



# **IRS Code 170(e)(3) Interpretive Guide**

**[formerly the Gray Area Issues Report]**

# TABLE OF CONTENTS

<b>Section</b>	<b>Page</b>
<b>Preamble</b>	<b>3</b>
<b>Introduction</b>	<b>4</b>
<b>General Policies</b>	<b>5-6</b>
<b>Pet Food / Pet Products</b>	<b>7</b>
1a. Pet Food and Pet Products – 501(c)(3) Organizations	7
1b. Pet Food and Pet Products – Non-501(c)(3) Organizations	7
<b>Disposal of Unusable Products</b>	<b>8-9</b>
2. Disposal or Distribution of Unusable Food Donations	8-9
<b>Client Eligibility</b>	<b>10-13</b>
3. Client Eligibility Guidelines	10
4. Labor Disputes / Furloughs	11
5. Purchased Product Client Distribution Programs and Donated Product Distribution	12-13
<b>Agency Eligibility</b>	<b>14-26</b>
6. Primary vs. Incidental Use / Self-Evident Need	14
7. Personal Residence-Based Services	15-16
8. Religious Proselytizing	17
9. Comprehensive Care Service Fees	18
10. Voluntary Contributions	19
11. Incidental Membership Fees / Program Participation Fees	20
12. Municipal Programs	21
13. Prison-Based Programs	22
14. Native American Tribal Organizations	23
15. Foster Care Family Support Programs	24-25
16. Food Co-ops	26
<b>Member Fees and Charges</b>	<b>27-29</b>
17. Credit for Product Received	27
18. Averaging Shared Maintenance Fees	28
19. Credit for Services	28
20. Incidental Client Fees	29

# PREAMBLE

In 1991, Feeding America released the Gray Area Issues Report. Since then, that report has guided the Feeding America Network in the use of donated products under Internal Revenue Service Code 170(e)(3). This code defines the tax deduction that donors are eligible to receive if the donation is used according to the regulations, defines the organizations eligible to receive those donations, and defines allowable uses of those donations.

In 2010, Feeding America transformed the Gray Area Issues Report into the IRS Code 170(e)(3) Interpretive Guide. The Interpretive Guide acknowledged that many of those original gray areas of agency relations were addressed and defined in the 2008 Member Contract. The 2010 version of the Interpretive Guide also provided guidance and clarification on issues that raised frequent questions among Members.

This second version of the IRS Code 170(e)(3) Interpretive Guide reflects the changes made in the 2014 Member Contract. Many issues from the 2010 version of the Interpretive Guide have been incorporated into the Member Contract necessitating Member compliance, mainly under Appendix B, Section 2, C, 2, e – Internal Use of Donated Product. As such, retaining those sections in the Interpretive Guide would be redundant. To assist Members with this transition, the following is a list of those areas previously covered in the 2010 Interpretive Guide now a part of Member compliance standards and included in the 2014 Member Contract:

- Operational Use of Non-Food Products
- Volunteer Use of Donated Products
- Meeting Use
- Emergency Use by Staff/Volunteers
- Tasting and Testing
- Fundraising Events
- Clients Accessing Product Who Also Provide Volunteer Services
- Member or Agency Distribution Utilizing Non-501(c)(3) Distributing Agents
- Agencies Distributing to Other Agencies

Since the last version of the Interpretive Guide, Members have often requested assistance from Feeding America interpreting what is acceptable within the confines of IRS Code 170(e)(3). In response, a section on Food Co-ops was added to address these questions.

From the onset of this project, it has been Feeding America's commitment to ensure that all sections of this guide fully comply with IRS Code 170(e)(3) both in the letter of the law and the spirit of the law. Legal counsel, both Feeding America's internal legal counsel and external legal counsel with expertise in IRS Code 170(e)(3), have thoroughly reviewed the document in its entirety. Their guidance has been invaluable to ensuring fundamental legal compliance and guiding our actions to avoid taking positions which might compromise the integrity and standing of the Feeding America network.

# INTRODUCTION

Feeding America and its Members rely significantly on product donations from substantial donors who, in turn, rely on Feeding America and its Members to use product in accordance with their representations to the donor. Failure to comply with those promises and these guidelines can result in significant tax and legal issues for donors and the Feeding America network and can negatively impact important donor relations. In implementing and adhering to the IRS Code 170(e)(3) Interpretive Guide, both network Members and Feeding America must recognize that what is described in this manual as being acceptable practices can quickly become unacceptable if carried to an extreme or if not monitored on a regular basis. Moderation, reason, and common sense must be the guide in observing these rules.

Example: The acceptable practice of having staff test food for fitness becomes clearly unacceptable if a Member interprets it to mean that any staff who wants to can eat donated product any time they feel hungry.

A good rule to follow in determining if a practice is acceptable is to scrutinize the practice from the perspective of a product donor, an attorney, a media reporter, a social media site, a member of the Member's board, and the Member's CEO/Executive Director. If the practice is acceptable when viewed from those vantage points, then it probably is within reason.

Many of these guidelines begin with "Members may... ." In such instances, the guidelines mean exactly that - a Member may or may not pursue or permit the described practice. A Member may freely prohibit any practices it deems undesirable for itself or its service area, and its agencies must abide by that decision. It is extremely important from a legal and ethical standpoint that each Member be consistent in applying these guidelines within their service area. Members must treat all like agencies and individuals equally. A Member's policies should be clear, consistent, and applied across the board.

To ensure consistency, define operational boundaries, and fully address those aspects of the IRS Code 170(e)(3) Interpretive Guidelines where the Member is required to make a decision, the Member's Board of Directors should establish specific written policies that clearly articulate the organization's positions. Additionally, all staff, volunteers, and agencies involved with areas addressed in this guide must be made aware of and adhere to these requirements.

# GENERAL POLICIES

## **Applicability of IRS Code 170(e)(3) Regulations**

All products (food or otherwise) donated to members must be considered as having been donated under the provisions of Section 170(e)(3) of the U.S. Internal Revenue Code, unless the donor clearly provides verification to the contrary in writing. The Member must treat all donations as gifts that qualify for the enhanced charitable contribution deduction for donated inventory under Section 170(e)(3) of the Code.

Example: In the instance of a Member soliciting a donation of cookies to use as refreshments at a fundraiser, the Member would need to solicit and receipt the product accordingly, acknowledging that the donation does not qualify for the enhanced deduction (because it is not used exclusively for the care of the ill, needy, or infants).

Many donors do not decide until tax preparation time at the end of the year which donations will be listed as standard deductions, and which will be applied to the enhanced deduction available under IRS Code 170(e)(3). Because of this, Feeding America requires Members to follow IRS Code 170(e)(3) requirements at all times for any inventory donation from a donor. Good guidelines to remember include:

- National and local donors typically donate products for use by the ill, needy or infants/minors;
- IRS provides an enhanced tax deduction only when products are distributed by qualified organizations and used by qualified clients;
- In-house use of products by individuals not meeting IRS Code 170(e)(3)'s eligibility requirements (ill, needy or infants) can lead to being considered a form of compensation and subject to employment laws.

For the Member to provide an enhanced tax deduction under IRS Code 170(e)(3) to the original product donor, any transferees that ultimately receive that donated product may not pay money or provide property or services in return for the product. Further, transferees may not charge the ill, needy or infants for the food. Situations where these guidelines apply and impact the enhanced deduction may include but are not limited to:

- A partner of the Member who receives donated product from the Member and then the partner incorporates donated product into meals that are then sold at a discount to those in need;
- The Member themselves when donated product is used in a non-profit or co-operative grocery store and then sold to the end recipient.

The product donor must reasonably anticipate that the donated product will be used consistently with the provisions of IRS Code 170(e)(3) for the product donor to take the enhanced deduction. In the situations described above and in other potential situations, if the Member has prior

knowledge that the transferee organization was not going to use the donated product in a manner consistent with IRS Code 170(e)(3) requirements, then the Member cannot provide a written statement to the product donor to ensure the enhanced product deduction.

**Applicability of IRS Publication 557 - "Tax Exempt Status for Your Organization"**

All agencies receiving donated products from Members must be federally exempt 501(c)(3) organizations, wholly owned by a 501(c)(3), or a 501(c)(3) equivalent (churches). See Publication 557 for an explanation of the different 501(c) statuses. Additionally, Appendix B, Section 2, A, 1 of the Member Contract defines Agency Eligibility.

# PET FOOD / PET PRODUCTS

## 1a. Pet Food and Pet Products – 501(c)(3) Organizations

Members may distribute donated pet food or pet products to 501(c)(3) organizations at their own discretion.

GUIDELINES: IRS Code 170(e)(3) regulations require that donated product be distributed to qualified human recipients solely for the care of the ill, the needy, or infants. Members that handle pet food that is distributed to agencies that serve people (including SPCA-type groups that supply pet food to needy families with pets) may be handled and receipted in the normal manner.

## 1b. Pet Food and Pet Products – Non-501(c)(3) Organizations

Members may distribute donated pet food or pet products to non-501(c)(3) institutions such as zoos, animals shelters, animals hospitals, and other animal welfare organizations, at their own discretion, but such donations are not otherwise subject to these guidelines.

GUIDELINES: IRS Code 170(e)(3) regulations require that donated product be distributed to qualified human recipients solely for the care of the ill, the needy, or infants. Members that handle pet food or pet products that are distributed to agencies such as zoos or animal shelters that "serve" only animals and no humans must be receipted with language clearly stating to the donor that IRS Code 170(e)(3) does not apply.

# DISPOSAL OF UNUSABLE PRODUCTS

## 2. Disposal or Distribution of Unusable Food Donations

Members and agencies should make all reasonable efforts to distribute donated product in accordance with IRS Code 170(e)(3) before it spoils. However, in those instances when it is not possible, Members and agencies may distribute spoiled donated product, or product which might reasonably be expected to spoil prior to distribution, to a non-501(c)(3) party for use as a by-product that cannot be redistributed for human consumption (such as animal feed or biomass energy), and may require and/or receive money, property, credits or services in exchange. It is Feeding America's position that this product, by definition, is no longer subject to IRS Code 170(e)(3) regulations once it is deemed unfit for human consumption, provided that it was usable according to FDA requirements at the time of the donation and that the Member and the donor could reasonably anticipate use in accordance with IRS Code 170(e)(3) at that time.

**GUIDELINES:** All usable donated products must be used for purposes related to the care of the ill, needy, or infants via eligible 501(c)(3) agencies. Members should develop policies and procedures which assure that only unusable product, or product which might reasonably be expected to spoil prior to distribution, is distributed as animal feed to non-501(c)(3) parties, and that the Member or agency used its best possible efforts to distribute the food for human consumption first.

When the product becomes unusable the Member's obligation to distribute to a charity must be a priority. A 501(c)(3) or equivalent should be sought. If no interested parties of this nature are available, or if more unusable product exists than can be used by these parties, approved for-profit businesses can be used. In this case, under generally accepted charitable principles, the Member or agency is obligated to receive as much money as possible for the property. Care must be taken to select businesses with no special interest in or involvement with the Member or agency (i.e., no organizations connected with Board members, relatives of Board members, or staff should be used).

Prior to providing an approved 501(c)(3) or non-501(c)(3) party with spoiled product, the Member or agency should evaluate:

- What quantities and types of products will be involved.
- Possible negative consequences, including adverse donor reactions.
- The nature of controls needed to implement and monitor the system.



Members and agencies should develop a written policy which:

- Requires a written agreement between the company receiving the product and the Member or agency (outlined below).
- Requires that distribution and payment records be kept separately from the Member or agency's normal distribution records.

The written agreement between the company receiving the product and the Member or agency must include the following:

- Statement of the mission and purpose of the Member or agency.
- Statement of reason as to why this outlet is needed by the Member or agency.
- Statement that the property will be used only as a by-product that will not be redistributed for human consumption, and will not be sold, offered for sale, transferred or bartered for money, other properties, or services.
- Statement that the recipient agrees to monitoring, including site visits, by the Member or agency.
- Statement as to the nature of the receipting and payment (if any) required by the Member or agency.
- Statement recognizing that the Member or agency, Feeding America, and the primary donor have specifically disclaimed any warranties or representations, expressed and implied, as to the purity or fitness of any and all food items accepted.
- Statement that the Member or agency, Feeding America and the primary donor shall not be susceptible to any liabilities, claims, losses, causes of action, or suits of law arising out of or attributed to any action done by the recipient in connection with the storage and/or use of the property supplied by the Member or agency and that the Member or agency and Feeding America will be indemnified and held harmless from any such liabilities, claims, losses, or causes of action.

# CLIENT ELIGIBILITY

## 3. Client Eligibility Guidelines

Members may decide for themselves what sort of client eligibility verification guidelines they will require their agencies to employ, subject to the non-discrimination clause as stated in the Feeding America Member Contract: Appendix B, Section 2, A, 2, a, vii.

Agencies served by the Member must outline their procedure for determining that the final recipient of the Product is ill, needy or infant such as using self-declaration of need or other intake processes. Agencies and the Member remain subject to record keeping requirements to ensure ongoing qualification with §170(e)(3).

**GUIDELINES:** Eligible clients are only "the ill, needy, or infants." Members should develop and observe policies and procedures that will reasonably assure service is being provided to eligible persons, including appropriate written statements and recordkeeping for verification..

Policies should establish a verifiable means of demonstrating distribution to only eligible clients. Depending on local realities, policies can be based on areas of residence, self-professed need, some specific forms of documentation, etc. Agency agreements should state that all product received from the Member will be used for qualified 170(e)(3) purposes only (i.e., in the service of the ill, needy, and infants), that the agency agrees to keep adequate books and records and to be monitored in relation to this, and the benefit is to the needy.

See also sub-section 6: Primary vs. Incidental Use / Self-Evident Need.

## 4. Labor Disputes / Forced Furloughs

Members may serve agencies which, in turn, provide products obtained from the Member to persons rendered needy by a labor dispute, temporary reduction of wages, or forced furloughs where government employee wages have been significantly delayed due to local, state or federal delays in funding, as long as the agency's normal standards of determining need are followed.

**GUIDELINES:** Mindful of the potential for abuse, negative publicity and/or adverse donor reaction, Members permitting this type of distribution should require that agencies develop and observe policies and procedures that will reasonably assure persons served are truly needy.

The need verification tests should go beyond the fact of the person being temporarily without earned income from their normal job, or he/she being a member of the union involved in the dispute. Potential clarifying questions include: Are they drawing strike pay? Are they working temporarily at another job? Most importantly, are they unable to reasonably financially support their and/or their family's needs at present due to their labor situation? In most cases, an affirmative answer to any of these questions could serve as a basis for declaring the client ineligible.

## 5. Purchased Product Client Distribution Programs and Donated Product Distribution

***Feeding America does not recommend selling purchased products to clients because of:***

- the absolute necessity of ensuring compliance with IRS Code 170(e)(3)
- the high potential for the public and clients to misunderstand this practice, and
- the potential for the public and clients to misunderstand the Member's or agency's mission of providing assistance free of charge to those in need.

***If a Member or agency chooses to offer a program that sells product to clients, then the guidelines below must be adhered to when marketing, administering, and operating this type of program.***

A purchased product client distribution program is defined as a program where individuals that may or may not meet the IRS Code 170(e)(3) eligibility requirements, pay for items that were initially purchased by the Member or agency. IRS Code 170(e)(3) strictly prohibits donated products from being sold, exchanged or bartered and stipulates that donated product may only be given to qualified individuals.

Members or agencies that choose to operate a purchased product client distribution program must be aware that any comingling of the donated product with the purchased product client distribution program at the time of distribution may be misinterpreted as donated products being sold to those who may or may not otherwise qualify to receive the product. Comingling can include distributing product in the same bag/box or simply from the same location at the Member's or agency's location.

The following guidelines must be adhered to at all times because of the high potential that the purchased product client distribution program may be misconstrued, by both the individuals receiving product and the public, as donated product being sold to individuals. These guidelines will help ensure that there is a clear understanding that donated products are not being sold, either directly or indirectly, and that donated products are being given without charge to only those individuals that qualify as ill, needy or infants. They also help to ensure that qualified clients who are there to receive only donated food do not feel pressured to purchase product or misunderstand that they do not need to purchase product in order to receive assistance.

- Donated products cannot be included inside the purchased product boxes/bags or given out in conjunction with the purchased product boxes/bags, i.e. immediately before or after the individual has paid for the purchased food they are given donated product in the same area or from the same person as the purchased product.
- Donated product cannot be used as an incentive, direct or implied, for individuals to purchase the boxes/bags. For example, a Member or agency giving out a 10 pound bag of donated food for every food box/bag purchased would be an implied incentive and is not allowable even if the final recipient was a qualified client.

- If Members or agencies advertise on their purchased product client distribution program materials that donated food will also be available at the time of purchase, there must be a statement in the materials that clearly states that the purchase of the box/bag is optional and not required to be eligible to receive donated food. It also must acknowledge that donated food will only be given to those that qualify as ill, needy or infants.
- If the Member or agency finds it necessary to distribute donated products at the same location and during the same window of time as the distribution of purchased product, then donated products must be distributed in a completely separate area from the purchased product.
  - Recipients of the donated products must demonstrate that they meet the eligibility requirements to receive the donated products.
  - The Member must clearly state to the individual both verbally and in written form, that
    - Only those that qualify are eligible to receive donated products.
    - Those who qualify are not required to purchase product to receive donated products.

# AGENCY ELIGIBILITY

## 6. Primary vs. Incidental Use / Self-Evident Need

Members may have as agencies organizations that serve both needy and some non-needy clients who qualify as ill and/or infants, or where overriding indicators of need are self-evident. Examples of these types of organizations can include youth programs, camps, child care centers, etc. The Member must ensure that the agency establishes a priority system that assures that the primary benefit of the program is to the needy and that the program exclusively serves those in at least one of the three categories: ill, needy, or infants.

**GUIDELINES:** It is important for Members to understand that, in addition to the specific provisions of IRS Code 170(e)(3) and the reference to care of the "ill, needy, or infants," distributions must meet the more general and overriding requirement of IRS Code 170 that they be for charitable purposes. Service to wealthy and healthy children, therefore, might not be a qualified use of donated property, regardless of the fact that these individuals are "infants."

Although the difficulties of addressing the issue are lessened by the fact that the products are distributed by 501(c)(3) organizations, which presumably have received an Internal Revenue Service determination that their operations are generally charitable, it is appropriate to emphasize that Member and Agency priorities should be directed to care of the needy. If groups serving some non-needy persons are served by the Member, policies and procedures must be developed and enforced by the Member to ensure that the service is secondary to the agency's service to the needy, and that a majority of the clients are low income with only incidental use by non-qualified recipients.

A Member may elect to serve congregate meal programs where "some" possibly ineligible persons may consume the product, if initial and follow-up monitoring by the Member confirms that "most" of the food is indeed being consumed by eligible persons and that there is no other way to reasonably serve them than through the meal programs. The clear objective should be service to the needy.

Example: In a community with multiple senior citizens meal sites, a Member could elect to serve only those meal sites in low income areas. The Member needs to make that decision within the targeting points of these guidelines.

Example: Members may provide products through mass distribution programs to individuals living in geographic areas where overriding indicators of need are evident and it is apparent that a majority of the clients served are needy.

## 7. Personal Residence-Based Services

Members may distribute products to Personal Residence-Based care programs, if the service is provided under the auspices of a 501(c)(3) organization, no individual is paying specifically for the food, and steps are taken to assure that primary service is to the needy. Examples include: personal residence-based day care programs in low income housing or neighborhoods, day care associations comprised of members who operate personal resident-based day care serving low income neighborhoods, 501(c)(3) sponsored adult drug rehabilitation resident programs operating in a personal residence. In each of these contexts, it is difficult to imagine the beneficiaries not meeting the client-eligibility standard of being ill, needy or infants.

**GUIDELINES:** Agency participation in a member program must be within the context of a 501(c)(3) and for charitable use. An independent association of personal resident-based care providers could be eligible to participate provided that the associations adhere to all requirements under IRS Code 170(e)(3) including: that the donated product is not in exchange for specific payments, they can adequately demonstrate the provision of a range of other services to association members in addition to food (examples include training programs on nutrition, child care strategies, CPR training, obtaining state certification, child care referral assistance) and that primary service is to the needy with no, or otherwise incidental use, by anyone other than the needy. Any Member electing to permit/pursue this practice must evaluate how the association will:

- Authorize order and pick-up personnel.
- Handle shared maintenance payments to the Member.
- Limit use of Member product to homes with enrolled clients only.
- Limit quantities of Member product used to an amount appropriate to the number of clients present at any given time.
- Enforce adherence to the overriding charitable intent of the original donor.

The Member must require that the agency have a written policy outlining which of its programs are eligible to use Member product and under what circumstances. The following items must be addressed in the policy:

- The donated product is not in exchange for specific payments.
- Primary use of donated products must be to needy clients with only incidental use by those not qualifying as needy clients.

Note: One exception to this policy is that for agencies only, donated food and beverages may be consumed by staff or volunteers who are directly involved in the preparation of a meal or providing other services during a meal. The consumption of the meal should be part of staff or volunteer involvement with clients (e.g. at the same tables and time as clients are being served) and only if it is incidental to the intended use of the Product designated to serve the ill, needy or infants in accordance with Section 170(e)(3) of the Code. See Member Contract, Appendix B, Section 2, C, 2, e (Internal Use of Donated Product). Close attention should be paid to ensure that staff and/or volunteers do not abuse this practice. See also sub-section 3: Client Eligibility Guidelines.

- A Member-approved method of authorizing order and pick-up personnel will be maintained.
- The money needed to pay the Member shared maintenance will come from sources other than either the provider family or the family of the client. "Membership payments" by either of these families is not acceptable, as shared maintenance is only allowable between 501(c)(3) organizations recognized by the IRS as having been incorporated for the purpose of providing charitable service to the clients in question. Please note that unincorporated personal residence-based care providers are themselves individuals, and do not have a charitable intent as defined by the IRS (i.e., they file for-profit business income or regular individual income tax returns). Please note that, as always, voluntary and anonymous contributions are allowable, See sub-section 10: Voluntary Contributions.
- The primary source of any fundraising activity organized for the purpose of collecting funds to pay Member-shared maintenance will not be association membership fees or from the association's members.
- No additional charge will be made by the association of individual member families to individual clients or the clients' families for use of the donated products.

To assure that use of the donated products is in the care of the needy, it is recommended that the Member adopt a formal policy in regard to agencies serving some non-needy clientele, see sub-section 6: Primary vs. Incidental Use / Self Evident Need.

In addition, because the potential for abuse is so great, Member monitoring programs in regard to this type of agency must be extensive and comprehensive.



## 8. Religious Proselytizing

Whether religious proselytizing by agencies is prohibited, limited, or allowed is strictly a local Member decision.

GUIDELINES: Current Internal Revenue Codes governing members make no mention of religious proselytizing, either pro or con. In that many agencies are churches, it is unreasonable to assume that these groups will provide their service without some degree of religious activity. However, Members are well within their rights to develop a policy stating that proselytizing cannot be discriminatory or onerous to the client, and that any and all complaints to this effect will be investigated by the Member. The key to any Member investigation is that the Member's purpose of making donated product available to all eligible ill, needy, or infant individuals be carried out without regard to religious preference. Members should be aware that any limitation on proselytizing must be uniformly enforced to avoid charges of religious discrimination.

## 9. Comprehensive Care Service Fees

Members may serve residential (in-patient) or on-site programs that provide and charge a fee for a comprehensive care service, with food being a part of that scope of service, provided that the service is to the needy, ill, or infants (see sub-section 6: Primary vs. Incidental Use/Self Evident Need). Examples of this type of agency would be day care centers, sheltered workshops, homes for the elderly, and residential treatment centers.

**GUIDELINES:** The agency must be a 501(c)(3) serving the ill, needy, or infant persons in some comprehensive care program that includes attending to the clients' nutritional needs while the clients participate in the program. No part of the fee can be based on the provision of food or products that have been donated to the 501(c)(3) and the fee must be comprehensive and cannot vary based on the donated products that are utilized by the agency.

## 10. Voluntary Contributions

Members may distribute donated products to agencies that utilize contribution canisters, envelopes, or similar means of allowing clients to contribute to the program, provided that all contributions are truly voluntary and can be made in a completely anonymous way, unconnected to the receipt of benefits from the agency.

**GUIDELINES:** The key factors are *anonymous and truly voluntary*. The focus of the IRS regulations is not so much on the concept of "receive" (meaning the receipt of monetary donations) as it is on the concept of "expectation of payment." Suggesting a donation amount is also acceptable if no pressure is applied; clients must be able to make their donations in an inconspicuous manner and receive assistance, if otherwise qualified, without making a donation. These contributions are not payment for the food received if the above conditions are met. Circumstances cannot, however, be such that it is difficult or embarrassing to not contribute or where the actual facts demonstrate that one must contribute in order to receive assistance.

In the case of the additional distribution of supplemental purchased products, suggested donations for donated products must be clearly separate from the collection of money covering purchased food costs. It is incumbent upon the Member to assure, through its agency monitoring program, that the conditions outlined above are maintained. Agencies can neither keep records of which clients contribute, nor prohibit or discourage participation based on a client's nonpayment, nor withhold benefits to non-donating participants

In monitoring, Members should make every effort to determine that the suggested donation, in addition to being anonymous and voluntary, is reasonable.

**Recommended Practice:** *Because the potential for abuse is so great, Feeding America does not recommend that this practice or any variation of this practice be allowed.*

## 11. Incidental Membership Fees / Program Participation Fees

Members may distribute donated products to agencies assessing incidental fees in the form of regular client membership fees and/or program fees (e.g. YMCA summer camp programs, YWCA child development programs, Boys and Girls Clubs after school care) provided that the Member assures through its agency monitoring program and in writing by the agency to the Member that the following conditions are met:

- The fees assessed are not related to either the cost of the agency's acquisition of the product or the cost of making the product available for distribution.
- Other services are provided, over and above the distribution of the donated food.
- No portion of the fees can be utilized to pay Member fees.
- Clients cannot be required to provide any services in exchange for products received from the Member.
- That the product is used exclusively for the care of the ill, needy, or infants.

GUIDELINES: Programs that have as their basis of organization regular client membership fees must conform to the five stipulations outlined above to be considered for agency membership. Collection of client membership fees cannot be related to the distribution of the food. A program with a client membership fee structure that provides no service other than the distribution of food cannot be considered eligible for agency membership.

In addition, the burden of proof that the membership fee is reasonable is the responsibility of the program (or Member, if it is a Member-operated program; See sub-section 20, Incidental Client Fees). Total program costs on which the fee is based must be clearly documented. The Member must be aware that IRS Code 170(e)(3) expressly prohibits the transfer or use of donated product in exchange for money, property or services.

Examples of acceptable additional services include:

- Training in nutrition, menu planning, and/or meal planning.
- Informational newsletters.
- Day trips, field trips, or other planned social activities and outings.
- Organized seminars offering professional speakers on any number of topics, including speakers from other agencies (such as the Social Security Administration, the SNAP Office, a local domestic violence shelter, Bread for the World, etc.).

Please note that the membership fee should not vary based on the specific services provided at any given time, but rather should be pre-determined and regular (i.e., annual or semi-annual).

## 12. Municipal Programs

Members cannot provide donated products to hospitals, schools, etc. that are entities of a municipality.

It is possible that municipal entities may be host sites for Member programs provided the programs meet all Member Contract requirements.

**GUIDELINES:** Entities operated directly by a branch of government at any level (local, state, or federal) are municipalities, not 501(c)(3)s, and are not eligible to receive donated products from Members. However, not all hospitals and schools are municipal entities; if a hospital or school is in fact a 501(c)(3) it could be eligible for agency membership. See also sub-section, 6: Primary vs. Incidental Use / Self Evident Need, and sub-section 9: Comprehensive Care Service Fees.

### **13. Prison-Based Programs**

Any programs serving prison or jail inmates that are sponsored by prisons/jails, 501(c)(3) organizations, and/or 501(c)(3) equivalents/religious organizations (commonly referred to as Chaplaincy programs), are ineligible to receive donated product from Members or agencies.

#### **GUIDELINES:**

- Only 501(c)(3) organizations and/or 501(c)(3) equivalents/religious organizations are eligible to receive donated product under Internal Revenue Code 170(e)(3) and since prisons and jails are government entities, they are not eligible for agency membership.
- Any program, even if sponsored by a 501(c)(3) or a church, may not provide donated product to prison/jail inmates as this group does not satisfy the eligibility category as defined under IRS Code 170(e)(3).

## 14. Native American Tribal Organizations

Members may distribute donated products to American Indian/Native American tribal organizations, however, such service must be channeled through legitimate 501(c)(3) or 501(c)(3) equivalent organizations (churches).

**GUIDELINES:** Some tribal organizations have established American Indian Associations, Clubs, Assistance Organizations, and/or Indian Centers that have 501(c)(3) status. Due to various treaty provisions or "separate nation" status, a tribal organization may be unable to establish a 501(c)(3) organization directly. If this is the case, service may be channeled through mission churches on reservations or through neighboring churches, community action agencies, and other established agencies that may service Native Americans as a targeted population or along with other eligible clients. A final allowable option would be the establishment of a "Friends of..." organization as a 501(c)(3) recognized by the IRS as having been incorporated for the purpose of providing charitable service to the clients in question. Control of the 501(c)(3) could be retained by the tribal organization via the structuring of the Board of Directors, if desired.

## 15. Foster Care Family Support Programs

GUIDELINES: Foster Parent Associations are ineligible for agency membership. See the Member Contract, Appendix B, Section 2, A, 1, j.

### **501(c)(3) Non-Profit Organizations providing programs and support for foster care**

**families:** There are 501(c)(3) charitable organizations that provide support for families with foster children, or have these programs as one of a variety of different services offered among several target audiences of the organization. The operator of these programs is not a Foster Parent Association which is defined as a 501(c)(3) membership organization only open to families with foster children, whose services may vary in scope from one association to another. An organization offering foster care family support can become or retain their agency eligibility status if it meets all of the criteria below. If the organization is not able to meet all of these requirements, the organization will be ineligible for agency membership.

Agency Requirements:

1. Must meet the standard agency requirements as stated in the Member Contract.
2. Must not be commonly listed as a Foster Parent Association.
3. Must offer at least once per quarter a substantial amount (3 or more) of regularly scheduled programs and/or services that are directly organized and administered by the organization for families with foster children and/or other individuals. These programs cannot be related to the distribution of products obtained from the Member. A referral or information service, such as a website or call center that identifies other programs in the community for the clients to attend, does not qualify as a program/service. Examples of substantial services and programs are counseling services, foster care placement programs, group homes for foster kids who have not been placed with a family, training and educational workshops for adults and kids.
4. Must have an open pantry and allow all people access to pantry products if they request assistance and meet the ill, needy or infant qualification. The organization does not need to publicly advertise that they are an open pantry, unless they choose to do so. However, if the Member is contacted by an individual inquiring about pantry distribution sites, then the Member should include these organizations in the referral list.
5. Only provide products to clients that the organization can confirm, or who otherwise self-attest, that they meet the criteria of ill, needy or infants that are truly needy. Families accessing the donated product must, at a minimum, self-attest that they are in need and qualify to receive the donated product. (A child who is placed in foster home is not a determinant of need, because they are being cared for by a guardian. The determinant of need is based on the need of the foster family/adult responsible for the care of the child.)



6. Cannot require clients to fill out a Membership Application. The organization can collect client information on an information form, however the form must boldly state that anyone who needs food assistance and qualifies as ill, needy or infant does not need to fill out the form to receive assistance.
7. Must distribute the products from a facility or organizational vehicle that is not owned, rented by or occupied by a recipient of the products, unless it is a foster child group home that is officially operating as a foster child group home for the county or state government.
8. Must limit the amount of products taken by the families to that which is reasonable as determined by the average amount given to other families being served by pantries in the Member's service area. Distributing cases of product to individual families is not recommended.
9. If the agency is identifying itself as a Foster Child Placement organization or as a Foster Child Group home as one of the 3 programs as stated in requirement #3, then the organization must be officially recognized and registered by the state and county as such.
10. If the agency charges a fee from clients to participate in programs or utilize services offered by the organization, these fees can only be used for the services and programs that they are receiving from the organization and not used for any of the expenses incurred to operate the pantry program, including shared maintenance fees. Organization finances must be verified by the Member during the organization inspection.

## 16. Food Co-ops

Members may partner with organizations advertising themselves as food co-ops if those organizations meet all of the other requirements described in IRS Code 170(e)(3) and of the Member Contract.

**GUIDANCE:** Food Co-ops are typically framed as regular distributors of food to individuals and families that are members of the co-op organization. Individuals and families that participate in the co-op often pay an initial membership fee and may also pay an ongoing regular fee to participate in the co-op and receive food. Certain food co-ops require that participants contribute volunteer service to qualify for membership. Individuals and families that do not participate in the co-op through the fees and/or volunteer service may or may not be eligible to receive food product through the food co-op.

It is extremely unlikely that providing donated product to food co-ops could be done in conformance with IRS Code 170(e)(3). In addition to this reason, Feeding America does not recommend partnerships with food co-ops as agencies because of the potential for abuse and the many different requirements that would have to be met related to topics such as client eligibility, voluntary contributions, incidental membership fees/program participation fees, religious proselytizing. See sub-sections 3-5, 8, 10, and 11.

However, it is the decision of each individual Member whether or not to partner with food co-op organizations. Members that choose to partner with food co-op organizations as agencies should ensure that agency eligibility requirements are applied consistently across all agency partners, and should be careful to ensure that these organizations meet all requirements of IRS Code 170(e)(3) and of the Member Contract.

For those Members that choose to partner with food co-op organizations, the following requirements must be met:

1. The provision of donated product must serve the needy.
2. The fee assessed to co-op participants must not be related to the provision of donated product provided by the Member. Other services must be provided to clients for the fee and the burden of proof is on the food co-op that the participant fee is reasonable.
3. No participants in need of food assistance can be required to volunteer to receive donated product.

# MEMBER FEES AND CHARGES

## 17. Credit For Product Received

Members may give agencies or other Members donated product or shared maintenance credit for products they (the Member or agencies) donate to the Member. Members may not require agencies or other Members to provide donated product in exchange for products they receive from the Member.

**GUIDELINES:** Items donated for charitable purposes under IRS Code 170(e)(3) may not lawfully be bartered. Members may credit agencies for product donations so long as the agency's giving and receiving product to/from the Member are logged in the Member's books as separate transactions.

Example: The agency delivers product to the Member; the donation is logged in and processed just like any other donation, except that a credit is added to the agency's account. That ends the transaction.

## **18. Averaging Shared Maintenance Fees**

Members may not exceed the Feeding America shared maintenance ceiling on some items so as to average out those items which are distributed at no charge or for some amount under the ceiling.

## **19. Credit For Services**

Members may choose to allow agencies or other Members to earn credit against shared maintenance owed, based on labor provided by volunteers working at the Member in the name of and for the agency. The Member may not require agencies or other Members to provide services in exchange for products they receive from the Member.

**GUIDELINES:** This does not apply to individual volunteers representing themselves. The key is that this represents an agency to agency transaction as described in the IRS regulations as acceptable. It is recommended that the agency's volunteer credit and the agency's receiving of product be logged in the Member's books as separate and independent transactions.

## 20. Incidental Client Fees

Members may operate programs that distribute donated products directly to clients, and assess incidental fees in the form of regular client membership fees, provided that the following conditions are met:

- The charges are unrelated to the cost of the client's acquisition of donated product and that the costs of administration, warehousing, and distribution of that donated product are reasonable and appropriate.
- Other services are provided over and above the distribution of the food.

**GUIDELINES:** Member programs that have as their basis of organization regular client membership fees must conform to the two stipulations outlined above. Collection of program fees cannot be related to the distribution of the food. A program with a client membership fee structure that provides no service other than the distribution of food is ineligible. In addition, the burden of proof that the program client membership fee is reasonable is the responsibility of the Member. Total program costs on which the fee is based must be clearly documented.

Examples of acceptable additional services include:

- Training in nutrition, menu planning, and/or meal planning
- Informational newsletters
- Day trips, field trips, or other planned social activities and outings
- Organized seminars offering professional speakers on any number of topics, including speakers from other organizations (such as the Social Security Administration, the SNAP Office, a local domestic violence shelter, Bread for the World, etc.)

Please note that the client membership fee should not vary based on the specific services provided at any given time, but rather should be pre-determined and regular (i.e., annual or semi-annual).