

F ood & N utrition S ervice	FNS INSTRUCTION	NUMBER
	U.S. DEPARTMENT OF AGRICULTURE 3101 PARK CENTER DRIVE ALEXANDRIA, VA 22302-1500	410-1 Rev 2

ACTION BY: Administrator
 Food and Nutrition Service Headquarters
 Food and Nutrition Service Regional Offices
 State Distributing Agencies

CLAIMS FOR LOSSES OF DONATED FOODS AND RELATED ADMINISTRATIVE
 LOSSES—PROCEDURES FOR THE STATE DISTRIBUTING AGENCY

I PURPOSE

The purpose of this Instruction is to establish the general standards and procedures that the State distributing agency must follow in order to ensure that restitution is made for the loss of donated foods, or for the loss or improper use of funds provided for, or accruing from, the distribution of donated foods. The Instruction includes the responsibility of the distributing agency in making claim determinations and pursuing other claim actions against parties responsible for such losses. It also includes the procedures that the distributing agency must follow to prevent future losses.

II LEGISLATIVE AND REGULATORY AUTHORITY

A This Instruction is based on the following legislative authority:

1 Section 16(b) of the Child Nutrition Act of 1966, as amended, which authorizes the Secretary of Agriculture to determine the amount of, settle, or adjust any claim arising under that Act or under the Richard B. Russell National School Lunch Act, or to compromise, deny, or waive any such claim.

2 Section 14 of the Commodity Distribution Reform Act and WIC Amendments of 1987, which authorizes the Secretary of Agriculture to determine the amount of, settle, adjust, or waive a claim arising under any domestic food assistance program administered by the Secretary.

3 Section 12(g) of the Richard B. Russell National School Lunch Act, as amended, which makes persons or entities who embezzle, willfully misapply, steal, or obtain by fraud any funds, assets, or property provided as part of a Federal grant subject to Federal criminal prosecution and other penalties.

DISTRIBUTION:	MANUAL MAINTENANCE INSTRUCTIONS: Replace revision 1 with this instruction	RESPONSIBLE FOR PREPARATION AND MAINTENANCE: FDD	Page 1 DEC 29 2010
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4 Section 4(c) of the Agriculture and Consumer Protection Act of 1973, as amended, which makes persons or entities who embezzle, willfully misapply, steal, or obtain by fraud any donated foods, or funds, assets, or property deriving from donated foods, subject to Federal criminal prosecution and other penalties.

5 Section 5(k) of the Agriculture and Consumer Protection Act of 1973, as amended, which authorizes the Secretary of Agriculture to determine the amount of, settle, adjust, or waive a claim arising under CSFP.

6 Section 215 of the Emergency Food Assistance Act of 1983, as amended, which authorizes the Secretary of Agriculture to determine the amount of, settle, adjust, or waive a claim arising under this Act.

B This Instruction is based on the following regulatory authorities:

1 Federal regulations in 7 CFR Parts 247, 250, 251, 253, and 254, and in 7 CFR Parts 3016 and 3019.

2 Federal Claims Collection Standards, FCCS, Chapter IX, 31 CFR Parts 900-904.

III RECORDKEEPING

A Required records. The distributing agency must maintain documentation of the following items, and must ensure that recipient agencies maintain similar documentation, as applicable:

1 Claim actions taken, including any justification supporting such actions;

2 Funds collected in claims;

3 Use of collected funds, including purchase of replacement foods; and

4 Corrective actions taken by distributing or recipient agencies, storage facilities, or other entities, in accordance with Section X of this Instruction.

B Retention of records. All records must be retained for a period of 3 years from the date of resolution of the claim, or from the date that corrective actions were initiated, as applicable.

IV SCOPE

A This Instruction is applicable to losses that occur when:

1 Donated foods are no longer fit for human consumption as a result of spoilage, contamination, infestation, or damage, or when the results of an investigation by Federal, State, or local health authorities deems them no longer fit for human consumption;

2 Donated foods are not stored or managed in accordance with the provisions of a contract or agreement, or with regulatory provisions or policy relating to storage and inventory management;

3 Donated foods are stolen, willfully misapplied, obtained by fraud, or improperly distributed, or are not otherwise available for distribution to eligible recipients;

4 A processor fails to meet the required processing yield of donated food or fails to produce end products that meet required specifications;

5 Administrative funds or funds accruing from donated foods are stolen, embezzled, willfully misapplied, or obtained by fraud; or

6 Administrative funds or funds accruing from donated foods are not used in accordance with 7 CFR Part 250 or applicable program regulations, or in accordance with allowable costs for such funds in 7 CFR 3016 or 3019, and in Office of Management and Budget (OMB) regulations applicable to such costs (2 CFR Part 225 or 230).

B This Instruction is not applicable to losses that occur in the following situations:

1 State or local agencies exceed their assigned caseloads in CSFP (such improper distribution of donated foods is subject to regulations in 7 CFR Part 247).

2 Participants or households receive donated foods for which they are ineligible (such losses are subject to regulations applicable to specific programs—e.g., 7 CFR Part 247 for CSFP).

3 The loss of donated foods before their acceptance at the delivery location by the consignee (i.e., claims for donated foods in transit), or in other cases where the USDA vendor may be held liable for the loss (such losses are subject to FNS Instruction 420-1, Managing Agency Debts).

4 The loss of donated foods by recipient agencies in child nutrition programs (e.g., school food authorities in NSLP), or by commercial enterprises with which such recipient agencies have entered into contracts or agreements (in most cases, no claim action is required for such losses, but some losses may be subject to the State administering agency's review responsibilities in 7 CFR Part 210).

5 Unless there is evidence indicating such loss is the result of theft, embezzlement, willful misapplication, or fraud, the loss of donated foods by charitable institutions receiving donated foods in accordance with 7 CFR 250.67 (no claim action is required for such losses).

6 Losses identified in audits, investigations, or management reviews conducted by the Department, or by authorized representatives of the Department (such losses are subject to FNS Instruction 420-1, Managing Agency Debts).

V DEFINITIONS

A The definitions in 7 CFR 250.3 are applicable to this Instruction.

B The following definitions are also applicable to this Instruction:

1 Claim. A demand, or basis for a demand, that restitution be made for the loss of donated foods, or for the loss or improper use of funds relating to donated foods, by the party responsible for such loss.

2 Claim action. Any action taken to initiate, pursue, or resolve a claim, or to collect and dispose of funds in a claim.

3 Claim adjustment. A revision of the original amount of the claim indicated in the notification and demand for payment, as a result of further information received.

4 Claim determination. A determination that a loss of donated foods, or a loss or improper use of funds, has occurred, the value of that loss, the party responsible for the loss (if any), and any other pertinent information.

5 Compromise. A decision to accept less than the full amount of a claim as payment.

6 Consignee. A distributing agency, recipient agency, commercial storage facility, or other entity that receives a shipment of donated food from a vendor, or from a Federal storage facility.

7 Forgiveness. A decision to absolve the responsible party from payment of a claim.

8 In-kind replacement. The replacement of a loss of donated food with the same type of food of U.S. origin, of equal or better quality in all USDA procurement specifications as the donated food, and at least equal in value to the lost donated food.

9 Similar replacement. The replacement of a loss of donated food with another type of food from the same food group (i.e., dairy, grain, meat/meat alternate, vegetable, fruit, etc.) that is of U.S. origin, of equal or better quality in all USDA procurement specifications for that type of food, and at least equal in value to the lost donated food.

10 Suspension. Interruption of collection on a claim on a temporary basis.

11 Waiver. The adjustment of a claim (usually a relinquishment) as a result of subsequent legal interpretation or action

VI CLAIM DETERMINATION

A Elements and time frame. The distributing agency must investigate any loss of donated foods, or any improper use or loss of funds, as described in Section IV.A of this Instruction, regardless of the value of the loss, in order to determine if a claim must be pursued against the party responsible for the loss. Such claim determination must be completed within 30 days from the date of discovery of the loss, or from the date that information was first received indicating that the loss had occurred, whichever is later. As part of the claim determination, the distributing agency must establish:

- 1 The types and quantities of donated foods lost;
- 2 The value of the donated foods lost, or the amount of funds improperly used or lost;
- 3 The date and location of the loss, to the extent they can be determined;
- 4 The cause, including if theft, embezzlement, or fraud was involved; and
- 5 The party responsible for the loss, if any.

B Value of donated foods. In establishing the value of the donated food loss, the distributing agency must use the USDA purchase price of the food at the time the loss occurred, or, at the distributing agency's option, one of the other values included in 7 CFR 250.58(e).

C Value of loss does not exceed \$500. If the distributing agency determines that the value of the donated food loss, or improper use or loss of funds, does not exceed \$500, or does not exceed an amount established by State statute for pursuit of a claim (if greater than \$500), it is not required to pursue a claim, or to forward the claim determination to the FNS Regional Office (FNSRO) for further action. However, if the loss has occurred as a result of theft, embezzlement, willful misapplication, or fraud, the distributing agency must pursue further claim actions, in accordance with this Instruction, or forward the claim determination to the FNSRO for further action, regardless of the value of the loss.

D No responsible party. If the distributing agency determines that the loss did not result from action or negligence by a specific party (e.g., if the loss occurred as a result of a natural event, such as a hurricane or flood, or as a result of a general power outage), or through failure to comply with the provisions of an agreement or contract, it is not required to pursue a claim or to forward the claim determination to the FNSRO for further action. However, the distributing agency must notify the FNSRO if the value of such a loss exceeds \$500.

E Referral to FNSRO. Unless exempted by the contingencies described in this section, the distributing agency must forward the claim determination to the FNSRO for further pursuit of the claim, if the distributing agency is itself responsible for the loss. In pursuing the claim against the distributing agency, the FNSRO must follow the standards and procedures in FNS Instruction 420-1, Managing Agency Debts. If the loss exceeds \$100,000, the FNSRO must notify FNS Headquarters of the loss before pursuing further claim actions.

VII PURSUIT AND PAYMENT OF CLAIM

A Pursuit of claim. If any party other than the distributing agency is responsible for the loss (e.g., a subdistributing or recipient agency, or a commercial storage facility), the distributing agency must pursue further claim actions against that party, unless exempted by the contingencies described in Section VI of this Instruction. Although the distributing agency is responsible for acting on the claim, it must notify the FNSRO of the loss. If the loss exceeds \$100,000, or is a result of theft, embezzlement, willful misapplication, or fraud, the FNSRO must, in turn, notify FNS Headquarters of the loss.

B Notification and demand for payment. After completing the claim determination, the distributing agency must provide written notification and demand for payment to the party responsible for the loss. The notification and demand for payment must include the following information:

1 A description of the loss, including the types and quantities of the donated foods lost, and the value of the loss;

2 The date, location, and cause of the loss, if determined;

3 Evidence and documentation relating to the loss, including a certificate of inspection by health officials, as applicable;

4 Evidence of theft, embezzlement, willful misapplication, or fraud, as applicable; and

5 A formal demand that the responsible party make a payment to the distributing agency for the full value of the loss of donated foods, or improper use or loss of funds, by a date not to exceed 30 days from the date of the notification and demand for payment.

C Adjustment to amount of claim. The distributing agency may make a claim adjustment (i.e., an adjustment to the amount of the claim), as defined in Section V of this Instruction, based on information provided by the responsible party, or obtained from another source, subsequent to the notification and demand for payment. The distributing agency must notify the responsible party of the claim adjustment, including any information that formed the basis for the action, and the amount for which the responsible party remains liable. This notification constitutes a demand for payment of the outstanding balance. A claim adjustment does not entitle the responsible party to any reimbursement for previous payments made on the claim.

D Follow-up notification and demand for payment. If payment, or a request for adjustment or other appeal of claim actions, has not been received after 30 days, the distributing agency must follow up with a second notification and demand for payment to the responsible party. The demand must require payment by a date not to exceed 60 days from the date of the original notification and demand for payment.

E Review of claim actions. The distributing agency must submit any claim actions to the FNSRO for review in the following cases:

1 The distributing agency receives an appeal of claim actions from the responsible party, which may include a request to compromise, forgive, suspend, or waive a claim; or

2 The FNSRO directs the distributing agency to submit such claim actions for review.

VIII FNS CLAIM ACTIONS

A Claim amount does not exceed \$100,000. If the amount of the claim does not exceed \$100,000, the FNSRO is responsible for acting on a request to compromise, forgive, suspend, or waive a claim, or on any other appeal or review of a claim action, in accordance with Section VII.E of this Instruction. Such actions by the FNSRO must be in accordance with the standards and procedures in FNS Instruction 420-1, as applicable.

B Claim amount exceeds \$100,000. If the amount of the claim exceeds \$100,000, the FNSRO must refer a request to compromise, forgive, suspend, or waive a claim, or any other appeal or review of a claim action, to FNS Headquarters, along with FNSRO recommendations for action on the request or review of claim actions. FNS Headquarters will act on such request or review in accordance with the standards and procedures in FNS Instruction 420-1, as applicable.

C Claim against distributing agency. If FNS determines that the distributing agency was in any way responsible for the loss, or that the distributing agency failed to take required claim actions in pursuing a claim against the responsible party, FNS may initiate a claim against the distributing agency to make restitution for the loss, in accordance with the standards and procedures in FNS Instruction 420-1, as applicable.

IX USE OF COLLECTED FUNDS

A Purchase of replacement foods. The first priority for the use of funds collected in a claim for the loss of donated foods is the purchase of replacement foods for use in the program in which the loss occurred. The distributing agency may make such purchase, or may permit the appropriate recipient agencies, or another entity, to make such purchase. Replacement of donated foods must be in-kind or, if in-kind replacement is not feasible, must be similar replacement (In-kind and similar replacement are defined in Section V of this Instruction). Donated food losses may not be replaced by other USDA donated foods or, unless specifically approved by FNS, by foods donated from other sources.

B Payment of administrative costs. If the purchase of replacement foods is not feasible, funds collected in a claim for the loss of donated foods must be used to pay costs of storing and distributing donated foods, or related administrative costs, insofar as such costs are allowable in accordance with 7 CFR 3016 or 3019, as applicable, and in OMB regulations applicable to such costs (2 CFR Part 225 or 230). Such funds may be used to pay allowable costs at either the distributing agency or recipient agency level. This alternative may be exercised, for example, if the distributing agency determines that replacement foods could not be

utilized in an efficient manner, or that the availability of foods in the commercial market would not permit in-kind or similar replacement.

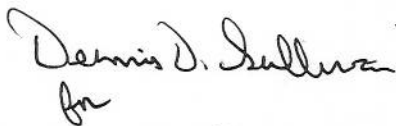
C Replacement of lost or improperly used funds. Funds lost or improperly used must be replaced with other funds for use in paying the costs of storing and distributing donated foods or related administrative costs, insofar as such costs are allowable in accordance with 7 CFR 3016 or 3019, and in OMB regulations applicable to such costs (2 CFR Part 225 or 230). Funds provided as part of a Federal grant may not be used in such replacement.

D Salvage account. The distributing agency must maintain funds collected in a claim (and not immediately used to purchase foods or pay administrative costs) in a salvage account, in accordance with 7 CFR 250.15(f)(3), and must comply with requirements in 7 CFR 250.15(f)(4) in depositing funds into, and expending funds from, such account.

X PREVENTING FUTURE LOSSES

A Corrective actions. The distributing agency must ensure that corrective actions are taken to prevent future losses of donated foods or loss or improper use of funds, and must also ensure that recipient agencies or other entities, as appropriate, take corrective actions to prevent future losses. The FNSRO should recommend specific actions or procedures as necessary, or at the request of the distributing agency.

B On-site reviews. The distributing agency must include a review of corrective actions taken in its next required on-site review of a recipient agency, storage facility, or other entity that has been the subject of a claim. The distributing agency must also review all records of claim actions, including records of purchase of replacement foods and other use of collected funds, as applicable, during such review. The distributing agency should conduct more frequent reviews than required of such agencies or entities, in accordance with applicable regulations, as determined necessary.



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