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TO: All Local Health Departments and other Indiana Food Regulatory Agencies

FROM: A. Scott Gilliam, MBA, CP-FS
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SUBJECT: Additional Guidance for Changes to Definition of “Food Establishment”
Under Senate Enrolled Act 190 (IC 16-18-2-137)

This is a supplement to the document issued by this office on June 8, 2007. The intent is to assist local health departments (LHD) and other Indiana food regulatory agencies in the uniform use of the definition of “food establishment” as redefined in Senate Enrolled Act 190 (SEA 190). SEA 190 of the 2007 Indiana General Assembly changed the definition of “food establishment” found in Indiana Code (IC) 16-18-2-137, affecting its use in IC 16-42-5 (Food Establishment Act) and IC 16-42-5.2 (Food Handler Certification Act).

SEA 190 dramatically changed the definition of “food establishment” which is the basis for determining whether or not a food operation is subject to compliance with certain public health laws and rules. SEA 190 does provide direction for the evaluation of the church, religious, civic, fraternal, veteran or charitable organization(s). It gives a baseline for determining whether or not they meet the definition of “food establishment” based upon what they serve and who prepares it.

This document will give history of the definition, discuss the change and provide guidance as to the affects the change has on the interpretation of IC 16-42-5, IC 16-42-5.2 and the affected rules. It will provide an in-depth discussion of the tax exempt requirements of the federal government and explain the different classes of exemptions and their association with the new definition of “food establishment” under Indiana law. However, this document’s primary focus is on IC 16-18-2-137(b) (2), (5), and (6).

BACKGROUND AND DISCUSSION

SEA 190, effective July 1, 2007, did three (3) important things as it relates to IC 16-42-5, IC 16-42-5.2 and the affected rules:

- I. It added a subsection to the official definition of the term “food establishment”.
- II. It describes what is not a “food establishment” referencing section 501 of the Internal Revenue Code, (I.R.C.) rather than the Indiana Department of Revenue exemption law;
 - A. It identifies certain organizations, such as religious, nonpublic educational, civic, fraternal, veterans or charitable;
 - B. It has identified that whatever the 501 exempt organization does relating to food must be centered on an “event” or “celebration” as described in IC 16-18-2-137(b)(2), (5) and (6);
 - C. It does not exempt the organization serving food being provided in a restaurant or cafeteria with an extensive menu;

D. It does not exempt food prepared by a for-profit entity; and

E. It changed the length of time the civic, fraternal, veterans or charitable organization(s) can serve food without meeting the definition of “food establishment” from thirty (30) days to fifteen (15) days within a calendar year.

III. It repealed IC 16-42-5-4, which stated provisions concerning not-for-profit organizations and their ability to waive their exemption from regulation.

Prior to SEA 190, the definition of “food establishment” was found in IC 16-18-2-137 and was defined simply “*for purposes of IC 16-42-5 and IC 16-42-5.2, means any building, room, basement, vehicle of transportation, cellar, or open or enclosed area occupied or used for handling food*” which could involve many different types of food handling. In IC 16-42-5.2, the definition of “food establishment” is referenced, as it relates to the definition of certified food handlers and food handler. In addition, the section concerning non-profit organizations addressed in IC 16-42-5-4 that were exempt from the Indiana gross income tax was repealed, but a more extensive definition was written to replace it and took effect on July 1, 2007.

Furthermore, a “retail food establishment” as defined in ISDH Rule 410 IAC 7-24, Retail Food Establishment Sanitation Requirements, is a subset of the definition of “food establishment”. If a facility is determined to not be a “food establishment” then it would also not be considered a “retail food establishment.”

I. Definition of “Food Establishment”

(Affected sections IC 16-18-2-137(b))

With the addition of the new subsection to the definition of “food establishment” a re-evaluation of all organizations and event operations that may be affected will need to be performed and a determination made as to whether or not the operation meets the new definition of “food establishment”. This must be done first before considering inspecting or licensing the operation. Operations that do not meet the definition are not subject to Indiana laws and rules.

II. IRS 501 “Tax Exempt” Code

(Affected sections IC 16-18-2-137(b)(2); IC 16-18-2-137(b)(5); IC 16-18-2-137(b)(6))

To discuss this subject, one needs to know and understand the conditions under which the IRS code functions. The new definition of “food establishment” addresses religious; nonpublic educational settings; and civic, fraternal, veterans or charitable organizations, all of which are impacted by the IRS 501 code. All organizations must be a legal entity and have IRS 501 status. It is therefore necessary for a common understanding of what is meant by the terms.

Legal Entity: The IRS has indicated that an organization must be a “legal entity” in order to be tax-exempt under IRS section 501. The following are examples of how an organization could prove they exist as a legal entity:

- Letters of Determination or Affirmation, if the organization has filed for the tax exempt status; *These letters may also be available when certain organizations, not required to file, may have voluntarily filed.*
- “Articles of Incorporation”, if a corporation has filed with the Secretary of State;
- Organization or governing document signed by at least two (2) members, if an association;
- Documentation related to their charter from a parent organization; or
- Legal opinion as to the tax status of the organization from a licensed attorney.

If an organization applied for a “letter of determination or affirmation” from the IRS, but the document is not available, then the regulatory authority has the authority to ask to see any documentation used to facilitate a determination.

Documentation of activity, such as banking account statements, book ledgers, invoices and volunteer schedules or rosters, do not qualify as proof of a legal entity.

Types and Examples of IRS 501 Organizations: There are certain rules or criteria that the different subclasses of IRS 501 must abide by. A charitable organization is organized and operated exclusively for religious, educational, scientific or other charitable purposes and is the broadest category. For example, all **IRS 501(c)(3)** organizations, including churches and religious organizations, must abide by the following:

- Their net earnings may not inure to any private shareholder or individual
- They must not provide a substantial benefit to private interest
- They must not devote a substantial part of their activities to attempting to influence legislation
- They must not participate in, or intervene in, any political campaign on behalf of (or in opposition to) any candidate for public office
- The organization's purposes and activities may not be illegal or violate fundamental public policy

Examples of **tax-exempt section 501(c)(4) "civic"** organizations are: volunteer fire departments, homeowners associations, and civic associations whose primary purpose is for social welfare. These do not include campaign committees related to political activity.

Examples of **tax-exempt section 501(c)(8) or (10) "fraternal"** organizations are: Moose, Optimist, Shriners and Jaycees that must operate under the "lodge" system with a parent organization. Organizations, such as the Knights of Columbus or the Masons, have similarities to religious organizations, but are considered to be separate "fraternal" organizations under the IRS code. according to the IRS and fall under either subsection 8 or 10 as tax exempt.

Examples of **tax-exempt section 501(c)(19) "veterans"** organizations are: American Legion, Veterans of Foreign Wars, and Eagles that must meet the following specific criteria:

- To promote the social welfare of the community (that is, to promote in some way the common good and general welfare of the people of the community).
- To assist disabled and needy war veterans and members of the U.S. Armed Forces and their dependents and the widows and orphans of deceased veterans.
- To provide entertainment, care, and assistance to hospitalized veterans or members of the U.S. Armed Forces.
- To carry on programs to perpetuate the memory of deceased veterans and members of the Armed Forces and to comfort their survivors.
- To conduct programs for religious, charitable, scientific, literary, or educational purposes.
- To sponsor or participate in activities of a patriotic nature.
- To provide insurance benefits for its members or dependents of its members or both.
- To provide social and recreational activities for its members.

Examples of **tax-exempt 501(c)(3) charitable** organizations are the nonprofit and nongovernmental hospitals, old-age homes, animal shelters, Red Cross chapters, the United Way, and Goodwill Industries.

A. Identification of the Organizations

(Affected sections IC 16-18-2-137(b)(2); IC 16-18-2-137(b)(5); IC 16-18-2-137(b)(6))

In review of IC 16-18-2-137, there is no reference to churches separate from a religious organization. However, to discuss the IRS code it is necessary for church and religious organizations to be separated. The IRS requirements are different for each type of organization.

Church: The term “church” is not defined in law and is intended to be used broadly in the sense that it would cover any place of worship, including, but not limited to, churches, synagogues, temples, and mosques. It also includes conventions and associations of churches, as well as integrated auxiliaries of a church.

A “church” is never required to file Form 1023 to be tax-exempt. Form 1023 is the document that most other organizations submit to the IRS to apply for tax-exempt status. Churches also do not have to file Form 990. Form 990 is the annual tax filing form that most other 501 tax-exempt organizations file with the IRS to continue their tax-exempt status. Still however, the organization must comply with all the other legal requirements for section 501(c)(3) organizations (described above). The IRS considers the following criteria in determining whether an organization is a church:

- Distinct legal existence
- Recognized creed and form of worship
- Definite and distinct ecclesiastical government
- Formal code of doctrine and discipline
- Distinct religious history
- Membership not associated with any other church or denomination
- Organization of ordained ministers
- Ordained ministers selected after completing prescribed courses of study
- Literature of its own
- Established places of workshop
- Regular congregations
- Regular religious services
- Sunday schools for the religious instruction of the young
- Schools for the preparation of its members

An integrated auxiliary of a church refers to a type of organization that is related to a church or convention or association of churches, but is not such an organization itself. In general, the IRS will treat an organization that meets the following three (3) requirements as an integrated auxiliary of a church. The organization must:

- Be described both as an IRS 501(c)(3) charitable organization and as a public charity under IRS 509(a)(1), (2) or (3); (Note: Section 509 is not relevant for purposes of this document.)
- Be affiliated with a church or convention or association of churches; and
- Receive financial support primarily from internal church sources as opposed to public or governmental sources.

Examples are men’s and women’s organizations, seminaries, mission societies and youth groups as long as they meet the first two (2) bullets above.

There are obvious difficulties with these parameters for regulators in making these types of distinctions, but if necessary, these attributes can be verified.

Religious organizations: Religious organizations that are not churches would include nondenominational ministries, interdenominational and ecumenical organizations (other than associations of churches) whose principal purpose is the study or advancement of religion, rather than the practice of worship.

- These entities would have 27 months from the inception of the organization to file Form 1023 for IRS to recognize their tax-exempt status unless they have less than \$5,000 in average annual gross receipts.
- If the religious organization has less than \$25,000 in average annual gross receipts, it does not have to file Form 990.

The IRS takes a broad view of religious purposes (encompassing much more than just churches) and educational purposes (more than just schools). See Internal Revenue Manual (IRM) 7.25.3 for a discussion of such purposes under IRS 501(c)(3): <http://www.irs.gov/irm/part7/index.html>

Organizations organized for educational purpose in a nonpublic educational setting: For nonpublic educational settings, the IRS has provided the following as pertinent points in making the determination:

- Nonpublic educational settings are more inclusive than just private schools.
- All children's organizations, such as baseball little leagues; boys and girl scouts; YMCA's; and YWCA's are all considered forms of nonpublic educational settings for children.
- Many of these organizations do not have their own tax-exempt status under IRS code section 501, but are usually sponsored by another umbrella organization, such as a school, church or national association office.
- Also included are parent-teachers associations, parent booster clubs, and other loosely knit organizations affiliated with the umbrella organization.

Schools that are funded by taxpayer dollars with school boards populated by members elected or appointed by citizen voters or other officials, are not tax-exempt under IRS code section 501 and therefore, are considered "food establishments."

- Any auxiliary operations, such as concession stands and fund raisers operated by booster clubs, would need to have their own tax-exempt status under IRS code section 501, since the public school does not have such exemption and; therefore, cannot act in the capacity as the umbrella organization.
- The booster club would need to have the same tax-exempt status under IRS code section 501 as any other non-profit civic, fraternal, veterans or charitable organization.
- Very small IRS 501(c)(3) public charities (less than \$5,000 average annual gross receipts) are not required to apply for 501(c)(3) status in order to be exempt.

Civic, Fraternal, Veterans and Charitable organizations: The same determinations will have to be made on civic, fraternal, veterans and charitable organizations as with the religious and non-public educational organizations. The organization must tax-exempt under section 501 of the IRS code or they would be considered "food establishments". They may or may not be IRS 501(c)(3), but must have at least an IRS 501 status.

B. Events or Celebrations

(Affected sections IC 16-18-2-137(b)(2); IC 16-18-2-137(b)(5); IC 16-18-2-137(b)(6))

Even though the organization(s) has a tax-exemption under section 501 of the IRS code, the food served by church, religious, civic, fraternal, veteran, or charitable organization, must be centered on an "event" or "celebration" held for the benefit of the organization. Examples of event(s) or celebration(s), as mentioned in the statute include, but are not limited to, events, such as pitch-ins, funeral dinners, wedding receptions, etc. and others as listed in the law. A concession stand operated at a nonpublic educational setting, such as a private school sporting event would be an example of an event not considered to be a "food establishment",

as it is connected with an event sponsored by the umbrella organization. All event type functions would be activities not meeting the definition of a “food establishment”.

The operation of a food pantry or food bank is an example of an activity which should be evaluated on a case by case basis. A food pantry or food bank could be operated in connection with an event or celebration. There are, however, food pantries or food banks that could be operated routinely and not be associated with an event. The “non-event” activities would be classified as a “food establishment”.

If a food bank or pantry is determined to not meet the definition of a “food establishment”, it is important to know that the Food Drug and Cosmetic (FDC) Act (IC 16-41-1 through IC 16-42-2) provides limited authority to conduct a complaint investigation or a recall effectiveness check. These operations will often receive donated and/or salvaged foods. It is therefore important that these facilities be visited in the event of a serious situation, such as a canned food botulism recall. However, it is strongly recommended that the FDC Act not be used to perform **routine** inspections on operations that do not meet the definition of a “food establishment”.

C. Extensive Menu

(Affected sections IC 16-18-2-137(b)(5))

Webster’s Dictionary defines “extensive” as “having broad extent, far and wide” which does little to define at what point a food operation is extensive. However, IC 16-42-5.2 provides an exemption from food handler certification if the operation is limited to the following:

- (1) Heating or serving precooked foods.
- (2) Preparing or serving a continental breakfast such as rolls, coffee, juice, milk, and cold cereal.
- (3) Preparing or serving nonalcoholic or alcoholic beverages that are not potentially hazardous beverages or ice.
- (4) Preparing or serving packaged or unpackaged foods that are not potentially hazardous foods, including elephant ears, funnel cakes, cotton candy, confectionaries, baked goods, popcorn, and chips and grinding coffee beans.
- (5) Providing prepackaged food in its original package.

For lack of anything more explicitly defined in law on “extensive” food handling, the Indiana State Department of Health (ISDH) considers the aforementioned list to describe what is not extensive and can be done in a restaurant or cafeteria operated by a religious or nonpublic educational setting without meeting the definition of a “food establishment”. Examples of food items are provided on the Food Protection Program website under Food Handler Certification. The following website details examples of foods practices that are covered and not covered under this law: <http://www.in.gov/isdh/regsvcs/foodprot/index.htm>

Therefore, if a restaurant or cafeteria type operation operated by these organizations serves more than the aforementioned list, then they are serving an extensive menu and should be regulated.

D. For-Profit Entities

(Affected sections IC 16-18-2-137(b)(5); IC 16-18-2-137(c))

In IC 16-18-2-137, subsections (b)(5) and (6), addresses events where a for-profit entity may be contracted to provide food for a church, religious, civic, fraternal, veteran or charitable organization(s). In these situations, the “for-profit entity” would be considered a “food establishment” and the food prepared by the “for-profit entity” would be subject to the applicable laws and rules. This would include instances where an organization hires the for-profit entity to prepare food that is supplied by the organization. However, any food prepared and donated by the members of the organization(s) and used at the same event would not be regulated.

E. From Thirty (30) Days to Fifteen (15) days

(Affected sections IC 16-18-2-137(b)(6))

In previous years, the civic, fraternal, veteran or charitable organization(s) were allowed to operate for 30 days or less per calendar year and they were not considered “food establishments”. The new definition of “food establishment” changes the time frame from thirty (30) days or less per calendar year to fifteen (15) calendar days or less per year. In other words, if a civic, fraternal, veteran or charitable organization(s) operates a food operation for more than fifteen (15) calendar days per year, they meet the definition of a “food establishment”.

III. IC 16-42-5-4 Repealed

(Affected section IC 16-18-2-137(b)(6))

It is no longer possible for not-for-profit entities desiring to be regulated to waive their right to exemption, since the waiver of exemption was repealed.

If an organization, which has been determined to not meet the definition of a “food establishment”, requests to have a food safety evaluation of their operation conducted by a health department representative, such a courtesy evaluation may be conducted. This evaluation should only be done as a public service consultation and not regulatory. Conclusions cited can be made in writing, but cannot be considered violations of a law or rule. Statements should reflect that the conditions or processes cited are based on generally accepted food safety principles instead of a reflection of noncompliance with a law or rule. These comments should be written on a medium, such as blank paper and not on an inspection form.

In addition, organizations found not to meet the definition of “food establishment” are not subject to any additional requirements, such as registration with a LHD. Such activities are a form of regulation that can not be applied to these organization(s) or event(s).

CONCLUSION

The significant changes to the definition of “food establishment”, which is the basis for determining whether or not a food operation is subject to compliance with certain public health laws and rules, now requires each potential “food establishment” be assessed, based on this guidance, and a decision be made by the regulatory authority. If it is determined that an organization does not meet the definition of “food establishment”, thus making it not amenable to the laws and rules, it is recommended that the situation be documented for evidentiary and historical purposes. One never knows when the situation may need to be reviewed in the future.

In addition, attached are appendixes, which represent examples of events and organizations which, do meet the definition of a “food establishment”, as well as a list of organizations that do not meet the definition. See appendix A and B.

Attached are decision trees, see Appendix C, which have been developed for each of the four (4) main categories, “church; religious organization; non-public educational settings; and civic, fraternal, veterans and charitable organizations. They are to be used as a tool, along with your understanding of this guidance document, to assist in making determinations whether or not an organization meets the definition of a “food establishment”. These tools follow the progression of this guidance document and must be used in conjunction with the guide for maximum benefit.

For information regarding the status of an organization that has applied for and received recognition of IRS 501, call 1-877-829-5500 or writing to:

Internal Revenue Service
EO Determinations
P.O. Box 2508
Cincinnati, OH 45202
Fax number 513-263-3522

The following URL addresses may help with your understanding the IRS 501 Code:

<http://www.irs.gov/irm/part7/ch10s03.html#d0e84851>

<http://www.irs.gov/irm/part7/ch10s04.html#d0e85030>

<http://www.irs.gov/formspubs/lists/0.,id=97796.00.html>

<http://www.irs.gov/irm/part7/ch10s24.html> Forms

<http://www.irs.gov/pub/irs-pdf/p1828.pdf> Church and Religious Organization Guide

In addition, the following websites were recommended by the IRS as good resources for checking on an organization's IRS 501 status:

<http://tfcny.fdncenter.org/990s/990search/eseach.php>

<http://www.guidestar.org/index.jsp>

<http://www.eri-nonprofit-salaries.com/index.cfm?FuseAction=NPO.Search>

It is best to type or copy and paste these URL address into your web browser.

If you have questions regarding this topic or this document, please contact the Food Protection Program at 317-233-7360 or your area Food Protection Program representative.

Appendix A

Examples of Entities that are not a “Food Establishment”

- A private home used for personal living such as preparing food for themselves or their guests free of charge
- Parochial schools and private universities that have pitch-ins, private parties, or any other event that benefits the school or university
- Churches that have ceremonies and private events that benefit the organization and its members, such as funeral dinners, pitch-ins, wedding receptions, communions and other similar types of events
- Vehicles delivering food for Meals on Wheels, Salvation Army, Red Cross or church members delivering meals to the needy or homeless; vehicles used for delivery to/from Area on Aging Senior centers
- Family reunions anywhere, private parties anywhere, wedding receptions anywhere, funeral dinners anywhere, wakes and open houses anywhere
- Parochial/private schools and private universities, and auxiliary organizations related to these entities that have concession stands, bake sales, popcorn sales or any other activity connected to an event that benefits the school or university
- Churches that have ceremonies and private events that benefit the organization and its members, such as bake sales, pitch-ins, chili and spaghetti dinners, pizza fund raisers and popcorn sales
- Bake sales; chili, spaghetti, steak and pork chop dinners; fish fries; pizza fund raisers; and popcorn sales occurring not more than 15 calendar days per year that are operated by Indiana non-profit organizations, such as civic, fraternal, veterans or other charitable organizations under IRS 501
- Boy Scout Troop holding a chili dinner open to the public if the sponsoring organization has IRS 501 status
- Baseball little league concession stands if the organization(s) has IRS 501 status
- Home economic and culinary classes where food is prepared and consumed by the class students or their guests, such as family members or close friends of the students. This does not include a restaurant operated by the culinary students for anyone to consume food provided by the class.
- A church which operates a food bank intermittently in conjunction with an event or celebration
- A coffee shop with purchased pastries served and operated by a ministry of a church (outreach, youth group, seniors fellowship)

Appendix B

Examples of Entities that are a “Food Establishment”

- A produce stand set up at the corner of a private lot selling whole or cut produce
- A building on a private lot being used for the business (advertising & some fee) of processing game animals
- A retail honey processor (see honey processor guidance document)
- A retail maple syrup processor (see maple syrup guidance document)
- An individual making apple cider/wine/fresh, frozen, dried, cooked meat or produce/baked goods/meals for sale
- Bake sales; chili, spaghetti, steak and pork chop dinners; fish fries; pizza fund raisers; and popcorn sales occurring **for more than 15 calendar days** per year that are operated by organizations, such as civic, fraternal, veterans or other charitable organizations tax exempt under IRS code section 501
- Bake sales; chili, spaghetti, steak and pork chop dinners; fish fries; pizza fund raisers; and popcorn sales that are operated by organizations, such as civic, fraternal, veterans or other charitable organizations **not** tax exempt under IRS code section 501
- A “for-profit entity” contracted by a religious, educational, civic, fraternal, veterans or charitable organization to prepare food for religious, educational, civic, fraternal, veterans or other charitable organizations’ event or celebration whether the organization is exempt or not tax-exempt under I.R.C. section 501
- An extensive menu of food prepared in a school cafeteria
- A church operating a soup kitchen, or other regular food service production with an extensive menu of prepared items

SENATE ENROLLED ACT No. 190

SECTION 1. IC 16-18-2-137 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]:

Sec. 137. (a) "Food establishment", for purposes of IC 16-42-5 and IC 16-42-5.2, means any building, room, basement, vehicle of transportation, cellar, or open or enclosed area occupied or used for handling food.

(b) The term does not include the following:

(1) A dwelling where food is prepared on the premises by the occupants, free of charge, for their consumption or for consumption by their guests.

(2) A gathering of individuals at a venue of an organization that is organized for educational purposes in a nonpublic educational setting or for religious purposes, if:

(A) the individuals separately or jointly provide or prepare, free of charge, and consume their own food or that of others attending the gathering; and

(B) the gathering is for a purpose of the organization.

Gatherings for the purpose of the organization include funerals, wedding receptions, christenings, bar or bat mitzvahs, baptisms, communions, and other events or celebrations sponsored by the organization.

(3) A vehicle used to transport food solely for distribution to the needy, either free of charge or for a nominal donation.

(4) A private gathering of individuals who separately or jointly provide or prepare and consume their own food or that of others attending the gathering, regardless of whether the gathering is held on public or private property.

(5) Except for food prepared by a for-profit entity, a venue of the sale of food prepared for the organization:

(A) that is organized for:

(i) religious purposes; or

(ii) educational purposes in a nonpublic educational setting;

(B) that is exempt from taxation under Section 501 of the Internal Revenue Code; and

(C) that offers the food for sale to the final consumer at an event held for the benefit of the organization;

unless the food is being provided in a restaurant or a cafeteria with an extensive menu of prepared foods.

(6) Except for food prepared by a for-profit entity, an Indiana nonprofit organization that:

(A) is organized for civic, fraternal, veterans, or charitable purposes;

(B) is exempt from taxation under Section 501 of the Internal Revenue Code; and

(C) offers food for sale to the final consumer at an event held for the benefit of the organization;

if the events conducted by the organization take place for not more than fifteen (15) days in a calendar year.

SOURCE: IC 16-42-5-4; SECTION 2. IC 16-42-5-4 IS REPEALED [EFFECTIVE JULY 1, 2007].