necessary for the employee to perfect the claim and an explanation of why such material or information is necessary, and

(iii) In the case of a denial of the claim, in whole or in part appropriate information as to the steps to be taken, as set forth below, if the employee wishes to appeal the agency decision on the claim.

(3) Within 30 days after receipt of an agency decision denying a claim, an employee may appeal the agency decision. An appeal shall be in writing and addressed to the agency official designated in the agency's decision. The employee's appeal may contain any document or comments the employee deems relevant to the claim.

(4) The agency shall make a decision on the employee's appeal not later than 30 days after its receipt of the appeal. The agency's decision on the appeal shall be written in an understandable manner and shall include the reasons therefor as well as references to applicable statutes and regulations. If the decision on the employee's appeal is not made within this 30 day time period, or if the decision on the appeal denies the employee's claim, in whole or in part, the employee shall have exhausted his or her administrative remedy and shall be eligible to file suit in the appropriate Federal district court pursuant to 5 U.S.C 8477. There is no administrative appeal of an agency final decision to the Board.

(b) *Board procedure*. The Board shall provide the following procedure for reviewing claims relating to possible errors on the part of the Board:

(1) On receipt of a claim transmitted by an agency in accordance with paragraph (a)(1) of this section, the Recordkeeper shall review the claim and provide the employee with a decision within 30 days of its receipt of the claim. This decision shall be in writing and shall contain the following information:

(i) The Recordkeeper's determination on the claim and the reasons therefor, including reference to applicable statutes or regulations;

(ii) In the case of a denial of the claim, in whole or in part, a description of any additional material or information necessary for the employee to perfect the claim and an explanation of why such material or information is necessary, and

(iii) In the case of a denial of the claim, in whole or in part, appropriate information as to the steps to be taken, as set forth below, if the employee wishes to appeal the Recordkeeper's decision on the claim.

(2) Within 30 days after the receipt of the Recordkeeper's decision denying a claim, an employee may appeal the decision. The appeal shall be in writing and addressed to the Executive Director, Federal Retirement Thrift Investment Board, Benjamin Franklin Station, Post Office Box 511, Washington, DC 20044, and may contain any documents or comments the employee deems relevant to the claim.

(3) The Executive Director shall make a decision on the employee's appeal not later than 30 days after the Board's receipt of the appeal. This decision shall be written in an understandable manner and shall include the reasons therefor as well as references to applicable statutes and regulations. If the decision on the employee's appeal is not made within this 30 day time period, or if the decision denies the employee's claim, in whole or in part, the employee shall have exhausted his or her administrative remedy and shall be eligible to file suit in the appropriate Federal district court pursuant to 5 U.S.C. 8477.

(c) Agency or Board initiative. Errors or actions covered by this part may be corrected, in the manner and to the extent provided in this part, at the initiative of the agency or of the Board regardless of whether an employee submits a claim pursuant to this section.

(d) Time limitation. An error or action described in this Part shall only be eligible for correction pursuant to paragraphs (a) and (b) of this section for a period of three years from the date on which the employee discovered or should have discovered the error, whichever occurs first.

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5 CFR Part 1631

Disclosure of Records

AGENCY: Federal Retirement Thrift Investment Board.

ACTION: Interim rule with request for comments.

SUMMARY: The Federal Retirement Thrift Investment Board (the Board) was established by Pub. L. 99-335 (June 6, 1986), the Federal Employees' Retirement System Act of 1986, 1986 U.S. Code Cong. & Ad. News (100 Stat. 514) (to be codified principally at 5 U.S.C. 8401 through 8479), as amended by Pub. L. 99-509, the Omnibus Budget Reconciliation Act of 1986, and Pub. L. 99-556, the Federal Employees' Retirement System Technical Corrections Act of 1986, to administer the Thrift Savings Plan for Federal employees. Regulations of the Board are contained in Title 5, CFR, Chapter VI, Parts 1600 through 1699. The Executive Director of the Board is publishing in Part 1631 interim regulations governing procedures for handling requests for records under the Freedom of Information Act (5 U.S.C. 552) and other authorities.

DATES: Interim rules effective May 13, 1987; comments must be received on or before July 15, 1987.

ADDRESS: Comments may be sent to: John J. O'Meara, Federal Retirement Thrift Investment Board, Benjamin Franklin Station, P.O. Box 511, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: John J. O'Meara, (202) 653-2573.

SUPPLEMENTARY INFORMATION: The Board, as a new agency, is issuing interim regulations which implement the public information provisions of the Freedom of Information Act, as well as provide procedures for access to information and records under other authorities. The Board is an independent establishment located in Washington, DC and it has no field offices. However, the Board does have a recordkeeping responsibility which is performed by contract and the contractor may be located outside of the Washington, DC area. The records maintained for the Board by its contractor are subject to these disclosure regulations. At this time, the recordkeeping contract is held by the National Finance Center, Department of Agriculture, New Orleans, Louisiana.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities. They will affect only internal Board procedures relating to the disclosure of records.

Paperwork Reduction Act

I certify that these regulations do not require additional reporting under the criteria of the Paperwork Reduction Act of 1980.

Waiver of Notice of Proposed Rulemaking and 30-day Delay of Effective Date

Pursuant to 5 U.S.C. 553 (b)(B) and (d)(3), I find that good cause exists for waiving the general notice of proposed rulemaking and for making these regulations effective in less than 30 days. The Board wishes to have these procedures in existence at the earliest date in order to process requests for records which are being maintained by the Board at this time.

List of Subjects in 5 CFR Part 1631

Administrative practice and procedure, Freedom of Information, and Records. Federal Retirement Thrift Investment Board.

Francis X. Cavanaugh,

Executive Director.

Title 5 CFR is amended by adding Part 1631 to Chapter VI to read as follows:

PART 1631—AVAILABILITY OF RECORDS

Subpart A—Production or Disclosure of Records Under the Freedom of Information Act, 5 U.S.C. 552

Subpart B—Production in Response to Subpoenas or Demands of Courts or Other Authorities

Authority: 5 U.S.C. 552, as amended by Pub. L. 93–502 and Pub. L. 99–570.

Subpart A—Production or Disclosure of Records Under the Freedom of Information Act, 5 U.S.C. 552

§ 1631.1 Definitions.

(a) "Board" means the Federal Retirement Thrift Investment Board.

(b) "Agency" means agency as defined in 5 U.S.C. 552(e).

(c) "Executive Director" means the Executive Director of the Federal Retirement Thrift Investment Board, as defined in 5 U.S.C. 8401(13) and as further described in 5 U.S.C. 8474.

(d) "FOIA" means Freedom of Information Act, 5 U.S.C. 552, as amended.

(e) "General Counsel" means the General Counsel of the Federal Retirement Thrift Investment Board.

(f) "Workday" means those days when the Board is open for the conduct of government business, and does not include Saturdays, Sundays and legal public holidays.

§ 1631.2 Purpose and scope.

This subpart contains the regulations of the Federal Retirement Thrift Investment Board, implementing 5 U.S.C. 552. The regulations of this subpart describe the procedures by which records may be obtained from all organizational units within the Board. Official records of the Board available pursuant to the requirements of 5 U.S.C. 552 shall be furnished to members of the public only as prescribed by this subpart. To the extent that it is not prohibited by other laws the Board also will make available records which it is authorized to withhold under 5 U.S.C. 552 whenever it determines that such disclosure is in the public interest.

§ 1631.3 Organization and functions.

(a) The Federal Retirement Thrift Investment Board was established by the Federal Employees' Retirement System Act of 1986 (Pub. L. 99–335, 5 U.S.C. 8401 et seq). Its primary function is to manage and invest the Thrift Savings Fund for the benefit of participating Federal employees and Members of Congress. The Board is responsible for investment of the assets of the Thrift Savings Fund and managment of the Thrift Savings Plan. The Board consists of:

(1) The five part time members who serve on the Board;

(2) The Office of the Executive Director;

(3) The Office of Deputy Executive Director;

(4) The Office of the General Counsel; and

(5) Officials who are responsible for the following divisions—

(i) Finance

(ii) External Relations

(iii) Employee Relations

(iv) Automated Systems

(v) Administration

(b) The Board has no field organization, however, it provides for its recordkeeping responsibility by contract and the contractor may be located outside of the Washington, D.C. area. Thrift Savings Plan records maintained for the Board by its contractor are Board records subject to these regulations. Offices are presently located at 1717 H Street NW., Washington, DC and the mailing address is Benjamin Franklin Station, P.O. Box 511, Washington, DC 20044. Regular office hours are from 9:00 a.m. to 5:30 p.m., Monday through Friday.

§ 1631.4 Public reference facilities and current index.

(a) The Office maintains a public reading area located in Room 206, 1717 H Street NW., Washington, DC, and makes available for public inspection and copying a copy of all material required by 5 U.S.C. 552(a)(2), including all documents published by the Board in the **Federal Register** and currently in effect.

(b) The FOIA Officer or his or her designee shall maintain files containing all materials required to be retained by or furnished to the FOIA Officer under this subpart. The materials shall be filed by chronological number of request within each calendar year, indexed according to the exceptions asserted, and, to the extent feasible, indexed according to the type of records requested.

(c) The FOIA Officer shall also maintain a file open to the public, which shall contain copies of all grants or denials of appeals by the Board.

§ 1631.5 Records of other agencies.

Requests for records that originated in another agency and are in the custody of the Board will be referred to that agency for processing, and the person submitting the request shall be so notified. The decision made by that agency with respect to such records will be honored by the Board.

§ 1631.6 How to request records—form and content.

(a) A request made under the FOIA must be submitted in writing, addressed to: FOIA Officer, Federal Retirement Thrift Investment Board, Ben Franklin Station, P.O. Box 511, Washington, DC. 20044. The words "FOIA Request" should be clearly marked on both the letter and the envelope.

(b) Any Board employee or official who receives a FOIA request shall promptly forward it to the FOIA Officer, at the above address. Any Board employee or official who receives an oral request made under the FOIA shall inform the person making the request of the provisions of this subpart requiring a written request according to the procedures set out herein.

(c) Each request must reasonably describe the record(s) sought, including, when known: Entity/individual originating the record, date, subject matter, type of document, location, and any other pertinent information which would assist in promptly locating the record(s).

(d) When a request is not considered reasonably descriptive, or requires the production of voluminous records, or places an extraordinary burden on the Board, seriously interfering with its normal functioning to the detriment of the business of the Government, the Board may require the person or agent making the FOIA request to confer with a Board representative in order to attempt to verify, and, if possible, narrow the scope of the request.

(e) Upon initial receipt of the FOIA request, the FOIA officer will determine which official or officials within the Board shall have the primary responsibility for collecting and reviewing the requested information and drafting a proposed response.

§ 1631.7 Initial determination.

The FOIA Officer or his or her designee shall have the authority to approve or deny requests received pursuant to these regulations. The decision of the FOIA Officer shall be final, subject only to administrative review as provided in § 1631.10.

§ 1631.8 Prompt response.

(a) The FOIA Officer or his or her designee shall either approve or deny a request for records within 10 working days after receipt of the request unless additional time is required for one of the following reasons:

(1) It is necessary to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(2) It is necessary to consult with another agency having a substantial interest in the determination of the request or to consult with two or more components of the Board having substantial subject matter interest therein.

(b) When additional time is required for one of the reasons stated in paragraph (a) of this section, the FOIA Officer or his or her designee shall acknowledge receipt of the request within the 10 workday period and include a brief explanation of the reason for the delay, indicating the date by which a determination will be forthcoming. An extended deadline adopted for one of the reasons set forth above may not exceed 10 additional workdays.

§ 1631.9 Responses—form and content.

(a) When a requested record has been identified and is available, the FOIA Officer or his or her designee shall notify the person making the request as to where and when the record is available for inspection or that copies will be made available. The notification shall also advise the person making the request of any fees assessed under §1631.13 of this part.

(b) A denial or partial denial of a request of a record shall be in writing signed by the FOIA Officer or his or her designee and shall include:

(1) The name and title of the person making the determination;

(2) A reference to the specific exemption under the Freedom of Information Act authorizing the withholding of the record, and a brief explanation of how the exemption applies to the record withheld; or

(3) A statement that, after diligent effort, the requested records have not been found or have not been adequately examined during the time allowed by § 1631.8, and that the denial will be reconsidered as soon as the search or examination is complete; and

(4) A statement that the denial may be appealed to the General Counsel within 30 days of receipt of the denial or partial denial. If a requested record cannot be located from the information supplied, or is known to have been destroyed or otherwise disposed of, the person making the request shall be so notified.

§ 1631.10 Appeals to the General Counsel from initial denials.

(a) When the FOIA Officer or his or her designee has denied a request for records in whole or in part, the person making the request may, within 30 calendar days of its receipt, appeal the denial to the General Counsel. The appeal must be in writing, addressed to the General Counsel, Federal Retirement Thrift Investment Board, Ben Franklin Station, P.O. Box 511, Washington, DC 20044 and clearly labeled as a Freedom of Information Act Appeal".

(b) The General Counsel will act upon the appeal within 20 workdays of its receipt. The General Counsel may extend the 20 day period of time by any number of workdays which could have been claimed and consumed by the FOIA Officer or his or her designee under § 1631.8 but which were not claimed and consumed in making the initial determination. The Board's action on any appeal shall be in writing, signed by the General Counsel.

(c) If the decision is in favor of the person making the request, the General Counsel shall order records promptly made available to the person making the request.

(d) A denial in whole or in part of a request on appeal shall set forth the exemption relied on and a brief explanation of how the exemption applied to the records withheld and the reasons for asserting it, if different from that described by the FOIA Officer or his or her designee under § 1631.9. The denial shall state that the person making the request may, if dissatisfied with the decision on appeal, file a civil action in the district in which the person resides or has his principal place of business, in the district where the records are located, or in the District of Columbia.

(e) No personal appearance, oral argument or hearing will ordinarily be permitted in connection with an appeal to the Board.

(f) On appeal, the General Counsel may reduce any fees previously assessed.

§ 1631.11 Fees to be charged—categories of requesters.

(a) There are four categories of FOIA requesters: Commercial use requesters; representatives of news media; educational and noncommercial scientific institutions; and all other requesters. The time limits for processing requests shall only begin upon receipt of a proper request which reasonably identifies records being sought and which identifies the specific category of the requester. The Freedom of Information Reform Act of 1986 prescribes specific levels of fees for each of these categories:

(1) When records are being requested for commercial use, the fee policy of the Board is to levy full allowable direct cost of searching for, reviewing for release, and duplicating the records sought. Commercial users are not entitled to two hours of free search time, nor 100 free pages of reproduction of documents, nor waiver or reduction of fees, based on an assertion that disclosure would be in the public interest. The full allowable direct cost of searching for, and reviewing, records will be charged even if there is ultimately no disclosure of records. Commercial use is defined as a use that furthers the commercial trade or profit interests of the requester or person on whose behalf the request is made. In determining whether a requester falls within the commercial use category, the Board will look to the use to which a requester will put the documents requested. Where a requester does not explain his/her purpose, or where his/her purpose is insufficient, the Board shall require the requester to provide information regarding the use to be made of the information prior to accepting the request for processing. The time limits for processing and

response shall not begin until such information is adequately received.

(2) When records are being requested by representatives of the news media, the fee policy of the Board is to levy reproduction charges only, excluding charges for the first 100 pages. Representatives of the news media refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances where they can qualify as disseminators of news) who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. As traditional methods of news delivery evolve (e.g. electronic dissemination of newspapers through telecommunications services) such alternative media would be included in this category. In the case of "freelance" journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but the Board may also look to the past publication record of a requester in making this determination. To be eligible for inclusion in this category, a requester must meet the criteria specified in this section and his or her request must not be made for a commercial use basis as that term is defined under paragraph (a)(1) of this section.

(3) When records are being requested by an educational or noncommercial scientific institution whose purpose is scholarly or scientific research, the fee policy of the Board is to levy reproduction charges only, excluding charges for the first 100 pages. The term "educational institution" refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education and an institution of vocational education, which operates a program or programs of scholarly research. The term "noncommercial scientific institution" refers to an institution that is not operated on a commercial basis as that term is defined under paragraph (a)(1) of this section and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. To be eligible for inclusion in this category, a requester must show that the request is being made under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a noncommercial scientific institution) research.

(4) For any other request which does not meet the criteria contained in paragraphs (a)(1) through (3) of this section, the fee policy of the Board is to levy full reasonable direct cost of searching for and duplicating the records sought, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without charge. The first two hours of computer search time is based on the hourly cost of operating the central processing unit and the operator's hourly salary plus 16 percent. When the cost of the computer search, including the operator time and the cost of operating the computer to process the request, equals the equivalent dollar amount of two hours of the salary of the person performing the search, i.e., the operator, the Board shall begin assessing charges for computer search. Requests from individuals requesting records about themselves filed in the Board's systems of records shall continue to be treated under the provisions of the Privacy Act of 1974, which permit fees only for reproduction.

(b) Except for requests that are for a commercial use, the Board may not charge for the first two hours of search time or for the first 100 pages of reproduction. However, a requestor may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When the Board believes that a requester or, on rare occasions, a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the Board may aggregate any such requests and charge accordingly. For example, it would be reasonable to presume that multiple requests of this type made within a 30-day period had been made to avoid fees. For requests made over a longer period, however, the Board must have a solid basis for determining that aggregation is warranted in such cases. Before aggregating requests from more than one requester, the Board must have a concrete basis on which to conclude that the requesters are acting in concert and are acting specifically to avoid payment of fees. In no case may the Board aggregate multiple requests on unrelated subjects from one requester.

(c) In accordance with the prohibition of section (4)(A)(iv) of the Freedom of Information Act, as amended, the Board shall not charge fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself.

(1) For commerical use requesters, if the direct cost of searching for, reviewing for release, and duplicating the records sought would not exceed $30.00, the Board shall not charge the requester any costs.

(2) For requests from representatives of news media or educational and noncommercial scientific institutions, excluding the first 100 pages which are provided at no charge, if the duplication cost would not exceed $30.00, the Board shall not charge the requester any costs.

(3) For all other requests not falling within the category of commercial use requests, representatives of news media, or educational and noncommercial scientific institutions, if the direct cost of searching for and duplicating the records sought, excluding the first two hours of search time and first 100 pages which are free of charge, would not exceed $30.00, the Board shall not charge the requester any costs.

§ 1631.12 Waiver or reduction of fees.

(a) The Board may waive all fees or levy a reduced fee when disclosure of the information requested is deemed to be in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Federal Government and is not primarily in the commercial interest of the requester.

(b) A fee waiver request shall indicate how the information will be used, to whom it will be provided, whether the requester intends to use the information for resale at a fee above actual cost, any personal or commercial benefits that the requester reasonably expects to receive by the disclosure, provide justification to support how release would benefit the general public, the requester's and/or intended user's identity and qualifications, expertise in the subject area and ability and intention to disseminate the information to the public.

§ 1631.13 Prepayment of fees over $250.

(a) When the Board estimates or determines that allowable charges that a requester may be required to pay are likely to exceed $250.00, the Board may require a requester to make an advance payment of the entire fee before continuing to process the request.

(b) When a requester has previously failed to pay a fee charged in a timely fashion (i.e., within 30 days of the date of the billing, the Board may require the requester to pay the full amount owed plus any applicable interest as provided in § 1631.14(d), and to make an advance payment of the full amount of the estimated fee before the agency begins to process a new request or a pending request from that requester.

(c) When the Board acts under paragraph (a) or (b) of this section, the administrative time limits prescribed in subsection (a)(6) of the FOIA (i.e., 10 working days from the receipt of initial requests and 20 working days from receipt of appeals from initial denial, plus permissible extensions of these time limits) will begin only after the Board has received fee payments under paragraph (a) or (b) of this section.

§ 1631.14 Fee schedule.

(a) *Manual Searches for Records.* The Board will charge at the salary rate(s) (basic pay plus 16 percent) of the employee(s) conducting the search. The Board may assess charges for time spent searching, even if the Board fails to locate the records or if records located are determined to be exempt from disclosure. The Board may assess charges for time spent searching, even if the Board fails to locate the records or if records located are determined to be exempt from disclosure.

(b) *Computer Searches for Records.* The Board will charge the actual direct cost of providing the service. This will include the cost of operating the central processing unit (CPU) for that portion of operating time that is directly attributable to searching for records responsive to a FOIA request and operator/programmer salary apportionable to the search. The Board may assess charges for time spent searching, even if the Board fails to locate the records or if records located are determined to be exempt from disclosure.

(c) *Duplication Costs.* (1) For copies of documents reproduced on a standard office copying machine in sizes up to 8½ x 14 inches, the charge will be $.15 per page.

(2) The fee for reproducing copies of records over 8½ x 14 inches, or whose physical characteristics do not permit reproduction by routine electrostatic copying, shall be the direct cost of reproducing the records through Government or commerical sources. If the Board estimates that the allowable duplication charges are likely to exceed $25, it shall notify the requester of the estimated amount of fees, unless the requester had indicated in advance his/her willingness to pay fees as those anticipated. Such a notice shall offer a requester the opportunity to confer with agency personnel with the objective of reformulating the request to meet his/her needs at a lower cost.

(3) For copies prepared by computer, such as tapes or printouts, the Board shall charge the actual cost, including operator time, of production of the tape or printout. If the Board estimates that the allowable duplication charges are likely to exceed $25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his/her willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with agency personnel with the objective of reformulating the request to meet his/her needs at a lower cost.

(4) For other methods of reproduction or duplication, the Board shall charge the actual direct costs of producing the document(s). If the Board estimates that the allowable duplication charges are likely to exceed $25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his/her willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with agency personnel with the objective of reformulating the request to meet his/her needs at a lower cost.

(d) Interest may be charged to those requesters who fail to pay fees charged. The Board may begin assessing interest charges on the amount billed starting on the 31st day following the day on which the billing was sent. Interest will be at the rate prescribed in section 3717 of Title 31 of the United States Code, and it will accrue from the date of the billing.

(e) The Board shall use the most efficient and least costly methods to comply with requests for documents made under the FOIA. The Board may choose to contract with private sector services to locate, reproduce and disseminate records in response to FOIA requests when that is the most efficient and least costly method. When documents responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs, such as, but not limited to, the Government Printing Office or the National Technical Information Service, the Board will inform requesters of the steps necessary to obtain records from those sources.

§ 1631.15 Information to be disclosed.

(a) In general, all records of the Board are available to the public, as required by the Freedom of Information Act. However, the Baord claims the right, where it is applicable, to withhold material under the provisions specified in the Freedom of Information Act as amended (5 U.S.C. 552(b)).

(b) *Records from Non-U.S. Government Source.* (1) Upon receipt of a request for a record that was obtained from a non-U.S. Government source, or for a record containing information clearly identified as having been provided by a non-U.S. Government source, including a contract proposal or contract material, the Board will contact the source of the requested record or information requesting advice as to whether the release of the record would adversely affect the source's competitive position or invade anyone's privacy. Subsequent to receipt of such advice, the Board will independently examine the requested document and will notify the requester of the final decision.

(2) Board personnel will generally consider two exemptions in the FOIA in deciding whether to withhold from disclosure material from a non-U.S. Government source. Exemption 4 permits withholding of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Exemption 6 permits withholding certain information, the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy." The source whose material has been requested will be asked to supply convincing justification for any material it wishes withheld under the Act, in accordance with the following general guidelines.

(i) For consideration under exemption 4, the supplier of the record or information should identify material that would be likely to cause substantial harm to its present or future competitive position if it were released. If a contractor, the provider should assume that the material will be released to a competitor, even if that is not always the case. A contractor must provide detailed information on why release would be harmful, e.g., the general custom or usage in the business; the number and situation of the persons who have access to the information; the type and degree of risk of financial injury that release would cause; and the length of time the information will need to be kept confidential.

(A) In this respect, the Board will, as a general rule, look favorably upon recommendations for withholding information about ideas, methods, and processes that are unique; about equipment, materials, or systems that are potentially patentable; or about a unique use of equipment which is specifically outlined.

(B) The Board will not withhold information that is known through custom or usage in the relevant trade, business, or profession, or information that is generally known to any reasonably educated person. Self-evident statements or reviews of the general state of the art will not ordinarily be withheld.

(C) The Board will withhold all cost data submitted except the total estimated costs from each year of the contract. It will release these total estimated costs and ordinarily release explanatory material and headings associated with the cost data, withholding only the figure themselves. If a contractor believes some of the explanatory material should be withheld, that material must be identified and a justification be presented as to why it should not be released.

(ii) Exemption 6 is not a blanket exemption for all personal information. The Board will balance the need to keep a person's private affairs from unnecessary public scrutiny with protection to the public's right to information on Government records.

(A) As a general practice, the Board will release information about any person named in a contract itself or about any person who signed a contract as well as information given in a proposal about any officer of a corporation submitting that proposal. Except for names and other identifying details, the Board usually releases all information in resumes concerning employees, including education and experience. Efforts will be made to identify information that should be deleted and offerors are urged to point out such material for guidance. Any information in the proposal which might constitute an unwarranted invasion of personal privacy if released should be identified and a justification for non-release provided in order to receive proper identification.

(B) The Board can protect the names of, and identifying details about, other staff members who are described in a contract proposal if it is clear that identification of these employees would assist competitors in raiding and hiring them away. In this regard, names and other identifying details could be protected under Exemption 4 (harmful to competitive position) and also under Exemption 6 (it would be an unwarranted invasion of personal privacy to release them). In such a case, the Board would withhold names, home addresses, salaries, telephone numbers, social security numbers, marital status and, if these served to identify them, perhaps some details about past employment or professional activities of these persons.

§ 1631.16 Exemptions.

(a) 5 U.S.C. 522 exempts from all of its publication and disclosure requirements nine categories of records which are described in 552(b). These categories include such matters as national defense and foreign policy information, investigatory files, internal procedures and communications, materials exempted from disclosure by other statutes, information given in confidence and matters involving personal privacy.

(b) The records of the Board which are part of a system of records subject to the Privacy Act of 1974 are exempt from disclosure to the public except as provided by 5 CFR Part 1610.

§ 1631.17 Deletion of exempted information.

Where material records contain matters which are exempted under 5 U.S.C. 552(b) but which matters are reasonably segregable from the remainder of the records, they shall be disclosed by the Board with deletions. To each such record, the Board shall attach a written justification for making deletions. A single such justification shall suffice for deletions made in a group of similar or related records.

§ 1631.18 Annual report.

The Freedom of Information Officer shall annually on or before March 1, submit a Freedom of Information report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate. The report shall include those matters required by 5 U.S.C. 552(d).

Subpart B—Production in Response or Subpoenas or Demands of Courts or Other Authorities

§ 1631.30 Purpose and scope.

This subpart contains the regulations of the Board concerning procedures to be followed when a subpoena, order, or other demand (hereinafter in this subpart referred to as a "demand") of a court or other authority is issued for the production or disclosure of:

(a) Any material contained in the files of the Board;

(b) Any information relating to materials contained in the files of the Board; or

(c) Any information or material acquired by an employee of the Board as a part of the performance of his or her official duties or because of his or her official status.

§ 1631.31 Production prohibited unless approved by the Executive Director.

No employee or former employee of the Board shall, in response to a demand of a court or other authority, produce any material contained in the files of the Board or disclose any information or produce any material acquired as part of the performance of his or her official status without the prior approval of the Executive Director or his or her designee.

§ 1631.32 Procedure in the event of a demand for disclosure.

(a) Whenever a demand is made upon an employee or former employee of the Board for the production of material or the disclosure of information described in § 1631.31, he or she shall immediately notify the Executive Director or his or her designee. If possible, the Executive Director or his or her designee shall be notified before the employee or former employee concerned replies to or appears before the court or other authority.

(b) If response to the demand is required before instructions from the Executive Director or his or her designee are received, an attorney designated for that purpose by the Board shall appear with the employee or former employee upon whom the demand has been made, and shall furnish the court or other authority with a copy of the regulations contained in this part and inform the court or other authority that the demand has been or is being, as the case may be, referred for prompt consideration by the Executive Director or his or her designee. The court or other authority shall be requested respectfully to stay the demand pending receipt of the requested instructions from the Executive Director.

§ 1631.33 Procedure in the event of an adverse ruling.

If the court or other authority declines to stay the effect of the demand in response to an request made in accordance with § 1631.32(b) pending receipt of instructions from the Executive Director, or his or her designee, or if the court or other authority rules that the demand must be complied with irrespective of the instructions from the Executive Director not to produce the material or disclose the information sought, the employee or former employee upon whom the demand has been made shall respectfuly decline to comply with the demand.

(United States ex. rel. Touhy v. Ragen, 340 U.S. 462 (1951)).

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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 250 and 251

Donation of Foods for Use in the United States, Its Territories and Possessions and Areas Under Its Jurisdiction; Temporary Emergency Food Assistance Program for FY 1986 and 1987

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends the regulations governing the Temporary Emergency Food Assistance Program (7 CFR Part 251). This amendment will implement the discretionary provisions of Pub. L. 99-198 related to the transfer of section 32 commodities among eligible recipient agencies, the standards for commodity loss liability, and the procedures for determining each State's contribution toward meeting the required match of a portion of the Federal funds received under this program. Several technical revisions are also made to this part and to 7 CFR Part 250, Donation of Foods for Use in the United States, its Territories and Possessions and Areas under its Jurisdiction.

EFFECTIVE DATE: Provisions implementing the matching requirements contained in § 251.9 are effective October 1, 1987. All other provisions are effective April 1, 1987.

FOR FURTHER INFORMATION CONTACT: Susan Proden, Chief, Program Administration Branch, Food Distribution Division, Food and Nutrition Service, Park Office Center, Alexandria, Virginia 22302, Telephone (703) 756-3660.

SUPPLEMENTARY INFORMATION:

Classification

This action has been reviewed under Executive Order 12291 and has not been classified major because it does not meet any of the three criteria identified under the Executive Order. Compliance with the provisions in this rule will not have an annual effect on the economy of more than $100 million or more, nor will it cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions. This action will not have significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States based enterprises to compete with foreign based enterprises in domestic or export markets.

This action has been reviewed with regard to the Regulatory Flexibility Act (5 U.S.C. 601-612). S. Anna Kondratas, Acting Administrator of the Food and Nutrition Service (FNS), has certified that this action will not have a significant economic impact on a substantial number of small entities.

The effective dates of this rule are all set by statute. Section 1569(a) of Pub. L. 99-198 requires the matching requirements in § 251.9 of this rule to be effective October 1, 1987. The remaining provisions are subject to Section 1583 of Pub. L. 99-198 which mandates that the regulations implementing Title XV of Pub. L. 99-198 be issued no later than April 1, 1987. Since these provisions are necessary to implement Title XV Pub. L. 99-198, the rule (with the exception of the matching requirements) must be made effective not later than April 1, 1987. Thus, making all of the provisions except the matching requirements effective at least 30 days after publication is not required under 5 U.S.C. 553(d).

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 through 3520), additional recordkeeping and reporting requirements contained in §§ 250.4(a), 251.4(a), 251.4(j), 251.9(e), and 251.9(f) of this final rule are subject to review and approval by the Office of Management and Budget (OMB). Current reporting and recordkeeping requirements for Part 251 were approved by OMB under Control Number 0584-0313 and 0584-0341.

This program is listed in the Catalog of Federal Domestic Assistance under 10.568 and is subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. (7 CFR Part 3015, Subpart V and the final rule related notice published at 49 FR 22675, May 31, 1984).

Legislative Background

Title II, of Pub. L. 98-8 was designated as the Temporary Emergency Food Assistance Act of 1983 (7 U.S.C. 612c note), hereafter referred to as the "Act". It authorized the distribution of surplus agricultural commodities acquired through the Commodity Credit Corporation to various outlets for Fiscal Year 1983. It also authorized a $50 million appropriation for the cost of storage and distribution of commodities in that fiscal year. At least 20 percent of those funds was to be allocated by State agencies to emergency feeding organizations for costs incurred in providing commodities to needy households, including low-income and unemployed persons. The remaining funds could be used for States' storage and distribution costs.

The Act was subsequently amended, most recently by Pub. L. 99-198, the Food Security Act of 1985. Public Law 99-198 made a number of significant changes to the Act, foremost of which was the extension of the Temporary Emergency Food Assistance Program (TEFAP) through September 30, 1987.

Regulatory Background

Interim regulations governing the TEFAP were published on December 16, 1983, (48 FR 55988-55993). The Department published proposed amendments to the interim rule on July 2, 1984, (49 FR 27159-27160) which were designed to strengthen the accountability and monitoring requirements of Part 251. A 60-day comment period was provided for the interim as well as for the proposed rule.

In order to finalize the provisions of both the interim and proposed rule and implement the nondiscretionary provisions of Pub. L. 99-198, the Department published a final rule on April 16, 1986, (51 FR 12819). The final rule set forth the TEFAP regulations in their entirety.

A proposed rule to address the discretionary provisions of Pub. L. 99-198 was published on July 15, 1986 (51 FR 25534-25539). Specifically, the proposed rule outlined procedures for effecting section 32 transfers among recipient agencies, dealing with commodity losses incurred by emergency feeding organizations, determining the amount of funding to be provided to emergency feeding organizations and identifying and monitoring a State's contribution toward the newly required match of a portion of Federal funds received.

Analysis of Comments

Thirty days were afforded the general public for comment on the July 15, 1986, proposed rule. A total of 53 comment letters was received. Comment letters were received from various sources such as State agencies, emergency feeding organizations, members of Congress and public interest groups.

Transfer of Section 32 Commodities

Section 1564(a) of Pub. L. 99-198 authorized the Secretary to use donated commodities made available under section 32 of Pub. L. 74–320 (7 U.S.C. 612c) in the TEFAP. In addition, section 1561 of Pub. L. 99–198 amended section 32 to allow a public or private nonprofit organization that receives agricultural commodities under section 32 to transfer those commodities to another public or private nonprofit organization that agrees to use such commodities to provide, without cost or waste, nutrition assistance to individuals in low-income groups.

The proposed rule added a new paragraph (g) to § 251.4 which would allow emergency feeding organizations to transfer section 32 commodities to other emergency feeding organizations or to recipient agencies governed by 7 CFR Part 250. Consistent with provisions for commodity transfers among recipient agencies Part 250, such transfers could not be made without prior approval of the applicable State and/or distributing agency. In recognition of the fact that emergency feeding organizations are governed under Part 251 and recipient agencies are governed under Part 250, the proposed rule required that transfers between emergency feeding organizations and recipient agencies be documented on the form FNS–155, Receipt and Distribution of Donated Commodities. Corresponding changes were made to Part 250 to allow recipient agencies to transfer section 32 commodities to emergency feeding organizations under Part 251. As under Part 251, such transfers could not be effected without State/distributing agency approval. Further, cross-program transfers would have to be documented on the form FNS–155.

The proposed rule also moved the prohibition on the sale or other disposal of commodities in commercial channels from § 251.9 to proposed paragraph (g).

Thirteen comments were received concerning the transfer of section 32 commodities. Three of the commenters expressed concern about documenting cross program transfers of section 32 commodities on the form FNS–155 report since the current form does not lend itself to reporting donated foods in the possession of individual recipient agencies. Two commenters expressed concern relative to whether or not the distributing agency has final approval authority for the transfer of section 32 commodities which have been provided as a part of a State's authorized level of assistance since this is inconsistent with the proposed revision to the Food Distribution Program Regulations, Part 250.

While transfers of section 32 commodities could be documented and submitted as an attachment to the form FNS–155, upon reconsideration the Department has determined that documentation of transfers in any manner that provides an audit trail is sufficient. Thus, § 251.4(g) of this final rule has been revised to require that the transfer of section 32 commodities between emergency feeding organizataions and recipient agencies must be documented by the State/distributing agency and the documentation maintained in accordance with the recordkeeping requirements in § 251.10(a) and 250.6(r). Documentation of transfers will be subject to review during the management evaluation review. Corresponding changes have also been made to § 250.4.

The Department did not intend for the transfer procedures effectuating transfers under Part 251 to be inconsistent with the proposed Part 250 provisions. When the proposed change to Part 250 is made final, corresponding changes will be made to Part 251 if necessary.

Two commenters recommended that the rule clarify what commodities can be transferred from recipient agencies to emergency feeding organizations. Pub. L. 99–198 and the proposed rule limit the transfer of donated foods between emergency feeding organizations and recipient agencies to those which have been made available under section 32 of Pub. L. 74–320. The types of commodities made available under section 32 include meat, poultry, vegetables and fruits. The availability of section 32 commodities will vary depending on market conditions. In the event the distributing agency or TEFAP State agency is unable to determine if a particular food item was made available under section 32, the FNS Regional Office should be contacted for verification.

A few commenters raised concerns that such transfers could cause displacement of commercial food purchases and that the amounts which will be available for transfer will probably not be sufficient for a statewide distribution. The Department agrees that in most instances the amount of section 32 donated foods which will be available for transfer will not be sufficient for a statewide distribution to needy households and/or recipient agencies. However, the Department is confident that the distributing/State agencies will be able to provide for the equitable distribution of any section 32 commodities which become available for transfer. Furthermore, since the transfer of section 32 commodities is specifically authorized by Pub. L. 99–198, the Department does not have the discretionary authority to prohibit such transfers. With regard to the possibility of such transfers resulting in displacement of commercial sales, distributing/State agencies are currently required by §§ 250.6(1) and 251.4(b) to ensure that the distribution of donated food under Parts 250 and 251 does not diminish the normal expenditures for food by recipients and recipient agencies. These provisions apply to the use of transferred section 32 commodities as well. In addition, the Department is of the opinion that the quantities which will be made available by recipient agencies for transfer to emergency feeding organizations will not be significant enough to have a significant impact on commercial sales.

As stated in the proposed rule, the Department strongly encourages State and distributing agencies to consider factors such as the packaging size of the donated foods to be transferred and the transferee's method of distribution in an effort to avoid situations which pose potential health hazards.

One commenter asked if emergency feeding organizations can submit a claim for reimbursement for costs associated with the distribution of section 32 donated foods. Reimbursements for the costs of storage and distribution are allowable in accordance with § 251.8(d).

Standards for Commodity Losses Liability

Section 1570 of Pub. L. 99–198 requires the Secretary to "set standards with respect to liability for commodity losses * * * in situations in which there is no evidence of negligence or fraud, and conditions for payment to cover such losses". Further, the law requires that the special needs and circumstances of emergency feeding organizations be taken into consideration.

In order to implement this provision, a new paragraph (j) was added to § 251.4 of the proposed rule. Paragraph (j) outlined USDA policies for recovering commodity losses, taking into consideration the special needs and circumstances of emergency feeding organizations where no evidence of fraud or negligence exists.

Twenty-eight comment letters were received. Sixteen commenters opposed the provisions as outlined in paragraph (j) for various reasons. Five of the commenters oppose the claim provisions on the basis that emergency feeding organizations are supported through volunteer efforts and thus should not be held liable for losses. Three commenters recommended that a threshold, such as five percent, be established below which no claims action will be required.

In requiring that the special needs and circumstances of emergency feeding organizations must be taken into account, the statute did not provide that all claims of these organizations should be disregarded. In fact, the law provided that a limit on loss liability be set only when there is no evidence of fraud or negligence.

It is the opinion of the Department that the provisions contained in paragraph (j) of the proposed rule provide sufficient State agency discretion while ensuring that the integrity of the program is maintained. Therefore, the final rule retains the proposed requirement that in making final claim determinations for commodity losses incurred when there is no evidence of fraud or negligence, State agencies (and FNS Regional Offices when reviewing claim determinations) must consider the special needs and circumstances of the emergency feeding organization and make appropriate adjustments. With regard to the establishment of a threshold below which no claims action will be required, State agencies are not required to make claim determinations when the value of the lost commodities is $100 or less, unless there is evidence of fraud or a violation of Federal, State or local criminal law or when program operations would be adversely affected. However, in an effort to provide additional information on specific procedures for handling claims, paragraph (j) of the final rule has been revised to reference FNS Instruction 410–1, *Non Audit Claims—Food Distribution*. This instruction provides more specific information about claims collection and outlines the procedures which need to be followed in pursuing claims.

Paragraph (j) of the proposed rule also included clarification of an FNS policy relative to the use of funds derived from a claim due to the loss of foods. FNS policy requires that such funds be returned to the Department. One commenter objected to the requirement that funds derived from a claim due to the loss of TEFAP foods must be returned to the Department rather than being retained at the State or local level for replacement of the commodities or other program use. The Department believes that returning funds derived from claims to the Department is necessary to discourage improper use of commodities and to maintain program integrity. As discussed above, special needs of the EFOs will already have been taken into account in assessing a claim.

However, given the nature of this program, the Department may, in instances in which it has been determined by the Department that the collection of funds will have a significant adverse effect on the operation of the program, permit in-kind replacement of the foods in lieu of the requirement that payment be made to FNS. Repayment in kind can only be permitted under such terms and conditions as agreed to by the Secretary. Section 251.4(j) has been revised to incorporate the repayment in kind language.

Funding for Distribution of Commodities

In extending the Act through Fiscal Year 1987, Pub. L. 99–198 omitted a statutory requirement that funds given to emergency feeding organizations for payment of storage and distribution costs not exceed 5 percent of the value of commodities distributed by these organizations. This restriction was placed on all previous fiscal year's funding for section 204(b) of the Act. In discussing the deletion of the 5 percent restriction from Part 251 in the preamble of the final rule published on April 16, 1986, 51 FR 12819, the Department indicated that the issue would be further addressed in the proposed rulemaking. In § 251.8 of the proposed rule, the Department proposed to reestablish the 5 percent maximum.

Twenty seven comments were received concerning the 5 percent restriction. Twenty-five of the commenters opposed the provision. The majority of the commenters opposed the provision on the basis that: (1) States should have the flexibility to allocate funds based on their analysis of the activities of the emergency feeding organization; and (2) the 5 percent restriction will have an adverse effect on distribution in rural areas which is contradictory to the intent of the legislation.

While the Department agrees that States should have flexibility in allocating funds, the Department is also concerned that funds are allocated in a fair and equitable manner. In an effort to provide State agencies with flexibility, § 251.8 has been revised to eliminate the 5 percent restriction. However, to ensure that the State agency's allocation formula provides for the most effective use of the funds (e.g. funds are allocated based on the amount of food distributed), § 251.6 has been revised to require that State agencies describe the formula for allocating funds to emergency feeding organizations in the Distribution Plan submitted for approval by the FNS Regional Office. The Department plans to monitor States' allocation methods. If it appears that State procedures do not provide the appropriate degree of equity, we will reconsider the use of a mandated distribution formula.

State Matching Requirements

Section 1569(a) of Pub. L. 99–198 requires each State to match, in cash or in-kind, each Federal dollar retained by the State and used solely for State-level activities. Funds retained by the State to pay for the direct expenses of local distribution are excluded from the matching requirements. While funds may be allocated to the State before the matching requirements are satisfied, FNS is required to adjust the funding allocation to correct for overpayments and underpayments.

Paragraph (a) of § 251.9 of the proposed rule required that effective January 1, 1987, States would have to provide in cash or in-kind, a contribution equal to the difference between (1) the amount of funds received under § 251.8 and (2) any part of the amount allocated to the State and paid by the State to emergency feeding organizations or for the storage and distribution costs of such organizations.

Paragraph (b) reflected the provision in Pub. L. 99–198 which allows those States in which the legislature does not convene in regular session before January 1, 1987 to delay implementation until October 1, 1987. The preamble of the proposed rule (51 FR 25536) emphasized that this meant the match requirements would not be effective until October 1, 1987, in those States in which the legislature does not convene in regular session during the period between the effective date of the final rule (which would establish the Secretary's standards for in-kind contributions as required by section 1569(a) of Pub. L. 99–198) and January 1, 1987. Another exception recognized the provisions of 48 U.S.C. 1469a(d) which exempts American Samoa, Guam, the Virgin Islands and the Northern Mariana Islands from matching requirements (including in-kind contributions) if their respective matching requirements are under $200,000. To date American Samoa and Guam have not participated in TEFAP, however, the Department set forth the exception to prevent confusion if, at some later date, American Samoa or Guam should wish to participate.

In accordance with section 1569(a) of Pub. L. 99–198, paragraph (c) specified that a State's contribution toward the matching requirement would have to be through cash or in-kind contributions from non-Federal sources. In order for an in-kind contribution to be considered toward the matching requirements, it must meet the requirements set forth in 7 CFR Part 3015, Subpart G.

Thirty-five comments were received concerning the State matching requirements contained in § 251.9 of the proposed rule. Twenty-five of the commenters requested clarification concerning what in-kind and cash contributions can be counted toward meeting the matching requirement. Ten commenters recommended that the requirement be deleted.

As stated above, Pub. L. 99–198 requires each State to match, in cash or in-kind, each Federal dollar retained by the State and used solely for State level activities. Since the requirement is mandated by legislation, the Department does not have the authority to waive the matching requirement. Thus, paragraph (a) of the proposed rule has been retained in this final rule.

A few comments were received concerning the October 1, 1987, implementation date of the matching requirements for those States in which the legislature does not convene in regular session during the period between the effective date of the final rule and January 1, 1987. Since this rule is being published after January 1, the effective date of the matching requirements is October 1, 1987 for all States. Thus, § 251.9(b) of the final rule has been revised to eliminate the language relative to implementation dates. The October 1, 1987 implementation date for matching requirements is now contained at the beginning of § 251.9(a) and under the "Effective Dates" Section of this rule.

As pointed out by the commenters, the TEFAP legislative authority will expire on September 30, 1987. Even though the legislative authority for program operations will expire prior to the October 1, 1987, effective date, the Department encourages State to take the necessary action to implement the matching requirements since the Congress may extend the program.

With regard to what cash and in-kind contributions can be counted toward meeting the matching requirement, paragraph (c) of § 251.9 of the final rule has been revised to: (1) Include language which identifies allowable "cash contributions" as any cash outlay of the State agency specifically identifiable as State-level storage and distribution costs, including the outlay of money contributed to the State agency by other public agencies and institutions, and private organizations and individuals. Examples of cash contributions have also been included. Such examples include, but are not limited to, the purchase of office supplies, storage space, transportation, loading facilities and equipment, employees' salaries, and other goods and services for which there has been a cash outlay by the State agency; and (2) include language which identifies "in-kind contributions" as charges, which are non-cash outlays, for real property and non-expendable personal property and the value of goods and services specifically identifiable with State-level storage and distribution costs. Examples of in-kind contributions have also been added. Such examples may include, but are not limited to, the donation of office supplies, storage space, vehicles to transport the commodities, loading facilities and equipment such as pallets and forklifts, and other non-cash goods and services provided by the State agency. In accordance with 7 CFR 3015.52(a), the matching requirement shall not be met by costs supported by another Federal grant, except as provided by Federal statute.

These final regulations also clarify the extent to which EFO and/or other third party activities and expenditures count toward meeting the matching requirements. Cash donations by non-federal third parties and the value of third party in-kind goods and services are expressly permitted by 7 CFR 3015.51. The Department did not intend to modify this provision in these regulations.

However, the Department wishes to provide further clarification on the permissible source of contributions in the context of the TEFAP. 7 CFR 3015.51 limits matching contributions to allowable costs. In the case of the TEFAP, the only portion of the grant which must be matched is the amount of the grant retained at the State level and used for State-level storage and distribution costs. Therefore, the costs incurred by EFOs for local-level distribution and the value of volunteer services at the EFO level are not allowable costs with respect to this portion of the grant, and cannot be used to meet the matching requirement. On the other hand, if an EFO or other third party makes a cash or in-kind contribution to the State agency which is used by the State agency for State-level storage and distribution costs, the contribution may used to meet the match. For example, should an EFO offer the services of one of its employees to assist the State in its administration of the program, the employee's salary, for the period of time that the employee is working for the State, even though paid by the EFO, can be counted toward meeting the matching requirement.

Section 251.9(e) requires that the estimated amount of Federal funds to be retained at the State level for State level activities, the estimated dollar value of the State's contribution, and, if applicable, a description and valuation of in-kind contributions to be applied to the State's required match be identified in the State's Distribution Plan. Therefore, State-level activities for which State, EFO or other third party contributions may count toward meeting the match requirement will have already been identified in the State's Distribution Plan.

In addition, to permit States to count the value of services and expenditures for local-level storage and distribution to meet the matching requirement is contrary to the legislation. The statute expressly prohibits the States from passing on the cost of the matching requirement to any emergency feeding organization and requires the *States* to contribute the matching amount. Section 251.9(c) of the final rule has been issued to reinforce this application of 7 CFR 3015.51 to the TEFAP matching requirements.

The Department wishes to draw attention to the regulations concerning valuation of in-kind contributions found at 7 CFR 3015.53 through 3015.56. In general, the value of donated property is the fair market value or the cost of the property to the supplier, whichever is less.

Section 251.9(a) has also been revised to clarify that those funds which are retained by the State to pay for the direct storage and distribution costs of emergency feeding organizations are excluded from the matching requirement.

As required by section 1569(c) of Pub. L. 99–198, Paragraph (c) of § 251.9 of the proposed rule also prohibited State agencies from passing on the cost of the matching requirement to emergency feeding organizations. However, the proposed rule permitted the State to assess charges equal to its direct costs of storing and transporting the commodities less any amount the Secretary provides to the State for this purpose as specifically permitted in section 208 of the Act and 7 CFR 250.6(j)(2). The proposed rule did prohibit the State from counting the assessment fees toward the matching requirement.

Twenty-one comments were received concerning this provision. Twenty of the commenters objected to State agencies being permitted to assess charges against emergency feeding organizations for reasons such as: (1) It was the intent of Congress in section 1569(c)(5) of Pub. L. 99–198 to prohibit such charges; and

(2) it is not possible for EPO's to pay such fees.

Section 208 of the 1983 Temporary Emergency Food Assistance Act authorizes State agencies to assess charges to cover costs incurred by the States. However, section 1569 of the 1985 Act prohibits State agencies from assessing any fees. After reevaluating the legislation, including the statutory prohibition against charging for commodities, and reviewing comments on this provision, paragraph (d) of § 251.9 of the final rule has been revised to prohibit State agencies from assessing any charges for foods made available under TEFAP.

Paragraphs (d) and (e) of § 251.9 of the proposed rule outlined the Department's proposed implementation of the matching requirement. Under paragraph (d), the Department proposed to required State agencies to submit, as part of the Distribution Plan currently required in § 251.6 a plan, for FNS approval, which identifies the estimated amount of Federal funds to be retained at the State level for State level activities, the estimated dollar value of the State's contribution and, if applicable, a description and valuation of the in-kind contribution to be applied to the State's required match. The proposed rule also amended § 251.6 of the current TEFAP regulations to reflect these additional requirements. Submission of the expanded distribution plan would continue to be required no later than October 1 of each fiscal year. Paragraph (e) of the proposed rule required State agencies to identify the State's contribution toward the matching requirements on the SF-269, Financial Status Report.

Three comments were received concerning submission of the TEFAP Distribution Plan. Two commenters supported the provisions contained in paragraph (d) of the proposed rule. One commenter expressed concern about the October 1 date for submission since it does not appear that it will coincide with the effective date of the final rule. Submission of a revised Distribution Plan is no longer an issue since the matching requirements will not be effective until October 1, 1987.

With regard to paragraph (e) of the proposed rule, one commenter expressed concern about how in-kind contributions are to be reported on the SF-269, Financial Status Report. Guidance material for use in preparing the SF-269 report is being developed and will be provided to all State agencies.

Section 251.9(f) of the proposed rule provided that a State's failure to meet the required match would result in the suspension or disallowance of the appropriate portion of the States' allocation. The Department received no comments concerning the provisions contained in paragraph (f) of the proposed rule. This paragraph is being adopted as proposed as paragraph (g) of § 251.9 in the final rule.

Agreements

In an effort to clarify § 251.2(c) with regard to the frequency of written agreements, the proposed rule specifically required State agencies to enter into written agreements with EFO's which receive Federal funds of not more than one year's duration and which expire by September 30 of each year.

Six comments were received concerning the annual written agreement provision. Three of the commenters expressed concern relative to the agreement period. The commenters recommended that the agreement period should be determined by the State agency. As mentioned in the preamble of the proposed rule, until funds are appropriated to the Department, the Department is without authority to obligate funds to State agencies, and through the State agencies to the EFO's. Therefore, it is necessary to require State agencies to enter into agreements with EFO's which coincide with the Federal fiscal year. However, in an effort to limit the administrative burden on the State agencies and EFO's, § 251.2(c) of the final rule has been revised to permit State agencies to make up to two one-year renewals of EFO agreements.

All initial agreements and renewals must still be limited to one Federal fiscal year. At the time of renewal, instead of completing the entire initial application process, the EFO may limit its submission to any information which has changed from the initial application and updated caseload information. The renewals are limited to two so as to ensure that the State agency has current information on these EFO's. These restrictions on agreements and renewals apply only to EFO's which receive Federal funds.

List of Subjects

7 CFR Part 250

Aged, Agricultural commodities, Business and industry, Food assistance programs, Food donations, Food processing, Grant programs-social programs, Infants and children, Price support programs, Reporting and recordkeeping requirements, School breakfast and lunch programs, Surplus agricultural commodities.

7 CFR Part 251

Aged, Agricultural commodities, Business and industry, Food assistance programs, Food donations, Grant programs-social programs, Indians, Infants and children, Price support programs, Reporting and recordkeeping requirements, School breakfast and lunch programs, Surplus agricultural commodities.

Accordingly, 7 CFR Part 250 and 7 CFR Part 251 are amended as follows:

PART 250—DONATIONS OF FOOD FOR USE IN THE UNITED STATES, ITS TERRITORIES AND POSSESSIONS AND AREAS UNDER ITS JURISDICTION

1. The authority citation for Part 250 is revised to read as follows:

Authority: Sec. 32, Pub. L. 74-320, 49 Stat. 744 (7 U.S.C. 612c); Pub. L. 75-165, 50 Stat. 323 (15 U.S.C. 713c); secs. 6, 9, 60 Stat. 231, 233, Pub. L. 79-396 (42 U.S.C. 1755, 1758); sec. 416, Pub. L. 81-439, 63 Stat. 1058 (7 U.S.C. 1431); sec. 402, Pub. L. 91-665, 68 Stat. 843 (22 U.S.C. 1922); sec. 210, Pub. L. 84-540, 70 Stat. 202 (7 U.S.C. 1859); sec. 9, Pub. L. 985-931, 72 Stat. 1792 (7 U.S.C. 1431b); Pub. L. 86-756, 74 Stat. 899 (7 U.S.C. 1431 nt); sec. 709, Pub. L. 89-321, 79 Stat. 1212 (7 U.S.C. 1446a-1); sec. 3, Pub. L. 90-302, 82 Stat. 117 (42 U.S.C. 1761); secs. 409, 410, Pub. L. 93-288, 88 Stat. 157 (42 U.S.C. 5179, 5180); sec. 2, Pub. L. 93-326, 88 Stat. 286 (42 U.S.C. 1762a); sec. 16, Pub. L. 94-105, 89 Stat. 522 (42 U.S.C. 1766); sec. 1304a, Pub. L. 95-113, 91 Stat. 980 (7 U.S.C. 612c nt); sec. 311, Pub. L. 95-478, 92 Stat. 1533 (42 U.S.C. 3030a); sec. 10, Pub. L. 95-627, 92 Stat. 3623 (42 U.S.C. 1760); sec. 1561, Pub. L. 99-198, 99 Stat. 1589 (7 U.S.C. 612c); 5, U.S.C. 301, unless otherwise noted.

2. Section 250.4 paragraph (a) is revised to read as follows:

§ 250.4 Availability of donated foods.

(a) *Distribution and use of donated foods.* Commodities shall be available only for distribution and use in accordance with the provisions of this part, and with respect to distribution to households on or near an Indian reservation, of Part 253 of this chapter. Donated foods not so distributed or used (for any reasons) shall not be sold, exchanged or otherwise disposed of without the approval of the Department. However, donated foods may be transferred between recipient agencies with the authorization of the distributing agency if determined to be in the best interest of the distribution program. Food donated under section 32 of Pub. L. 74-320 (7 U.S.C. 612c) may also be transferred by recipient agencies to emergency feeding organizations which are distributing donated foods under 7 CFR Part 251. A transfer between recipient agencies and emergency feeding organizations may be made only with the prior approval of the distributing agency and the State agency responsible for administering TEFAP. Transfers of donated foods between emergency feeding organizations and recipient agencies shall be documented. Such documentation shall be maintained in accordance with §§ 250.6(r) and 251.10(a) by the distributing agency and the State agency responsible for administering TEFAP and made available for review upon request.

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PART 251—TEMPORARY EMERGENCY FOOD ASSISTANCE PROGRAM FOR FISCAL YEARS 1986 AND 1987

1. The authority citation for Part 251 continues to read as follows:

Authority: Pub. L. 98-8, as amended: 7 U.S.C. 612c note.

2. Section 251.2 paragraph (c) is revised to read as follows:

§ 251.2 Administration.

* * * * *

(c) Each State agency which has been designated to make distributions of donated foods to emergency feeding organizations and to receive payments for storage and distribution costs in accordance with § 251.8 of this part shall perform those functions pursuant to an agreement entered into with the Department. Such State agencies shall enter into a written agreement with eligible emergency feeding organizations. This agreement shall provide that emergency feeding organizations agree to operate the program in accordance with the requirements of this part, and, as applicable, 7 CFR Part 250. In any case in which an emergency feeding organization will be receiving Federal funds, the agreement shall be effective no longer than one year and shall expire no later than September 30 of each year. The agreement may be renewed at the option of both parties for two additional one-year periods. As part of the renewal process, the emergency feeding organization shall provide any information which has changed since the initial application and updated caseload information.

3. Section 251.4 is amended by redesignating paragraphs (g) and (h) as (h) and (i), respectively. New paragraphs (g) and (j) are added to read as follows:

§ 251.4 Availability of commodities.

* * * * *

(g) *Availability and control of donated commodities:* Donated commodities shall be made available to State agencies only for distribution and use in accordance with this part. Except as otherwise provided in § 251.4(f), donated commodities not so distributed or used for any reason shall not be sold, exchanged, or otherwise disposed of without the approval of the Department. However, donated commodities made available under section 32 of Pub. L. 74-320 (7 U.S.C. 612c) may be transferred by emergency feeding organizations, as defined in § 251.3, or recipient agencies, as defined in § 250.3, to any other emergency feeding organization or recipient agency which agrees to use such donated foods to provide without cost or waste, nutrition assistance to individuals in low-income groups. Such transfers shall be effected only with prior authorization of the State agency and, as applicable, the distributing agency. Transfers of any donated commodities between emergency feeding organizations and recipient agencies shall be documented. Such documentation shall be maintained in accordance with §§ 251.10(a) and 250.6(r) by the distributing agency and the State agency responsible for administering TEFAP and made available for review upon request.

* * * * *

(j) *Commodity losses.* (1) the State agency shall be responsible for the loss of commodities:

(i) When the loss arises from the State agency's improper distribution or use of any commodities or failure to provide proper storage, care, or handling; and

(ii) When the State agency fails to pursue claims arising in its favor, fails to provide for the rights to assert such claims, or fails to require its emergency feeding organizations to provide for such rights.

Except as provided in paragraph (j)(4) of this section, the State agency shall begin claims action immediately upon receipt of information concerning the improper distribution, loss of or damage to commodities, and shall make a claim determination within 30 days of the receipt of information, as described in further detail in FNS Instruction 410-1, *Non-Audit Claims—Food Distribution.* The funds received from the collection of claims shall be returned to FNS. In instances in which it has been determined by the Department that the collection of funds will have a significant adverse effect on the operation of the program, the Department may permit in-kind replacement of the donated foods in lieu of payment to FNS. Replacement in kind will only be permitted under such terms and conditions as agreed to by the Secretary.

(2) If the State agency itself causes the loss of commodities and the value exceeds $250, the State agency shall immediately transmit the claim determination to the FNS Regional Office, fully documented as to facts and findings. Except as provided in paragraph (j)(4) of this section, if the State agency itself causes the loss of commodities, and the value does not exceed $250, the State agency shall immediately return funds equal to the claim amount to FNS.

(3) If the State agency determines that a claim exists against an emergency feeding organization, warehouseman, carrier or any other entity and the value of the lost commodities exceeds $2500, the State agency shall immediately transmit the claim determination to the appropriate FNS Regional Office, fully documented as to facts and findings. If FNS determines from its review of the claim determination that a claim exists, the State agency shall make demand for restitution upon the entity liable immediately upon receipt of notice from the FNS Regional Office. Except as provided in paragraph (j)(4) of this section, if the State agency determines that a claim exists in favor of the State agency against an emergency feeding organization, warehouseman, carrier or any other entity and the value of the lost commodities does not exceed $2500, the State agency shall immediately proceed to collect the claim.

(4) No claim determination shall be required where the value of the lost commodities is $100 or less. However, no such claim shall be disregarded where:

(i) There is evidence of fraud or a violation of Federal, State or local criminal law; or

(ii) Program operations would be adversely affected.

(5) The State agency shall maintain records and substantiating documents, on all claims actions and adjustments including documentation of those cases in which no claim was asserted because of the minimal amount involved.

(6) In making final claim determinations for commodity losses incurred by emergency feeding organizations when there is no evidence of fraud or negligence, State agencies and FNS Regional Offices, as applicable, shall consider the special needs and circumstances of the emergency feeding organizations, and adjust the claim and/or conditions for claim collection as appropriate. These special needs and circumstances include but are not limited to the emergency feeding organization's use of volunteers and limited financial resources and the

effect of the claim on the organization's ability to meet the food needs of low-income populations.

4. Section 251.6, paragraph (a) is revised to read as follows:

§ 251.6 Distribution plan.

(a) *Contents of the plan.* The State agency shall submit for approval by the appropriate FNS Regional Office a plan which contains:

(1) A description of the criteria established in accordance with § 251.5(b) for determining that applicant households are in need of food assistance under this part;

(2) The rates for distributing commodities to households in accordance with § 251.4(d)(3);

(3) A description of the program monitoring system including a detailed explanation of any factors which may contribute to the State requesting approval of exceptions to conducting the minimum number of reviews required by § 251.10(e);

(4) A description of the State's formula for allocating funds to emergency feeding organizations; and

(5) A description of the State's contribution toward the matching requirements as described under § 251.9(e)

* * * * *

§ 251.9 [Redesignated as § 251.10]

§ 251.10 [Amended]

5. Section 251.9 is redesignated as § 251.10. Paragraph (d) of newly redesignated § 251.10 is removed and paragraphs (e), (f), and (g) are redesignated (d), (e), and (f) respectively.

6. New § 251.9 is added to read as follows:

§ 251.9 Matching of funds.

(a) *State matching requirements.* Effective October 1, 1987, States shall provide in cash or in-kind, a contribution equal to the difference between—

(1) The amount of funds received under § 251.8 and

(2) Any part of the amount received by the State and paid by the State to emergency feeding organizations and any part of the amount retained by the State to pay for the direct storage and distribution costs of emergency feeding organizations.

(b) *Exceptions.* In accordance with the provisions of 48 U.S.C. 1469a, American Samoa, Guam, the Virgin Islands and the Northern Mariana Islands shall be exempt from the matching requirements of paragraph (a) of this section if their respective matching requirements are under $200,000.

(c) *Applicable contributions.* States shall meet the requirements of paragraph (a) of this section through cash or in-kind contributions from non-Federal sources. Such contributions shall meet the requirements set forth in 7 CFR Part 3015, Subpart G. Allowable contributions are only those contributions for costs which would otherwise be allowable as State-level storage and distribution costs. An allowable cash contribution is any cash outlay of the State agency specifically identifiable as a State-level storage and distribution cost, including the outlay of money contributed to the State agency by other public agencies and institutions, and private organizations and individuals.

Examples of cash contributions include, but are not limited to, the purchase of office supplies, storage space, transportation, loading facilities and equipment, employees salaries, and other goods and services specifically identifiable as State-level storage and distribution costs for which there has been a cash outlay by the State agency. Allowable in-kind contributions are any charges, which are non-cash outlays, for real property and non-expendable personal property and the value of goods and services specifically identifiable with State-level storage and distribution costs. Examples of in-kind contributions may include, but are not limited to, the donation of office supplies, storage space, vehicles to transport the commodities, loading facilities and equipment such as pallets and forklifts, and other non-cash goods or services specifically identifiable with State-level storage and distribution costs. In accordance with 7 CFR 3015.53 through 3015.56, the value of donated property shall be the fair market value or the cost of the property to the supplier, whichever is less. In accordance with 7 CFR 3015.52(a), the matching requirement shall not be met by costs supported by another Federal grant, except as provided by Federal statute.

(d) *Assessment fees.* States shall not assess any fees for the distribution of donated foods to emergency feeding organizations.

(e) *Plan requirements.* As a part of the State's Distribution Plan required under § 251.6, State agencies shall submit for FNS Regional office approval, the State's plan for meeting the match required under paragraph (a) of this section. Such plan shall identify the estimated amount of Federal funds to be retained at the State level for State level activities, the estimated dollar value of the State's contribution, and, if applicable, a description and valuation of in-kind contributions to be applied to the State's required match. This plan may be amended at any time during the fiscal year.

(f) *Reporting requirements.* State agencies shall identify their matching contribution on the SF-269, Financial Status Report, in accordance with § 251.10(d).

(g) *Failure to match.* If, during the course of the fiscal year, the quarterly SF-269 indicates that the State is or will be unable to meet the matching requirements in whole or in part, the Department shall suspend or disallow the unmatched portion of Federal funds subject to the provisions of paragraph (a) of this section. If, upon submission of the final SF-269 for the fiscal year, the Department determines that the State has not met the requirements of paragraph (a) of this section in whole or in part, the unmatched portion of Federal funds subject to the requirements of paragraph (a) of this section shall be subject to disallowance by FNS.

Dated: May 5, 1987.

S. Anna Kondrates,

Acting Administrator.

[FR Doc. 87-10898 Filed 5-12-87; 8:45 am]

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Agricultural Stabilization and Conservation Service

7 CFR Part 760

Dairy Indemnity Payment Programs

AGENCY: Agricultural Stabilization and Conservation Service, USDA.

ACTION: Final rule.

SUMMARY: The purpose of this rule is to adopt as final the interim rule published at 51 FR 12986, which amended the Dairy Indemnity Payment Program regulations, with an amendment which would shorten the period for conduct of the program from September 30, 1990, to January 31, 1988.

EFFECTIVE DATE: This final rule shall become effective on May 13, 1987.

FOR FURTHER INFORMATION CONTACT: Clarence Domire, Agricultural Program Specialist, Emergency Operations and Livestock Programs Division, ASCS, USDA, P.O. Box 2415, Washington, DC 20013; Telephone (202) 447-7673.

SUPPLEMENTARY INFORMATION: Information collection requirements contained in this regulation (7 CFR Part 760) have been approved by the Office of Management and Budget (OMB) in accordance with the provisions of 44