distributors in order to trace the distribution of recalled foods. Processors are also responsible for notifying all affected recipient agencies or USDA Foods distributors about recalls using the most expeditious method possible, ideally 24 hours or less.

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<sup>32</sup> Available at [www.fns.usda.gov/](http://www.fns.usda.gov/), food safety hyperlink.

<sup>33</sup> More information on this alert system is available at [www.fns.usda.gov/](http://www.fns.usda.gov/), food safety hyperlink.

## **Food Recall Notifications for Processors with National Processing Agreements**

The following list describes the expected sequence of actions taken to respond to a food recall.

1. Processors are contacted directly by USDA FNS and provided information about the recalled product including product identification information.  
[NOTE: USDA FNS also notifies TDA about recalled food items.]
2. Processors determine if the recalled product was used to produce finished end products that were distributed to recipient agencies or USDA Foods distributors, or if a substitute of a commercially purchased food was made in place of the USDA Foods.
3. Processors provide information about how recalled products were used and distributed to USDA FNS.
  - If commercially purchased foods were substituted for USDA Foods, the recall is considered a commercial recall and USDA FNS does not track the finished end products.
  - If recalled foods were used to make finished end products for recipient agencies or USDA Foods distributors, the processors must initiate notification to agencies that received the recalled food.
4. Processors notify TDA, recipient agencies, and USDA Foods distributors that received the recalled products. If none of these agencies received the recalled products, the processor will still contact TDA to confirm that TDA, recipient agencies in the state, and USDA Foods distributors in the state did not receive the recalled foods.
5. USDA Foods distributors immediately notify TDA, processors, and recipient agencies about the quantity of the recalled product remaining in their inventory and the quantity of the recalled product delivered to each recipient agency.
6. Processors compile information from each USDA Foods distributor about the quantity of product remaining in the distributor's inventory and the quantity of the recalled product shipped to each recipient agency and provides that information to TDA.
7. TDA reports all information obtained by the processor (including USDA Foods distributor information) to USDA FNS.
8. USDA FNS may also request information directly from the processors about recalled foods.

## **Food Recall Notifications for Processors with In-State Processing Agreements**

The following list describes the expected sequence of actions taken to respond to a food recall.

1. USDA FNS notifies TDA about the recalled food.
2. TDA notifies processors about USDA Foods recall.
3. Processors determine if the recalled product was used to produce finished end products that were distributed to recipient agencies or USDA Foods distributors, or

if a substitution of commercially purchased food was made in place of the USDA Foods.

4. Processors provide information about how recalled products were used and distributed to TDA.
5. TDA provides information to USDA FNS about the status of the recalled foods.
  - If commercially purchased foods were substituted for USDA Foods, the recall is considered a commercial recall and USDA FNS does not track the finished end products.
  - If recalled foods were used to make finished end products for recipient agencies or USDA Foods distributors, the processors must initiate notification to agencies that received the recalled food.
6. Processors notify TDA, recipient agencies, and USDA Foods distributors that received the recalled products. If none of these agencies received the recalled products, the processor will still contact TDA to confirm that TDA, recipient agencies in the state, and USDA Foods distributors in the state did not receive the recalled foods.
7. USDA Foods distributors immediately notify TDA, processors, and recipient agencies about the quantity of the recalled product remaining in their inventory and the quantity of the recalled product delivered to each recipient agency.
8. Processors compile information about each USDA Foods distributor about the quantity of product remaining in the distributor's inventory and the quantity of the recalled product shipped to each recipient agency and provides that information to TDA.
9. TDA reports all information obtained by the processor (including USDA Foods distributor information) to USDA FNS.
10. USDA FNS may also request information about recalled foods from the processors.

## Resources for Using USDA Foods

USDA provides numerous resources to assist in the operation of USDA Foods at <https://www.fns.usda.gov/usda-fis/school>, including manuals, tip sheets and webinars.

The following resources provide useful information on methods to ensure food safety.

[NOTE: Some of the resources are not specific to USDA Foods.]

### **Texas Department of State Health Services (DSHS)**

- Regulations related to food establishments for the state of Texas available at [www.dshs.state.tx.us/foode establishments/laws-rules.aspx](http://www.dshs.state.tx.us/foode establishments/laws-rules.aspx)

### **Texas Department of Agriculture (TDA)**

- *Cooler or Freezer Temperature Recording Form* available at [www.SquareMeals.org](http://www.SquareMeals.org)
- *Administrator's Reference Manual (ARM), Section 26, Food Safety* available at [www.SquareMeals.org](http://www.SquareMeals.org)

**United States Department of Agriculture (USDA)**

- *NSLP USDA Food Product Information Sheets* available at <https://www.fns.usda.gov/usda-fis/usda-foods-product-information-sheets>
- *USDA Foods E-Letters* available at [www.fns.usda.gov/fdd/usda-foods-e-letters](http://www.fns.usda.gov/fdd/usda-foods-e-letters)

**United States Food and Drug Administration (FDA)**

- *Are You Storing Food Safely* available at [www.fda.gov/ForConsumers/ConsumerUpdates/ucm093704.htm](http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm093704.htm)
- *Refrigerator & Freezer Storage Chart* available at [www.fda.gov/downloads/food/resourcesforyou/healtheducators/ucm109315.pdf](http://www.fda.gov/downloads/food/resourcesforyou/healtheducators/ucm109315.pdf)
- *Refrigerator Thermometers: Cold Facts about Food Safety Available* at [www.fda.gov/Food/ResourcesForYou/Consumers/ucm253954.htm](http://www.fda.gov/Food/ResourcesForYou/Consumers/ucm253954.htm)
- *Food and Drug Administration (FDA) HACCP Guidance* available at [www.fda.gov/Food/GuidanceRegulation/haccp/ucm2006810.htm](http://www.fda.gov/Food/GuidanceRegulation/haccp/ucm2006810.htm)

**Records Retention**

Records retained for USDA Foods serve to demonstrate compliance with all regulations. Distributors and processors are required to keep documentation for 3 years after the close of the federal fiscal year to which they pertain unless longer retention is required for the resolution of an audit, litigation, other regulations, or state law.

Processors must fully account for all USDA Foods delivered and carried forward from one year to the next. These records must demonstrate that production and delivery of USDA Foods and finished end products is equal to the USDA Food received and handled in accordance with its National Processing Agreement or In-State Processing Agreement with TDA and its contracts with individual distributors and recipient agencies.

USDA Foods or the value of USDA Foods not accounted for shall be the liability of the Processor.

Information Box 2
Records Retention
Public and charter schools are required to keep documentation related to school nutrition programs for 5 years.
Private schools, other nonprofit organizations, and residential child care institutions (RCCIs) are required to keep documentation for 3 years.
Distributors and processors are required to keep documentation for 3 years after the close of the federal fiscal year to which they pertain unless longer retention is required for the resolution of an audit, litigation, other regulations, or state law.

Documentation will be used to determine if processors, distributors, and recipient agencies have properly accounted for all USDA Foods under their control. In regulation USDA states the following:

Failure of the distributing agency, recipient agency, processor, or other entity to comply with recordkeeping requirements must be considered prima facie evidence of improper distribution or loss of donated foods and may result in a claim against such party for the loss or misuse of donated foods, in accordance with § 250.16, or in other sanctions or corrective actions.

Records retained for USDA Foods include, but are not limited to, the following types of documentation:

- Agreements and contracts
- Amount of USDA Foods in inventory, including length of time in inventory and all transfers
- Finished end products
  - Batch identification data
  - Batch recipes
  - Commercial product substitutions
  - Credited value of the USDA Foods contained in the finished end products
  - End product data schedules
  - Grading certificates, if applicable; waivers of grading requirements, if applicable
  - Product and performance reports
  - Product labeling
  - Product loss records
  - Production, sale, and delivery of finished end products, including sales through distributors
  - Quality control records, including packaging, net weight, and food safety
  - Quantity of the finished end products created for the period
  - Quantity of USDA Foods included, or commercial substitutes included in the finished end products
  - Receipts of USDA Foods shipments and finished end products
- Financial records
  - Assurances and documentation demonstrating crediting method and payments for USDA Foods
  - Audits, including documentation of findings and corrective action
  - Invoices, bills of lading, or other appropriate documentation that demonstrates the following:
    - Amount of USDA Foods and finished end products received and provided to the FSMC for use in the recipient agency’s food service including dollar and pound totals
    - Amount of USDA Foods and finished end products received from, or on behalf of, the recipient agency for use in its food service

- Amount(s) FSMC credited the recipient agency for the value of all USDA Foods received for use in the recipient agency's food service in the school or fiscal year, including the value of USDA Foods contained in finished end products
- Procurement documentation for processing contracts
  - Price charged for the finished end product or other processing service
  - Method of finished end product sales
  - Value of the USDA Foods in the finished end products
  - Time and location for the delivery of the finished end products
- Health and safety records, including any required inspections or certificates and product recall documentation and notifications
- Transfer records for all USDA Foods and finished end products

## Compliance

TDA will assess compliance with the use of USDA foods based on onsite and/or offsite processes.

### Recipient Agency

TDA may take appropriate fiscal action or terminate the *USDA Foods Agreement Between Contracting Entity and Texas Department of Agriculture* for any recipient agency that is not in compliance with the requirements for USDA Foods. Corrective action may include requiring a contracting entity (recipient agency) to hold a processor or distributor accountable as required by regulation. TDA may also report noncompliance directly to USDA for USDA to make an appropriate response.

### In-State Processors

TDA will take appropriate action to terminate the processor agreement or report noncompliance directly to USDA for USDA to make an appropriate response.

### Multi-State Processors

TDA will report noncompliance direction to USDA for USDA to make an appropriate response.

### Distributors

TDA will report noncompliance directly to USDA for USDA to make an appropriate response.

The cost of any products and/or services that were procured improperly is an unallowable cost to the nonprofit school food service account, including purchases made on behalf of the recipient agency by a third party.



## **Obligation of the Contracting Entity (recipient agency) to Report Fraud, Bribery, and Gratuity Violations**

Processors, distributors, and recipient agencies must report, in writing to TDA, all violations of federal criminal law—fraud, bribery, or gratuity.

The non-Federal entity or applicant for a Federal award must disclose, in a timely manner, in writing to the Federal awarding agency or pass-through entity all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. Failure to make required disclosures can result in any of the remedies described in § 200.338 Remedies for noncompliance, including suspension or debarment. (2 CFR Part 200.113; 31 U.S.C. 3321).

## **Criminal Penalty**

The maximum fine for embezzling, willfully misapplying, stealing, or obtaining by fraud, funds, assets, or property acquired under the National School Lunch Act or Child Nutrition Act is \$25,000.

## **Fraud**

Whoever embezzles, willfully misapplies, steals or obtains by fraud any funds, assets or property provided under the National School Lunch Program and/or School Breakfast Program [and/or Special Milk Program] whether received directly or indirectly, shall, if such funds, assets or property are of a value of \$100 or more, be fined no more than \$25,000 or imprisoned not more than 5 years or both; or if such funds, assets or property are of a value of less than \$100, be fined not more than \$1,000 or imprisoned not more than 1 year or both. Whoever receives, conceals or retains for personal use or gain, funds, assets or property provided under the National School Lunch Program and/or School Breakfast Program, whether received directly or indirectly, knowing such funds, assets or property have been embezzled, willfully misapplied, stolen or obtained by fraud, shall be subject to the same penalties.

**Termination of the Agreement for Financial Fraud or Misuse of Funds.** If serious deficiencies, such as fraud or misuse of funds occur, and corrective action is not practical, TDA will terminate the processor's or recipient agency's participation in all child nutrition programs administered by TDA, including the NSLP, SBP, SMP, CACFP, and SFSP.

- Processors and recipient agencies have agreements with TDA, but distributors have agreements generally with a processor or recipient agency; in the latter case, in the case of fraud or misuse of funds, the processor or recipient agency would terminate the agreement;
- In the case of a distributor's fraud or misuse of funds, suspected misconduct would be reported to USDA, and USDA would take appropriate action. Distributors would be prohibited from entering contracts to service USDA Foods for either processors or recipient agencies.

Suspected fraud or misuses by processors and distributors will be reported to USDA; USDA will take action as appropriate to the situation. TDA may also refer the matter to the appropriate local, state, and/or federal authorities.