DON'T WASTE, DONATE

ENHANCING FOOD DONATIONS THROUGH FEDERAL POLICY

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Harvard Food Law and Policy Clinic
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NATURAL RESOURCES DEFENSE COUNCIL

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About the Harvard Law School Food Law and Policy Clinic

The Harvard Law School Food Law and Policy Clinic, a division of the Center for Health Law and Policy Innovation, is an experiential teaching program at Harvard Law School that links law students with opportunities to work with clients and communities on various food law and policy issues. The clinic strives to increase access to healthy foods, assist small and sustainable farmers in breaking into new commercial markets, and reduce waste of healthy, wholesome food, while educating law students about ways to use law and policy to positively impact the food system. For more information, visit http://www.chlpi.org/flpc/.

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SECTION I. EXECUTIVE SUMMARY

While there is an abundance of food produced in the U.S. every year,[1] a significant amount of this wholesome, healthy, and safe food ends up in businesses' dumpsters and consumers' trash cans, making its way to landfills.[2] Forty percent of the food produced in the U.S. goes uneaten, resulting in at least 62.5 million tons of wasted food each year.[3] The amount of food waste in the U.S. has been on the rise for the past several decades, with per capita food loss increasing by 50 percent from 1974 to 2005.[4] At the same time, 42.2 million individuals, including 13.1 million children, were food insecure in 2015, meaning that at some point during the year they lacked access to a sufficient amount of food to lead an active, healthy lifestyle.[5] Diverting safe, edible food from the waste stream to food insecure individuals can significantly reduce food waste, while also playing a role in hunger relief efforts.

The authors of this report acknowledge that food donations alone cannot solve the pressing challenge of food insecurity, as this would require addressing the underlying poverty that is its root cause. However, as we work to implement broader and deeper solutions to food insecurity, complementary mechanisms for addressing hunger relief are still needed. Donations of healthy, wholesome food can provide a mechanism for immediate relief of food shortages and a critical response to food insecurity.

A number of federal laws and policies strive to enhance food recovery, yet many are out of touch with the evolving landscape of food donation and the effectiveness of others is limited by a number of barriers. This policy paper presents actions the federal government can take to better align federal laws and policies with the objective of increasing donation of safe surplus food. In brief, we recommend the following policy changes to enhance food donation:

Enhance Liability Protections for Food Donations. The Bill Emerson Good Samaritan Food Donation Act (Emerson Act) provides a federal baseline of civil and criminal liability protections for food donors and the nonprofits that receive and redistribute those donations. The protections afforded by the Emerson Act are significant and have enabled many food donations; yet, numerous existing and prospective donors remain unaware of these protections. Furthermore, several provisions in the Act should be broadened to better align with the current food recovery landscape.

Recommendations:

- **Congress should delegate an executive agency to be in charge of implementing and interpreting the Emerson Act.** Unlike many statutes that delegate power to an executive agency to interpret and enforce them, Congress never delegated authority over the Emerson Act to a specific agency. The Act also has never been interpreted by a court. As a result, donors may not know how to interpret some of the Act's more ambiguous terms and are unclear on the Act's requirements. Congress should designate a federal agency, most likely the U.S. Department of Agriculture, to be in charge of providing guidance and raising awareness about the Emerson Act.
- **Congress should amend the Emerson Act to provide liability protection to nonprofit organizations that either give food away for free or charge recipients a reduced fee.** The Emerson Act only provides liability protections to donors and nonprofit food recovery organizations when the end recipient receives food for free.[6] This means that the Emerson Act does not extend liability protection when the end recipient pays for the food, even at a reduced rate. This outdated language deters donations to innovative food recovery models, such as nonprofit "social supermarkets" that sell surplus food at a reduced price while filling a need in local communities. Such models allow food recovery organizations to use any funds generated by the sale to offset their operating costs, thus enabling them to serve more individuals.
- **The Emerson Act should be broadened to provide liability protection for wholesome food donated directly to individuals in need by food producers and licensed food service establishments, including restaurants, food processors, institutional foodservice, retailers, farms and others.** The Emerson Act covers donations made to "a nonprofit organization for ultimate distribution to needy individuals,"[7] but does not provide protection for donations of wholesome food directly from a donor to those in need. Extending protections to direct donations can help to increase efficiency, reduce costs, and enable timely use of perishable food. This provision should be limited to businesses and institutions that provide low-risk food, such as produce straight from the farm, or institutions that comply with commercial food safety requirements, thus ensuring that these direct donations will be made safely.
- **The Emerson Act should be amended so that foods must only comply with (or be reconditioned to comply with) federal, state, and local safety standards or safety-related labeling standards.** The Emerson Act currently only protects donations of foods that comply with or are reconditioned to comply with all federal, state, and local "quality and labeling standards."[8] However, federal law imposes several labeling requirements, such as the manufacturer's

address or the product's net weight, which are not necessary to ensure that donated food is safe. All donated food should comply with safety standards, but giving liability protection to donated foods that have labeling flaws irrelevant to safety could help prevent unnecessary waste.

- **The Emerson Act should explicitly provide liability protection for the donation of past-date food.** Date labels on food are generally indicators of freshness, yet many consumers, potential food donors, and state and local governments misinterpret these labels as indicators of safety. Despite the fact that Congress did not perceive past-date foods as beyond the Emerson Act's protection, the Act does not explicitly state that donations of past-date foods are protected from liability, raising fears among donors that donating past-date food will place them outside the Act's protection. Congress should amend the Act to clearly state that past-date food donations are protected from liability.

Improve Federal Tax Incentives for Food Donations. Federal tax incentives exist to encourage food donations. Food donors are eligible for either a general deduction (deducting the basis value of the charitable contribution) or an enhanced deduction (substantially higher than the general deduction) for qualified food donations. The enhanced tax deduction was modified and permanently expanded in December 2015 to apply to all businesses that donate food, so long as the donation meets certain criteria. The 2015 changes took a significant step to incentivize donations, but there are additional ways to further improve the federal tax incentives available for food donations.

Recommendations:

- **Federal tax incentives should be expanded to include an alternative tax credit that can be used by low-margin businesses, like many farms, in lieu of the enhanced deduction**. Tax deductions do not sufficiently incentivize low-profit margin businesses, such as many farms, even though these businesses often incur substantial additional operating costs and other ancillary expenses when making food donations. Congress can help to address the unique situation of farmers and other low-profit businesses that struggle to utilize a deduction by providing a tax credit instead of a deduction. Businesses should be free to choose whether to claim the enhanced deduction or the tax credit.
- **Federal tax incentives should be strengthened by adding a deduction or credit specifically to cover the cost of transporting donated food.** The cost of transporting food from the donor to a food recovery organization is common to all food donation but one that is difficult to cover, particularly for smaller businesses and food recovery organizations. To address this issue, Congress should provide a tax incentive specifically tailored to offset this cost. Such incentive should be limited to logistics, transportation, or trucking companies that transport donated food, farms that deliver donated food directly to food rescue organizations, and donors that pay a food recovery organization to transport donations. Limiting the tax incentive to these situations will help encourage businesses to donate transportation services and generate resources for food recovery organizations to increase their own transportation capacity.
- **Congress should foster the development of innovative, sustainable food recovery models by repealing the "no-charge" provision that prevents the enhanced deduction from being claimed if donated food is "transferred by the donee in exchange for money, other property, or services."**[9] The enhanced deduction is not available if the donated food will be sold, even at a steeply discounted price, to the end recipient. This "no-charge" provision hampers development of new food recovery models, such as nonprofit organizations that employ a retail "social supermarket" model, or those that create and sell value-added goods made from donated foods. Donors have little incentive to donate to such organizations if they are not able to claim the enhanced deduction, thus stifling innovation.
- **Congress should amend the enhanced deduction to only require compliance with safety standards and safety-related labeling Food, Drug, and Cosmetic Act requirements.** A business can only claim the enhanced deduction if the donated food meets all applicable safety and labeling requirements of the federal Food, Drug, and Cosmetic Act. Although some labeling requirements are relevant to safety (such as ingredient and allergen lists), some (such as net weight) are not. Disqualifying all mislabeled food from eligibility for the enhanced deduction deters donation of many wholesome foods. Congress should clarify that only labeling requirements related to safety serve as a prerequisite for receiving the enhanced tax deduction.

Standardize and Clarify Expiration Date Labels. There is no federal system regulating the "sell by," "best by," "use by," and other date labels used on food. Instead, each state decides whether and how to regulate date labels, leading to a patchwork of inconsistent regulations. Manufacturers have broad discretion on how the dates on foods are selected, and these dates typically reflect quality and taste rather than safety. Yet businesses, individuals, and even state regulators frequently misunderstand the dates and interpret them to be indicators of safety. Some states even restrict or forbid the sale or donation of past-date foods. These inconsistent and misguided state laws lead to wholesome foods unnecessarily

being discarded rather than donated.

Recommendations:

- **Congress should establish standard label language that distinguishes between quality-based and safety-based labels, and educate consumers on the meaning of the new date labels.** Congress should pass legislation or the FDA and USDA should collaborate to create a standardized date label system. Food manufacturers should have two options for date labeling: a "best if used by" date that is optional for indicating quality and a "use by" date required for food items that FDA and USDA find to have a food safety concern over time.
- **Allow for the sale or donation of foods after the quality date.** As part of the creation of a distinction between quality and safety dates, Congress should pass legislation or the FDA and USDA should collaborate to bar states from preventing the donation or sale of food that is past its quality date. Only the sale and donation of past-date foods bearing the "use by" safety date should be allowed to be restricted.

Better Monitor and Encourage Food Donation by Federal Agencies. The Federal Food Donation Act of 2008 encourages federal agencies that have contracts for food services or sale, food provision, or for use of federal property by private parties for events where food is provided, to donate excess food to nonprofits that distribute or serve to food-insecure people. This law requires that language encouraging the contractor to donate excess food, when possible, be added to such contracts. However, while they are encouraged to donate surplus food, federal agencies and their contractors are not required to make these donations. Further, they are not required to keep track of or report any donations they make, rendering it nearly impossible to assess vendors' performance or the broader impact of this Act.

Recommendations:

- **The Food Donation Act of 2008 should be amended to include a requirement that agencies and their contractors track and report on the amount of food donated.** Under current law, no reporting is required by federal agencies or their contractors regarding implementation of the Act. Required tracking and reporting on the amount of food donated will facilitate the collection of data on food donation and the effects of the Act, and help to increase donations.
- **The Food Donation Act of 2008 should be amended to require covered contracts to include language mandating that agency contractors take steps to donate excess food by creating a written agreement with a food recovery organization.** Mandating the insertion of stronger language and the formation of a relationship between the contractor and a food recovery organization through a written agreement would require agencies and contractors to take the necessary steps to begin donating food. In the event that surplus food is not donated, contractors should be required to summarize in an annual report the reasons for which they were unable to donate, such as refusal by the food recovery organization or the organization's inability to accept such donations. Mandating that agencies establish a relationship with a food recovery organization can increase food donations by federal agencies and help the federal government to serve as a model of best practices for states and private companies.

Publish Food Safety Guidance for Food Donations. Lack of clarity and consistency surrounding the food safety requirements for donated food poses a frequent barrier to donation. The FDA Food Code, a model food safety code created by the FDA and outside experts, has been adopted in some form by all 50 states but does not include language specifically related to food safety for food donations. This contributes to the absence of regulatory language specific to food donations in most state and local food safety regulations, and inconsistent regulatory language in those locales that do have relevant regulations. This deters food donations, as food donors are not able to find guidance regarding safety requirements for food donations, or are subject to regulations that vary greatly from one jurisdiction to another, posing a particular challenge to businesses that operate in multiple jurisdictions. The federal government does produce a separate resource for food recovery programs, known as the Comprehensive Resource for Food Recovery Programs, which contains valuable information about how to safely and effectively implement a food recovery program. However, this resource is not included in the FDA Food Code and is not widely disseminated, so most food donors, state regulators, and state and local health inspectors do not know of its existence. Additionally, the guide may not be appropriate for all organizations involved in food recovery, since existing organizations operate at a variety of scales and use different models of recovery. Finally, the resource is not regularly updated. Updating this guidance and incorporating it into the FDA Food Code would be an important step toward more consistent regulation of donated food.

Recommendations:

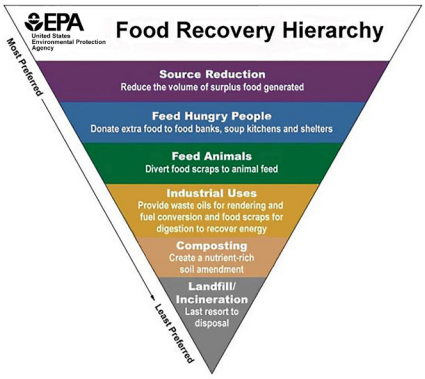
- **Include modernized and clarified guidance on food donations informed by food recovery organizations and donors operating at different scales and contexts in the FDA Food Code.** Because states generally base their food safety regulations on the model FDA Food Code, the addition of such language to the Food Code has the potential to foster more consistent state regulations and facilitate more food donation. Such language should be developed with the input of a range of potential donors and food recovery organizations operating at different scales and contexts, such as farms, restaurants, and food service establishments that donate prepare foods. The guidance should also reflect the ongoing evolution of food recovery in the U.S.
- **The FDA and the Conference for Food Protection should work to distribute the Comprehensive Resource so that it reaches a wider audience.** Whether or not the Comprehensive Resource is incorporated into the Food Code, the FDA and the Conference for Food Protection should go further to make the Comprehensive Resource more accessible by circulating it through additional online platforms, specifically ones frequented by food donors and local and state health inspectors.
- **The Comprehensive Resource should be updated every four years to reflect current food safety practices, data, language, and trends.** The Comprehensive Resource contains important information on implementing and maintaining a food recovery program, but its utility decreases when it is not regularly updated. The Comprehensive Resource should be updated every four years (the same frequency with which the FDA Food Code is updated) so that it reflects accurate data on food waste, common language with the Food Code, and current information on food science.

SECTION II. INTRODUCTION

Overview

The paradox of food waste in the United States—that large quantities of food are wasted each year while many individuals lack regular access to food—is proof of a broken food system. Forty percent of the U.S. food supply goes uneaten, resulting in at least 62.5 million tons of wasted food each year.[10] Although this excess food is wholesome and safe to eat, a significant amount ends up in landfills instead of the plates of those in need.[11] Uneaten food is the single largest contributor of solid waste in our nation's landfills.[12] This waste carries with it the loss of natural resources. Approximately 21% of the U.S.'s agricultural water and 20% of cropland and fertilizers are used to produce food that ends up in landfills.[13] This level of food waste presents a grave threat to our economy, our health, and our environment.

Despite the large amount of food that is unnecessarily discarded, 12.7 percent of U.S. households were food insecure in 2015, meaning that at some point during the year they lacked access to a sufficient amount of food to lead an active, healthy lifestyle.[14] It has been estimated that recovering and redistributing just 15 percent of all the food lost in the United States could feed 25 million Americans each year.[15]



Food waste reduction can be accomplished using multiple approaches, including preventing surplus food at the source, donating food to people in need, or diverting excess food to be used for composting or other industrial uses. In order to help public and private entities prioritize among these recovery opportunities, the U.S. Environmental Protection Agency (EPA) created the Food Recovery Hierarchy.[16] At the very top of the hierarchy, the EPA recommends "source reduction," or preventing food waste at the source.[17] The next best outcome, according to the Food Recovery Hierarchy, is ensuring that surplus or unused food is used to "feed hungry people."[18] Given all the resources that go into producing food and all the food insecure individuals in need, the best ethical and environmental choice for safe and wholesome surplus food is to ensure that it goes to people who need it.

It is important to clarify the role food donations can play in the broader picture of both reducing food waste and addressing food insecurity. Solving food insecurity will require addressing the underlying poverty that is its root cause. However, until we realize broader solutions to food insecurity, people still need food. At the same time, much safe, wholesome food currently goes to waste. While we work toward a more efficient food system, there is an abundance of surplus food that should be used to feed those in need. Food donations provide a mechanism for immediate relief from food shortages and are an essential resource that food insecure individuals rely on to feed themselves. Additionally, food donation programs

can often lead to less surplus by helping businesses realize the amount of excess food they generate.

Food Donation: An Underutilized Opportunity

Many food recovery and anti-hunger organizations recover and distribute food donations; together they are able to successfully rescue billions of pounds of food each year.[19] In 2015 alone, Feeding America, a nationwide network of food banks, distributed over 2 billion pounds of food that would have otherwise gone to waste.[20] However, a large percentage of surplus food still goes to waste. Across the entire supply chain, merely 10% of food is recovered each year.[21] On farms, an estimated 10 million tons of fresh fruits and vegetables remain unharvested each year due to low market prices, labor shortages, cosmetic imperfections and other causes.[22] Lost opportunities also abound in the manufacturing and retail sectors. According to a report jointly sponsored by the Grocery Manufacturers Association, National Restaurant Association, and Food Marketing Institute, three leading industry trade groups, only 1.7% of food products deemed unsalable by food manufacturers were recovered for human consumption;[23] among retailers and wholesalers 18% was recovered,[24] while among restaurants 2% was recovered.[25]

Across the entire supply chain, merely 10% of food is recovered each year.

In the late 1990's the federal government, led by the Clinton administration, first recognized the need to reduce food waste and encourage food recovery across all sectors of the food industry.[26] In a 1996 memorandum signed shortly after the Bill Emerson Good Samaritan Food Donation Act (discussed in Section III: Enhance Liability Protections for Food Donations), President Clinton acknowledged that despite the vast amounts of agricultural resources in the United States, some Americans still did not have enough to eat, and asserted that recovering food that would otherwise be wasted could help provide for those in need.[27] In this memorandum, Clinton instituted a policy encouraging federal agencies[28] and their contractors to donate excess wholesome food to nonprofits and created an Interagency Working Group on Food Recovery to Help the Hungry to carry out the policy.[29] In the midst of this growing awareness of the significance of food recovery efforts, the U.S. Department of Agriculture (USDA) and the U.S. Food and Drug Administration (FDA) jointly developed guidelines for safely implementing a food recovery program, the Comprehensive Guidelines for Food Recovery Programs (now the Comprehensive Resource for Food Recovery Programs; discussed in Section VII: Food Safety Guidance for Food Donations).[30]

After a lull following the considerable efforts of the 1990's, today the federal government and many stakeholders have a renewed focus on reducing food waste and enhancing food recovery. In 2015, the USDA and EPA announced the nation's first ever food waste reduction goal, seeking to halve U.S. food waste by 2030.[31] Prior to the announcement of this goal, both agencies utilized a variety of initiatives and challenges to educate consumers and businesses about the issues of food waste, food insecurity, and best practices to reduce waste and recover food.[32] Despite these efforts, more can be done to reduce barriers to food donation and better align incentives for businesses so that they can recover safe, wholesome food.

Barriers to Food Donation

Food is wasted for a variety of reasons, from cosmetically imperfect fruits and vegetables, to confusion over "best by" date labels, to a consumer culture that encourages grocery stores to overstock shelves, even when the food will not be sold. Much of this food could be donated instead of wasted, if not for a range of barriers that prevent safe, wholesome surplus food from finding its way to the plates of those in need.

One major barrier to donation is liability. Businesses worry about incurring liability if someone gets sick from eating donated foods. Many businesses fail to donate foods because they do not know about the liability protections available to food donors under the Bill Emerson Good Samaritan Food Donation Act (Emerson Act).[33] Those that are aware of available liability protections may be deterred by unclear provisions in the Act or may not want to incur additional costs needed to comply with the Act, such as re-conditioning some food products.[34] Navigating and complying with these rules can require a significant amount of time and resources, serving as additional barriers to food donation.[35]

Another key reason that food producers fail to donate healthy, wholesome food is cost. Food that is donated rather than sold must still be harvested, processed or prepared for donation, stored and transported to the eventual recipient, and sometimes reconditioned to ensure it complies with federal, state, and local quality and labeling laws.[36] Farmers in particular face steep costs to prepare food for donation. In order to donate surplus crops, they have to pay labor costs to harvest, wash, sort and pack crops that would otherwise be left in the fields or culled out. After food is prepared

for donation, it must be transported from the farm, restaurant, or retailer to the recipient food recovery organization. Transportation costs can be significant:[37] they include a vehicle (sometimes one with refrigeration), a driver, gas, and other vehicle maintenance and repairs. While many businesses pay for their trash, recycling, or organic waste to be picked up, they have come to rely on volunteer groups or food recovery organizations to transport the food for them without charge, even though donations are often more complicated and costly to manage. However, where no such organization exists, or where local food recovery organizations do not have capacity to transport the food, it may be more cost-effective for the donor to throw out the food instead of pay for transportation.[38]

Much food is wasted due to confusion over whether it can be eaten near or past its expiration date.[39] This confusion impacts consumers, but also food businesses, food recovery organizations, and even health inspectors, who may be unable to accurately respond to questions by potential donors. Some states even restrict or ban the sale or donation of past-date foods. Yet date labels on foods are generally not indicators of safety, but of freshness. Because of ongoing confusion about whether such foods can be donated, businesses needlessly discard past-date products, and food recovery organizations are often unable or unwilling to rescue this safe, wholesome food and get it to those in need.

The lack of clear food safety guidance also poses a challenge to food donation. The food safety laws that apply to food establishments—like restaurants, cafeterias, and retail stores—vary by state and locality. Because these food safety laws generally do not cover food safety for food donations, food donors and food recovery organizations often have trouble figuring out which food safety regulations apply to the food they wish to donate or distribute.

Despite the many barriers to food donation, growing numbers of individuals, nonprofits, and businesses are seeing food waste as a pressing issue and realizing the many ways to use surplus food productively. Yet more can be done to incentivize businesses to donate food instead of wasting it, and to support creative new models that can reduce food waste. For example, a number of innovative organizations have developed alternative ways to recover surplus food and get it to those in need. These innovators are testing technologies to better connect food donors with food recovery organizations, converting cosmetically imperfect fruits and vegetables into new food, like juices and soups, or applying retail models to provide surplus food at a reduced cost to communities in need.[40] Unfortunately, as is often the case, many of these innovations could not have been predicted when the laws were created, and thus several existing laws related to food safety and food donation pose barriers to these new models.

Keeping the Food out of the Landfill: Policy Ideas for States and Localities provides recommendations in eight policy areas that can be utilized by legislators, advocates, food donors, and food recovery organizations to call for policy changes at the state and local levels. This toolkit covers a range of exciting policy examples from all over the country, such as Virginia's new tax incentive for food donors, California's funding to support food recovery infrastructure, guidance by Indiana to help schools implement share tables and reduce food waste, and organic waste bans and waste recycling laws from New York City to Vermont. A variety of educational resources are also included in the toolkit to encourage readers to expand their knowledge of ways to address food waste.

Source: Keeping the Food out of the Landfill: Policy Ideas for States and Localities, Harvard Food Law and Pol'y Clinic and Univ. of Ark. (Apr. 2016), http://www.chlpi.org/wp-content/uploads/2013/12/Food-Waste-Toolkit_Oct-2016_smaller.pdf.

Policy Opportunities to Support Food Donation

When producers, restaurant, retailers, food recovery organizations, and innovators across the nation face barriers like the ones described above, systemic solutions are required. Food waste is a drain on our economy and our environment, when surplus food could instead be a resource for those in need. The federal government can play a significant role in both reducing food waste across the supply chain and ensuring that wholesome food finds its way to those in need, by reforming existing laws that pose barriers to food donation and creating new policies that encourage food donation.

Government at all levels can act to use policy tools to reduce food waste and increase food donation. However, given the numerous avenues and the great potential impact of federal action, this paper focuses on federal policy levers to effect such change. State laws and policies, to the extent that they are described in this paper, are used either to highlight models for such federal reform or to illustrate areas where federal action is needed. Other resources created by the report authors describe opportunities for state and local policy action to reduce waste food

The sections throughout this paper address various existing areas of federal law that merit reconsideration or reform to meet the goal of increased food donation. We based our recommendations on detailed legal and policy research, as well as discussions with several types of stakeholders, including farmers and food recovery organizations trying to increase food donation.

SECTION III. ENHANCE LIABILITY PROTECTIONS FOR FOOD DONATIONS

Many potential food donors, including grocers and retailers, cite the fear of liability as a significant deterrent to donating food.[41] A 2016 survey conducted by the Food Waste Reduction Alliance (FWRA), a joint industry task force comprised of leading companies and trade associations in the food, beverage, food service, and food retail industries, found that 25 percent of food retailers and wholesalers and 50 percent of food manufacturers cite liability concerns as one of the main barriers to food donation.[42]

In 1996, Congress attempted to address these concerns by passing the Bill Emerson Good Samaritan Food Donation Act (Emerson Act), which provides civil and criminal liability protection to a broad range of food donors and nonprofit food recovery organizations.[43] While the Emerson Act was an important first step, twenty years of experience with the Act have revealed some challenges. Because liability concerns remain a barrier to food donation, improving the Emerson Act offers a key avenue to increase the amount of healthy, wholesome food that is donated.

This section will first analyze the federal legal framework for liability protections under the Emerson Act. Drawing on the results of this overview and data from interviews with grocery stores, food recovery organizations, experts in food recovery, and other leaders in the food industry, this section will then outline the key shortcomings of the Emerson Act, as well as recommendations for how the federal government can improve the Emerson Act to address each shortcoming.

25% of food retailers and wholesalers and 50% of food manufacturers cite liability concerns as one of the main barriers to food donation.

Overview of the Bill Emerson Good Samaritan Food Donation Act

In the mid-1970s, advocates began pushing for federal and state legislation that encouraged more food donations to those in need. In 1977, California passed the first state-level Good Samaritan food donation law, and a number of states followed with a patchwork of laws that ranged from offering limited to expansive liability protections.[44] In 1990, Congress tried to address the lack of consistency across state laws by passing the Model Good Samaritan Food Donation Act, which created a model statute for states to adopt.[45] Since it was a model, it did not have the force of law and states were not required to follow it; consequently, it was only adopted by one state.[46] In 1996, Congress responded by passing the Emerson Act, which turned the model language into binding federal law and thus provided comprehensive national liability protection for food donors and recovery organizations.[47] The Emerson Act serves as a federal floor, preempting states from removing or providing less protection than that which was included in the Emerson Act, but allowing them to provide additional protections.[48]

The Emerson Act provides liability protection to food donors and the nonprofit food recovery organizations that receive donations and distribute food to those in need. Liability protection in the Act generally covers food donors, whether they are individuals, businesses, nonprofit organizations, government entities, or gleaners (individuals or entities that harvest donated agricultural crops).[49] Under the Act, a covered nonprofit organization is defined as an "entity that is operating for religious, charitable, or educational purposes" and that does not provide "net earnings" or any other benefit to "any officer, employee, or shareholder" of the entity.[50] This broad definition means that the recipient must be a nonprofit, but need not be a 501(c)(3) organization.

Donors and nonprofit food recovery organizations must meet the following four requirements to receive protection under the Emerson Act:

(1) The food must be donated to a nonprofit organization in good faith, meaning that the food must be donated with the honest belief that it is safe to eat;[51]

(2) The food must meet all federal, state, and local quality and labeling requirements, even if it is not "readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions;"[52]

(3) The nonprofit organization that receives the donated food must distribute it to needy individuals;[53] and

(4) The end recipient must not pay anything of monetary value for the donated food.[54]

Regarding the second requirement, even if a food does not meet all applicable quality and labeling standards, donors and

distributers can still be protected by the Emerson Act as long as the food is reconditioned to become fully compliant.[55] For this exception to apply, the food donor must inform the nonprofit organization of the defective condition of the food, and the nonprofit organization must be knowledgeable about the standards to properly recondition the food and be willing to do so.[56]

Regarding the fourth requirement, if one nonprofit donates food to another nonprofit for distribution, the first nonprofit can charge the distributing nonprofit a nominal fee to cover the cost of handling and processing the donated food.[57] However, the liability protection is lost if the end recipient pays for the food.

So long as the above requirements are met, the food donor and the nonprofit receiving the food will be shielded from both civil and criminal liability that may arise from the donated food, unless the donor acts with gross negligence or intentional misconduct.[58] In other words, the donor or nonprofit food recovery organization should not donate or facilitate the distribution of donated food that they know is likely to be harmful or dangerous. The Emerson Act's liability protection also extends to premises owned by donors who allow gleaners or food recovery personnel onto their property.[59] In this case, the property owner is protected from civil or criminal liability if injury or death arises due to any donation or collection activities on the owner's premises, except in the case of gross negligence or intentional misconduct.[60]

The Emerson Act laid an important foundation to support increasing food donations. However, much food is still wasted instead of donated, and modifications to the Emerson Act could help to ensure more food makes it to the tables of those in need.

Shortcomings and Recommendations for Reforming the Bill Emerson Good Samaritan Food Donation Act

The broad base of liability protection provided under the Emerson Act was intended to encourage food donations, yet donors are often unaware of this protection or hesitant to donate because of unclear terms in the language of the Act. Further, several provisions in the Act could be broadened to better align the protections they provide with the current food recovery landscape. Clarifying the Emerson Act's coverage and expanding its protections, as described below, can boost food donations.

Lack of federal guidance on the Emerson Act

Unlike many statutes that delegate power to an agency to interpret and enforce them, Congress never assigned the Emerson Act to a particular federal agency. As a result, no agency is responsible for providing federal guidance, offering an authoritative interpretation, answering questions, or raising awareness of the Act. Further, the Emerson Act has not been challenged in court, so no judicial interpretations of its language exist.[61] Potential donors have only the 1996 statutory language on which to base conclusions regarding their coverage. This lack of guidance makes many donors uncomfortable because they do not know how to interpret the ambiguities in the language of the Act, such as "needy individual."[62]

Unlike many statutes that delegate power to an agency to interpret and enforce them, Congress never assigned the Emerson Act to a particular federal agency.

Moreover, many donors remain unaware of the Emerson Act's protections. As demonstrated by the 2016 FWRA survey referenced above, many retailers and manufacturers still do not know about liability protections provided by the Act, and it is difficult to spread the word to those who are not already donating.[63] Yet since no agency has authority over the Act, no one has the mandate to increase public awareness of its coverage. A recent report by ReFED, a collaboration of business, nonprofit, foundation and government leaders committed to reducing food waste, found that educating potential food donors on donation liability laws has the potential

to divert 57,000 tons of food waste from the landfill per year.[64]

> **Recommendation**: ***Congress should delegate an executive agency to be in charge of implementing and interpreting the Emerson Act.*** This agency should be tasked with providing guidance to clarify the meaning of terms in the Emerson Act and with raising awareness about the Act's protections. The USDA is well positioned to assume oversight over the Emerson Act. The Emerson Act was added into a section of the U.S. Code known as the 1966 Child Nutrition Act (CNA), provisions of which "shall be extended, expanded, and strengthened under the authority of the Secretary of Agriculture."[65] In addition, USDA's track record of working to reduce food waste and support food recovery makes it an appropriate choice to steward the Emerson Act. If Congress does not act, the USDA, acting under the authority granted to it in the CNA, could likely make the decision to oversee the Act on its own. At times, USDA has already done so in order to interpret certain provisions of the Emerson Act.[66] Providing guidance on the provisions of the Emerson Act can help clarify the scope of the Act and awareness of its protections, and in turn increase the amount of food donated.

The Emerson Act fails to provide liability protection for food recovery organizations that sell food at a reduced price, and for donors that donate food to these organizations

The Emerson Act only protects donors when the end recipient of the donated food "is not required to give anything of monetary value."[67] It does not provide liability protection for the food donor or food recovery organization when the end recipient pays for the food, even at a reduced rate. This provision restricts the Emerson Act's protections to traditional models of food recovery that are limited to providing free food, and hinders development of innovative food recovery models.

In recent years, nonprofit food recovery organizations and individuals have begun to test entrepreneurial approaches to food recovery in a variety of ways. Some food recovery organizations that receive more produce than can be distributed promptly in fresh form use that excess produce to make soup that is sold at a low price to support the operation of the organization's free services. Others are following the model of "social supermarkets," popularized in Europe, that sell reduced-cost, healthy food items at nonprofit retail stores located in low-income neighborhoods.[68] Such models hold the promise of a long-term, financially sustainable solution to food recovery because they allow nonprofits to utilize the funds generated to support their operations.

One example is Daily Table, a nonprofit retail store that opened in the summer of 2015 in the Dorchester neighborhood of Boston, Massachusetts.[69] Daily Table sells nutritious foods and prepared meals at a low cost to residents of a neighborhood with limited healthy food options. [70] Daily Table receives the majority of the food it sells and makes into meals through donations and sells the food at a price comparable to fast food options, in order to provide families with healthy food options at a low cost.[71] Such organizations can fill a need in communities where individuals are food insecure or lack regular access to healthy foods, but for various reasons are unable to qualify for government assistance or adequately fulfill their needs with the use of a food pantry or soup kitchen. They also can provide individuals with a wider variety of foods, including fresh produce and prepared meals, and have longer operating hours than traditional food pantries.[72] Finally, such models offer the potential for a sustainable solution to food recovery, as organizations can use customer payments to offset the costs of labor, storage, preparation, and transportation of recovered food. These approaches can be particularly well-suited to food insecure individuals who have sufficient income to contribute financially for the food they receive.

The current "no-charge" requirement in the Emerson Act hinders the development of such innovations and also constrains food recovery organizations from broadening their offerings. By providing some of the food they receive for sale at a reduced cost, food recovery organizations could use the funds generated to support their operations, thus helping them meet additional demand for their traditional services. According to Feeding America, a nonprofit network of food banks, "food banks across the nation continue to be stretched thin in their efforts to meet sustained high need in the wake of the recession."[73] Food recovery organizations struggle to receive both donations of wholesome, safe food and to generate sufficient monetary donations to cover their labor, transportation, administrative, and other costs. Providing some of their food offerings for sale using a reduced-cost grocery model could generate funds to support their operations, while also giving them a chance to serve a broader client base. Organizations like Salvation Army and Goodwill utilize a similar model – they leverage the funds from the sale of items, such as clothing, to support their free services, create jobs, and provide job training programs. Allowing food recovery organizations to do the same could help to finance their ongoing work addressing food insecurity for individuals and families, while allowing them to serve a broader population.

Food donors are reluctant to donate to food recovery organizations outside the scope of the Emerson Act's liability protections, when they could instead donate to covered organizations. Federal liability protection does not need to be structured this way. Several states have improved upon the protections afforded by the Emerson Act by providing liability

protection even if the food recovery organization charges the end recipient of that food, so long as the food recovery organization is a nonprofit. The language of these state statutes varies, but each reaches a similar result. More information on these and other state laws can be found in Appendix A: State Liability Protection Laws. For instance,

- **Arizona** provides liability protection to donors that donate to a nonprofit (and to the nonprofit itself) that charges the end recipients "a fee significantly less than the value of the [food] item."[74]
- **Oregon** provides liability protection to donors that donate to a nonprofit (and to the nonprofit itself) that charges the end recipient for donated food based "on a scale reflecting ability to pay or only requiring a shared maintenance contribution."[75]
- **Massachusetts** provides liability protection to donors that donate to a nonprofit (and to the nonprofit itself) that charges the end recipient for food at a level to "cover the cost of handling such food."[76]
- **New Hampshire** provides liability protection to donors that donate to a nonprofit (and to the nonprofit itself) that charges end recipients for food at a high enough cost to "cover the cost of handling and administering such food and the distribution [of such food]."[77]

By going beyond the federal liability protection floor, these states encourage the development of innovative food recovery models, allowing nonprofit organizations to charge recipients a discounted price. The Emerson Act can be structured similarly in order to spur the development and testing of nonprofit social supermarkets and other innovative food recovery models.

> **Recommendation:** ***Congress should amend the Emerson Act to provide liability protection to nonprofit organizations that either give food away for free or charge recipients a reduced fee.*** Allowing nonprofit organizations to charge a reduced fee can help to offset the operating expenses and other costs associated with donating and distributing the food. The state examples mentioned above can serve as models for extending liability protections to organizations that sell donated food at a reduced price. Doing so allows food to be sold at a reduced cost, benefitting both food insecure populations and the nonprofit, which can now rely on a more sustainable funding source. The Emerson Act requires that the food recovery organization be a nonprofit organized and operated "for religious, charitable, or educational purposes."[78] This ensures that any funds generated from the sale of food will be used in furtherance of the organization's charitable purpose to serve more individuals in need, rather than for commercial purposes.

The Emerson Act fails to provide liability protection to donors donating directly to end recipients

The Emerson Act specifies that only donors who donate to a nonprofit organization that ultimately distributes the food to those in need will be protected from liability; it does not offer protection when donors donate food directly to end recipients. There may be instances where donors come into contact with individuals and families during the course of business, and would like to be able to donate directly to these constituents. For example, a restaurant or deli located in a neighborhood with high rates of food insecurity may wish to donate surplus food directly to food insecure individuals that live nearby, or a school might want to send excess food home with students in need rather than throwing it out. People in need will have increased access to food because they will be able to pick up donated food at more accessible locations, such as a neighborhood grocery store or a restaurant immediately within their community.

Without liability protection for such direct donation, restaurants, farms, retailers, and other food donors are discouraged from relying on such channels to donate surplus food. When food passes through a food recovery organization before it is distributed to vulnerable families, that organization can ensure the food is safely held and transported. Yet, for some food, such as produce coming directly from a farm, the safety risks are very low. And if the food is coming from a restaurant, retail food store, or other licensed food establishment, the business is already trained and licensed to safely handle food, and will know how to ensure that the food is safety donated directly to those in need. Even though donating food through a food recovery organization is preferable in many circumstances, there are some cases where food donations are not appropriate for food recovery organizations, or cannot be disseminated quickly enough to be consumed by those in need. Allowing for protection of direct donations can allow organizations to utilize this option instead of wasting such food.

Some states have improved upon the Emerson Act by providing clear liability protection even when donors donate directly to the end recipient. For instance,

- **Arizona** provides liability protection to donors and nonprofits that donate and distribute food to "a charitable or nonprofit organization" or directly "to any other person."[79]

- **New Hampshire** provides liability protection to donors who donate "to a bona fide charitable or non-profit

organization" or directly to a "needy individual or individuals."[80]

- **Vermont** provides liability protection to donors that donate food "to a bona fide charitable or nonprofit organization for free distribution" or "to a person for consumption."[81]

These statutes serve as a model for encouraging both donations through a nonprofit intermediary and providing protection for a direct method of distribution. There have been no instances of actual threatened lawsuits involving safety incidents related to donated foods in these states,[82] indicating that state laws with broader liability protections can eliminate barriers to food donation without jeopardizing the safety of end recipients.

> **Recommendation:** ***The Emerson Act should be broadened to provide liability protection for wholesome food donated directly to individuals in need by food producers and licensed food service establishments, including restaurants, food processors, institutional foodservice, retailers, farms, and others.*** Providing licensed food establishments with liability protection when they distribute "apparently wholesome food"[83] directly to those in need rather than only through nonprofits, reduces the costs of food recovery, increases the amount of food available for donation, and broadens the number of people that donors can reach. Perishable food, such as food that has already been cooked, will be more likely to reach those in need in time to be consumed. This provision should be limited to businesses and institutions that provide low-risk food, like produce straight from the farm, or institutions that comply with commercial food safety requirements, which ensures that these direct donations will be made safely. Licensed food establishments, such as restaurants and retailers, already undergo food safety training, certification and inspections, so these businesses know how to handle food safely. Expanding the protections of the Emerson Act as such will streamline food donation in a way that can increase efficiency and result in more food recovery.

The Emerson Act fails to provide liability protection for donations of food that does not meet all labeling requirements, even if such mislabeling is irrelevant to the food's safety

The Emerson Act provides liability protection only for donations of foods that already comply with or are reconditioned to comply with all local, state and federal quality and labeling standards.[84] At the federal level, labeling requirements include the name of the food, manufacturer's address, net weight or net quantity of contents, and an ingredient list (which includes allergen information), among others.[85] However, compliance with some of these labeling standards is not necessary to ensure that the donated food is safe. For instance, requiring accurate ingredient lists is necessary to protect the health of end recipients, but accurate net weight is not. Often food is donated precisely because it is mislabeled and cannot be sold. Requiring compliance with all labeling rules imposes an unnecessary burden on donors and food recovery organizations, leads to food waste, and does not enhance safety.

In a January 2016 Directive, the USDA eliminated certain labeling requirements for wholesome meat and poultry with minor labeling errors, such as incorrect net weight, thereby making the donation of certain mislabeled foods easier.[86] While the UDSA's Directive is a significant step in easing burdensome requirements for food donation, it is limited to meat and poultry,[87] meaning that all other food products must still comply with all local, state, and federal labeling requirements, including net weight, among others. Several states do not require donated food to meet all quality and labeling standards as a prerequisite for the donor or distributor to obtain liability protection. For example, California and Oregon provide liability protection to food donors in their state "regardless of compliance with any laws, regulations, or ordinances regulating the packaging or labeling of food."[88] This language allows donors to donate foods that do not fully comply with all labeling requirements, so long as the food meets any safety-related regulations, and releases the food recovery organizations from the time and resource intensive requirements of reconditioning the food.

> **Recommendation:** ***The Emerson Act should be amended so that foods must only comply with (or be reconditioned to comply with) federal, state, and local safety standards or safety-related labeling standards.*** Removing the requirement that donated food comply with all quality and labeling standards and instead focusing on meeting safety standards can increase the amount of food donated and decrease the cost of donation. In order to determine which standards or labels are needed for safety, Congress should direct an executive agency, likely the agency designated to interpret the Act, to issue guidance on which labels are relevant to safety. Donated food should receive liability protection if the mislabeling is irrelevant to safety, but it should still be required to meet safety standards and include safety-related labels, such as the ingredient or allergen list, in order to receive liability protection.

The Emerson Act does not explicitly provide liability protection for donation of past-date foods

The Emerson Act does not specifically address whether donations of past-date foods are protected from liability, causing

fears among donors and nonprofit food recovery organizations that donating past-date food will place them outside the Act's protection. Date labels on food are generally indicators of a food's freshness, not safety. Yet many consumers, retailers, and other potential food donors misinterpret these labels as indicators of safety.[89] The dizzying array of phrases used in date labels on foods, and the lack of understanding of their meaning, has created widespread confusion about whether past-date foods are safe to consume.[90] As a result, food donors and nonprofit food recovery organizations frequently throw away past-date foods, causing food waste. For example, one study found that $900 million worth of food inventory were wasted throughout the supply chain in a single year (2001) because the foods were past-date.[91] The lack of explicit liability protection in the Emerson Act for the donation and distribution of past-date foods reinforces the general confusion regarding the safety of past-date foods, and deters many donors from donating such foods.

In fact, when Congress passed the Emerson Act, it did not perceive past-date foods as unsafe to donate or outside the bounds of the Emerson Act's protection. In fact, Congress indicated in the House Committee report attached to the Emerson Act that date labels do not provide reliable guidance about food safety and that the donation of near- or past-date food would not automatically constitute "gross negligence," one of the standards of conduct that leads to the loss of liability protection.[92] However, since the Committee report is not part of the statutory text and is inaccessible to typical food donors, most food donors and food recovery organizations are not aware of this, and consequently frequently throw away past-date foods instead of donating or distributing them to those in need.

Massachusetts is one of the few states that explicitly provides liability protection to donors that donate past-date food.[93] Massachusetts' liability protection for food donations statute states "No person who donates food, including open-dated food whose date has passed, to a nonprofit corporation for distribution. . . shall be liable for civil damages for any injury arising out of the condition of such food."[94] Massachusetts thus provides a model for explicitly stating that donations of past-date food will receive liability protection.

It is important to note that despite this explicit language extending liability protection to past-date food, Massachusetts also has other unnecessarily burdensome state regulations regarding the sale and donation of past-date food.[95] This means that perfectly safe past-date food is often wasted, a topic discussed in more detail in Section V: Standardize and Clarify Expiration Date Labels.

> **Recommendation:** ***The Emerson Act should explicitly provide liability protection for the donation of past-date food.*** Although legislative documents already state that the donation of past-date foods is protected, a clear provision should be added to the Emerson Act in order to make explicit that the donation and distribution of past-date foods are protected from liability. Doing so would clarify the coverage of the Act and align its provisions with Congress' intent when it passed the law. This change can help set a new norm in food donation as well as food consumption by sending the message that past-date food is safe to consume, and that it can and should be donated. As described above, Massachusetts provides an example of such language in a Good Samaritan statute.[96]

SECTION IV. IMPROVE FEDERAL TAX INCENTIVES FOR FOOD DONATIONS

Businesses ranging from large corporations to small-scale farms may have different rationales for donating their excess foods, but one can assume the cost and tax implications of donating such food are taken into consideration. Tax incentives for food donations provide a financial incentive to businesses by making food donations more cost-effective and economically beneficial. These tax incentives are essential to offset the costs that donors incur in making donations.

When federal tax incentives for food donations were temporarily expanded to cover more donor businesses in 2005, food donations across the country rose by 137% in the following year.

Tax incentives have been extraordinarily successful in incentivizing food donation in the United States. For example, when federal tax incentives for food donations were temporarily expanded to cover more donor businesses in 2005, food donations across the country rose by 137% in the following year.[97]

In December 2015, Congress passed an important piece of legislation that greatly expanded the range of businesses eligible to claim tax incentives for food donations to include entities other than C-Corporations, which typically includes independent restaurants, small grocery chains, farms,

delis, bakeries, and other small and mid-size businesses.[98] Despite this exciting new development, the federal tax incentives for food donations could still be strengthened to encourage more donations and curb food waste.

This section will provide an overview of the current federal legal framework for tax incentives and briefly explain the history and recent changes to these incentives. This section will then outline the main shortcomings of the current tax incentives, and provide recommendations for how the federal government can further improve federal tax incentives to increase food donations and reduce food waste.

Current Legal Framework

Tax deductions and tax credits are two forms of tax incentives. A tax deduction reduces the taxpayer's taxable income, which is then used to calculate the amount of taxes owed.[99] By contrast, a tax credit is a direct reduction in the amount of taxes owed. Tax credits are particularly effective with lower-margin businesses that may not be able to avail themselves fully of tax deductions.[100] These two types of tax incentives have been implemented to incentivize food donation in different ways at the state and federal levels.

At the federal level, tax incentives for food donations include both a general and an enhanced deduction. The enhanced deduction provides a significantly higher financial benefit than the general deduction, as it allows businesses to deduct a value for donated food that is almost twice that of the general deduction.[101] This section will first provide a brief overview of the general and enhanced deductions for food donations, including how to calculate and qualify for the enhanced deduction, and then will describe some of the shortcomings of the current incentives, as well as recommendations for how to overcome them and increase the amount of food donated.

General Tax Deduction

Over the past 40 years, businesses have received a variety of federal tax incentives for food donations. Before 1969, the tax code allowed businesses to deduct the full fair market value (FMV) of charitable contributions—including food donations—from their taxable income.[102] Fair market value is an estimate of the market value of the property, based on what a knowledgeable, willing, and unpressured buyer would pay to a knowledgeable, willing, and unpressured seller.[103] This deduction created generous tax savings; in some circumstances, the tax savings even exceeded the profit a business would have been able to capture by selling the donated item on the open market.[104] Because this incentive created a windfall for food businesses, in the 1969 Tax Reform Act, Congress changed the tax code to allow businesses to deduct only the basis of the donated property[105]—that is, the business' cost of acquiring or producing the property[106]—which is generally lower than the property's FMV. This deduction is commonly known as the "general deduction."

In order for a charitable contribution to qualify for the general tax deduction, the donation must be used for charitable purposes and given to a qualified organization[107] under section 170 of the Internal Revenue Code (IRC).[108] There is a limitation on the amount of overall charitable contributions businesses can deduct each tax year. For non-C-corporations, total deductions cannot exceed 30% of the business' total taxable income each year.[109] Total deductions for C-corporations cannot exceed 10%.[110]

Enhanced Deduction

Tying the amount of the tax deduction to the food's basis value proved insufficient to incentivize businesses to donate food. In 1976, Congress realized that the general deduction was too low to offset the costs associated with donating food, and thereby created an "enhanced deduction" that offers a greater financial benefit for eligible donations.[111] As explained in more detail below, the enhanced deduction increases the amount of the deduction that can be claimed, allowing a business to deduct the smaller of (a) twice the basis of the donated food or (b) the basis of the donated food plus one-half of the food's expected profit margins.[112] This is often close to twice the value of the general deduction.

However, prior to 2005, only businesses incorporated as C-corporations could benefit from this enhanced tax deduction.[113] This limitation was temporarily eliminated in 2005 when, in response to Hurricane Katrina, Congress passed the Katrina Emergency Tax Relief Act (KETRA), which allowed *all* business entities—including S-corporations, limited liability corporations (LLCs), partnerships, and sole proprietorships—to take advantage of the enhanced deduction for qualifying donations made between August 28 and December 31, 2005.[114] While KETRA's expansion of the enhanced deduction was meant to expire at the end of 2005, it was so successful that Congress annually renewed the expansion between 2005 and 2014.[115] However, because the expansion was not in permanent law, each year businesses aside from C-corporations were unsure until the end of the year whether they would be able to claim the deduction.

In December 2015, Congress permanently expanded the enhanced tax deduction to all businesses through the Protecting Americans from Tax Hikes Act of 2015, a part of the 2016 omnibus budget.[116] The 2016 omnibus budget also raised the cap on the amount of enhanced deductions that can be claimed, strengthened the formula for calculating the deduction, and clarified the method for determining the FMV of unsalable food products.[117] By expanding and modifying the enhanced tax deduction, Congress has taken a significant step toward incentivizing additional food donations.

Calculating the enhanced deduction

As mentioned above, the enhanced deduction allows a business to deduct the smaller of (a) twice the basis of the donated food or (b) the basis of the donated food plus one-half of the food's expected profit margin, if it were sold at its FMV.[118]

To illustrate, imagine that a grocery store donates potatoes that were purchased for $30 (basis value) and would sell for $100 (FMV). The expected profit margin is the FMV minus the basis value ($100 - $30), which is $70. Under the enhanced deduction, the grocery store is entitled to deduct the smaller of:

(a) Basis Value x 2 = $30 x 2 = **$60**, or

(b) Basis Value + (expected profit margin / 2) = $30 + 70/2 = **$65**

In this case, the enhanced deduction would be $60. The enhanced deduction is substantially higher than the general deduction, which is limited to the basis value of $30.[119]

Beginning in January 2016, businesses have the option to calculate the FMV of certain products that cannot or will not be sold by using the price of the same or substantially similar food items being sold by the business, including foods that do not meet internal standards or for which there is not a market.[120] Businesses that do not account for inventories and are not required to capitalize indirect costs also have the option to calculate the basis value at 25% of the product's FMV, which is the value at which the goods would have been sold.[121]

Lastly, there is a cap on the amount a business can deduct using the enhanced deduction each year. A C-corporation's charitable deduction cannot exceed 10% of its taxable income,[122] except when the corporation has donated food, in which case it can increase its deduction to up to 15%.[123] Non-C-corporations can also claim up to 15% of their taxable income in the enhanced deduction.[124] Food donors can also carry forward any excess deductions beyond the 15% income limitation for up to five years.[125]

Requirements to receive the enhanced deduction

To claim the enhanced deduction, the food donation must meet several requirements. If any of these conditions are not met, the donation is disqualified from the enhanced deduction and is only be eligible for the general deduction.[126] The requirements are:

(1) The recipient food recovery organization or donee must be an IRC 501(c)(3) organization and a public charity or a private operating foundation;[127]

(2) The donee must use the donated property solely for the care of the ill, the needy, or infants in a manner consistent with the purpose constituting that organization's exempt status under IRC 501(c)(3);[128]

(3) The donee may not use or transfer the food in exchange for money, other property, or services;[129]

(4) The donee must provide a written statement to the donor stating that all requirements of IRC 170(e)(3) have been met;[130] and

(5) The donated food must be in compliance with the Food, Drug, and Cosmetic Act (FDCA).[131]

Regarding the third condition, there is an exception if the recipient organization charges another organization an amount that is "small or nominal in relation to the value of the transferred property and is not determined by this value" and is "designed to reimburse the [recipient] organization for its administrative, warehousing, or other similar costs."[132] For instance, a food bank is allowed to charge a soup kitchen a nominal fee to cover the costs of storing the food in the food bank's warehouse or transporting it to the soup kitchen. Notably, this exception does not apply when an organization is distributing food directly to low-income individuals; those individuals cannot pay even a nominal fee for the food if the enhanced deduction is still to apply.[133]

The written statement described in the fourth condition must include four components: (1) a description of the contributed property, including the date of its receipt; (2) a statement that the property will be used in compliance with the requirements of IRC 170(e)(3) as described above; (3) a statement that the recipient organization is recognized as exempt from federal income tax under IRC 501(c)(3); and (4) a statement that adequate books and records will be maintained and made available to the IRS upon request.[134]

Regarding the fifth condition, the donated food must satisfy all applicable requirements of the FDCA at the time the contribution is made, as well as for 180 days before the contribution.[135] This means that the donated food must not be adulterated or misbranded and must comply with federal food safety and labeling standards.[136] For food that did not exist for 180 days prior to donation, this requirement is satisfied if the food was in compliance with the FDCA for the period of its existence and at the time of donation, and any similar food held by the donor during the 180 days prior to donation was held in compliance with the FDCA.[137]

Shortcomings and Recommendations to Reform the Current Federal Tax Incentives for Food Donations

The expansion of the enhanced deduction is expected to significantly increase donations by ensuring that all businesses have a valuable incentive to donate surplus food instead of sending it to landfills, or plowing it under in the case of farms. But there remains room for improvement. This section explores each of these areas for improvement in turn and proposes solutions to issues.

Farms and other low-profit margin businesses struggle to claim the federal enhanced deduction

Despite permanent expansion of the federal enhanced deduction to all businesses, a tax deduction is a less effective incentive for businesses that operate with a low profit margin. Many farms, especially small and mid-size farms, fall into this category. For example, according to the USDA, 69 percent of all U.S. farms were in the operating profit margin "critical zone" in 2013.[138] Further, more small and mid-size farms might not earn enough from the sale of farm produce and services to cover their expenses and thus tend to have lower profit margins than large farms.[139]

Because many farms operate with a low-profit margin, tax deductions have a limited impact as an incentive for donation. By contrast, a tax credit usually provides a larger financial incentive than a tax deduction for businesses with lower income.[140] This is because the deduction only reduces taxable income, so the value of the deduction is contingent on the amount of taxable income, whereas tax credits lower the amount of taxes owed.

According to ReFED, 10.1 million tons of food is wasted on farms each year, even though this food is fresh and healthy and could instead provide nutrients to those in need.[141] Realizing that a stronger incentive is needed to support donations from certain businesses, notably farms, nine states (Arizona, California, Colorado, Iowa, Kentucky, Missouri, Oregon, South Carolina, and Virginia) and the District of Columbia offer state-level tax incentives for food donations.[142] Among these states and the District of Columbia, all but Arizona offer tax credits instead of deductions for donations.[143] While many of these state tax incentives apply to a range of donors, the bulk are aimed at increasing food donations from farms. For instance:

10.1 million tons of food is wasted on farms each year.

- **Virginia** offers anyone engaged in farming a tax credit of 30% of fair market value for the donation of food crops (i.e. grains, fruits, nuts or vegetables) to a nonprofit food bank.[144]
- **Iowa** offers anyone that produces a food commodity a tax credit of 15% of the product's fair market value.[145]
- **Kentucky** offers any taxpayer who derives income from agricultural products a 10% tax credit for the donation of

agricultural products (produce and meat) to a nonprofit food program.[146]

For a complete list of state tax incentives, see the chart in Appendix B: State Level Tax Incentive Laws.

Recommendation: ***Federal tax incentives should be expanded to include an alternative tax credit that can be used by low-margin businesses, like many farms, in lieu of the enhanced deduction.*** Low-profit margin businesses, especially farms, need a better incentive in order to make food donation feasible and cost-effective. These businesses should be able to choose to claim a tax credit as an alternative to the enhanced deduction. This suggestion is particularly important in the case of farms, as there is much healthy, wholesome food that gets plowed under instead of making its way to those in need.

The federal enhanced deduction does not help offset the transportation costs incurred by food donation

One of the most foundational and costly aspects of donating food is the transportation of the food from the farm, restaurant, or retailer to a food recovery organization. Transporting donated food requires a vehicle (sometimes one with refrigeration), a driver, gas, and other vehicle maintenance and repair expenses.[147] This can be quite costly: one food recovery organization that uses a fleet of six refrigerated trucks to rescue and deliver surplus food estimates that it spends $12,000 a week to run, maintain, and repair its trucks, pay its drivers, and cover additional operating costs.[148] In some locations, there is no food recovery organization that can come to the business to pick up the food, making it more cost-effective for the business to throw out the food than pay for transportation of the food.[149] It is not in the financial interest of most businesses to incur these costs when they are not offset by an adequate financial incentive, thus they either forgo making the donation, or in many cases the costs are borne by the food recovery organization. Food recovery organizations are leery of asking food donors to pay for their services, and instead must fundraise for resources to purchase, staff, and maintain vehicles.

Several tax incentives provide models to alleviate some of these costs. For example, the French government and some U.S. states offer tax credits for transportation or processing of donated food.

- A **French** tax credit allows companies that make in-kind donations to benefit from a tax credit amounting to 60% of the value of the goods donated, up to a maximum of 0.5% of a company's annual sales.[150] If the donating company is assuming the cost of transportation and/or storage of the goods, it is also eligible to receive a 60% tax credit on the costs of transportation and storage.[151]

- **California** offers a tax credit of 50% of the transportation costs paid or incurred by the donor in connection with the transportation of the donated food.[152]

- While **South Carolina** does not provide a tax incentive for transportation costs, it does provide a credit for processing of venison for donation, highlighting another way that tax incentives can be used to support specific expenses associated with food donation. It provides a flat tax credit of $75 per carcass processed for licensed meat packers, butchers, or processing plants that contract with charitable organizations to process venison for donation to clients in need.[153]

Recommendation: ***Federal tax incentives should be strengthened by adding a deduction or credit specifically to cover the cost of transporting donated food.*** The cost of transporting food from the donor to a food recovery organization is common to all food donations and is often a major barrier to food recovery. To address these issues, Congress should either expand the enhanced tax deduction to allow the cost of transportation to be included in the enhanced tax deduction calculation, or create a separate tax credit directed at the cost of transporting donated food. This tax incentive should be provided directly to logistics, transportation, and trucking companies that transport donated food to nonprofit organizations, and to donors that transport donated food themselves to the

food recovery organization's location. Such an incentive could encourage transportation and trucking companies to participate in food recovery efforts, for example by looking for backhauling opportunities to transport donated food instead of driving deadhead routes with empty vehicles. Similarly, providing an incentive for farms or food businesses to transport donated products can help eliminate a major barrier to donation of fresh produce and other foods.

The tax incentive should also be made available to donors who pay a food recovery organization to transport the food they donate. Because many food recovery organizations are nonprofits, they cannot claim a tax incentive themselves, but could be paid for their services from a tax incentive claimed by the donating business. Such an incentive, when passed through to food recovery organizations by the donor, could help defray the costs these organizations incur to handle foods that businesses wish to donate.

The enhanced deduction is not available for food donations to food recovery organizations that sell food at a reduced price

The federal enhanced tax deduction is limited to foods that are given away for free to those in need and not given "in exchange for money, other property, or services."[154] This limitation means donations made to nonprofit organizations that sell the food, even at a reduced cost, are not eligible for the enhanced deduction.

Similar to the rationale discussed in the liability protection section, a "no-charge" requirement hinders development of innovative new food recovery models, such as nonprofit retail stores, and restricts opportunities for existing food recovery organizations. Food donors have a significant monetary incentive to donate to food recovery organizations that can offer them the enhanced deduction, and are very unlikely to donate to an innovative food recovery model that cannot do so.

The "no-charge" limitation creates a significant chilling effect for this emerging sector of nonprofit social enterprise and reduces the overall success of the field of food recovery. If food recovery organizations are required to give food away for free in order to obtain liability protection and the enhanced deduction, such organizations have to receive both donations of food and monetary donations to cover labor, transportation, administrative, and other costs. They are also dissuaded from trying out a model that can better serve those low-income families who have modest means and would prefer to purchase food at a reduced price than to receive food for free. This requirement also dissuades existing food recovery nonprofits from trying out new models because of the barriers it poses to them using their existing food donations to do so.

For example, Philabundance, a food bank operating in the Greater Philadelphia area, launched "Fare & Square," a nonprofit retail store, in order to provide low-cost food to residents of a low-income community that lacked a retail food store.[155] Even though Philabundance often receives donated food that could be sold at Fare & Square, because of the limitations on the enhanced deduction, Philabundance must assure its funders that it strictly separates food that is donated (and can be given to food pantry recipients while maintaining the enhanced tax deduction for donors) from that which Philabundance purchases, and can therefore be sold at Fare & Square.[156] Such rules hinder the scale of Fare & Square and the potential for similar organizations to replicate their model.

The main rationale behind the "no-charge" restriction seems to be ensuring that the government will not indirectly subsidize food donations that are then used to make a profit for the recipient food recovery organization. Yet the "no-charge" restriction exists on top of the requirements that the donee is a certified 501(c)(3) nonprofit organization and that donated food is used in a manner related to the donor organization's reason for seeking an exemption under 501(c)(3) and solely "for the care of the ill, the needy, or infants."[157] These requirements already ensure that food will be used for a charitable purpose. Thus, any revenue-generating activities of such organizations would necessarily be conducted in furtherance of the enterprise's social mission, rather than for commercial purposes, meaning that such revenue can help ensure more people are served.

At the state level, Virginia serves as a model for allowing food donors to claim tax benefits when they donate to food recovery organizations that charge recipients a reduced fee. It specifically provides that food donors are eligible for the state's food donation tax credit even if "the donated food crops, if sold by the donee nonprofit food bank, are sold to the needy, other nonprofit food banks, or organizations that intend to use the food crops to provide food to the needy."[158]

Recommendation: ***Congress should foster the development of innovative, sustainable food recovery models by repealing the "no-charge" provision that does not allow the enhanced deduction to be claimed if donated food is "transferred by the donee in exchange for money, other property, or services."***[159] Similar to the suggested changes to the Emerson Act, the enhanced deduction should be broadened to cover donations to nonprofit organizations

that either give food away for free or charge recipients at a reduced price. This change would allow donors to benefit from the enhanced deduction when donating to organizations utilizing innovative models, like nonprofit retail or selling value-added products to raise funds to cover operating expenses, thus strengthening support for such organizations and models.

The enhanced deduction does not apply to donations of food that does not meet all Food, Drug, and Cosmetic Act requirements, even labeling requirements that are irrelevant to the food's safety

A business can only claim an enhanced deduction for food donations if the donated food meets all applicable requirements of the federal Food, Drug, and Cosmetic Act (FDCA) at the time the contribution was made, as well as for 180 days preceding the contribution.[160] Navigating FDCA food safety and labeling regulations for donated food requires a significant amount of time and resources for donors.[161] The FDCA mandates a range of safety measures, as well as a variety of label components on food products. For example, food labels for donated food must include the name of the food, the manufacturer's name and address, the net weight or net quantity of contents, an ingredient list (which includes allergen information), and allergen warnings for the eight most common food allergens.[162]

Compliance with all of these standards is necessary to accurately market food that is offered for sale; however, similar to the discussion above regarding the Emerson Act, some of these labels are not needed to ensure that donated food is safe. Some label components, like allergen labeling, are needed to protect the health of recipients of the food, whereas others, such as the net weight, are not. Requiring compliance with all labeling rules may pose an unnecessary burden for donors and food recovery organizations. This is especially true in the case of food that is being donated precisely because of an error in its labeling. Complying with the requirements subjects donors to high compliance costs, depriving businesses of an incentive to donate food that is mislabeled but otherwise safe to consume.

Recommendation: ***Congress should amend the enhanced deduction to only require compliance with safety standards and safety-related labeling Food, Drug, and Cosmetic Act requirements.*** Amending the enhanced deduction to only require compliance with safety-related standards will ensure that donors have an incentive to donate foods with labeling deficiencies irrelevant to safety, such as flaws in the net weight, the net quantity of contents, or the manufacturer's name and address. Compliance with all FDCA labeling standards is important to avoid misbranding of foods and consumer deception in the marketplace. But such compliance is not always necessary to ensure that such food is safe. In order to prevent donors from the burden of discerning which requirements are related to safety and which are not, the USDA and FDA should work together to issue guidance on which labels relate to food safety and which relate to quality. If a similar change is made in the context of the Emerson Act, the list of safety standards and safety-related labeling standards that must be met should be the same for both liability protection and the enhanced deduction.

SECTION V. STANDARDIZE AND CLARIFY EXPIRATION DATE LABELS

There is no federal system regulating the "sell by," "best by," "use by," and other date labels stamped onto food.[163] Instead, each state decides whether and how to regulate these labels. Manufacturers have broad discretion to determine how these dates are selected, and these dates typically reflect quality and taste.[164] Yet businesses, individuals, and even state regulators frequently misinterpret them to be indicators of safety. As a result, some states restrict or forbid the sale or donation of past-date foods. Even in states that allow donation of past-date foods, many food recovery organizations and food donation recipients are confused by date labels and choose not to distribute or consume foods that are past-date. This confusion and the profusion of inconsistent state laws lead to wholesome foods unnecessarily being discarded rather than donated.

Standardizing and clarifying date labels is the most cost-effective solution to reduce food waste, and could divert 398,000 tons of food waste per year.

Because so much food is wasted due to being past-date, ReFED found that standardizing and clarifying date labels was the most cost effective solution to reducing food waste, with the potential to divert 398,000 tons of food waste per year and create $1.8 billion per year in economic value.[165] The food industry recently set forward guidelines to address the confusion through voluntary standards for date label language.[166] However, to ensure complete participation and reduce conflicts with state laws (described below), federal government reform is still needed.

This section will first provide a brief overview of the current date labeling regulatory

landscape, and then outline key problems posed by the existing state patchwork of date label laws and the resulting confusion. It will finally provide recommendations for how the federal government could clarify date labels across food products and increase awareness about the meaning of these labels, thus promoting donations of safe, wholesome past-date foods.

Overview of Expiration Date Labels

No national uniform laws or regulations for date labeling currently exist.[167] The absence of federal regulation has allowed states to regulate date labels, leading to a wide range of labeling laws across different states. Nine states do not require date labels on foods.[168] The remaining states impose date labeling requirements on some foods, but these requirements vary with regard to label language and categories of food covered. A number of states require the use of labels only on narrow categories of food. New Hampshire, for example, requires date labels only on containers of cream and pre-wrapped sandwiches[169] and Rhode Island only requires date labels on packaged bakery products and shellfish.[170] Other states have much broader regulations. Massachusetts, for example, requires date labels on all prepackaged perishable and semi-perishable food products.[171]

Twenty states and the District of Columbia also prohibit or otherwise limit the sale or donation of past-date foods. Some states restrict past-date sales of only a narrow category of foods, such as milk[172] or eggs,[173] while others restrict broad categories of foods, such as all packaged perishables or semi-perishables.[174] Some states also prohibit the donation of past-date foods: Montana, for example, prohibits the donation (or sale) of milk 12 days after pasteurization.[175] For a complete list of state restrictions on donations of past-date foods, see *The Dating Game: How Confusing Food Date Labels Lead to Food Waste in America*.[176]

Although some states regulate the use of date labels for certain foods, manufacturers generally still have broad discretion to decide which foods will bear date labels, how the date is selected, and what language the labels will use.[177] Most manufacturers choose dates based on an estimate of the last day on which a food will be at its peak quality.[178] Manufacturers use a variety of quality-based methods to determine the timeframe for label dates, including analyses by food scientists, consumers taste tests, literature values, product turnover rates or consumer complaints.[179] These tests are intended to reflect product quality, not safety. [180] Both the USDA and FDA have acknowledged that most foods remain safe to consume after the passage of the date, if stored properly.[181] Only a small set of foods, such as certain ready-to-eat-foods, may pose some risk if consumed after the date; however, such products do not display distinct of that risk.[182]

State-Level Date Labeling Regulations

Generally, state date labeling laws fall into one of four date labeling categories:

- States that regulate date labels on some foods (shellfish is the most commonly-regulated food), but do not regulate the sale of goods after those dates have passed.
- States that do not regulate date labels, but do regulate sales once manufacturers voluntarily choose to use date labels.
- States that regulate both date label presence and product sale after the dates have passed.
- States that do not require or regulate labels.

Source: The Dating Game: How Confusing Food Date Labels Lead to Food Waste in America, Harvard Food Law and Pol'y Clinic and Nat'l Res. Def. Council 12–15 (2013), http://www.chlpi.org/wp-content/uploads/2013/12/dating-game-report.pdf.

labels to warn

Although expiration dates generally do not relate to safety, this patchwork state regulatory system and the myriad of different labels that appear on products engender confusion among consumers, who often believe that date labels are indicators of safety.[183] 84% of consumers report that they throw away food after the date due to safety concerns,[184] demonstrating that they often misunderstand the meaning of date labels. Food recovery organization staff and volunteers, as well as food recipients, often share this confusion. This confusion contributes significantly to household food waste and hinders the distribution of safe, wholesome past-date foods to food insecure individuals.

To help address this, on February 15, 2017 the two largest trade groups for the grocery and manufacturing industries launched a voluntary initiative to standardize date labels on food packages.[185] The voluntary initiative encourages retailers and manufacturers to only use one of two standard phrases on consumer facing food packaging—one for quality and one for safety.[186] This announcement is an important first step toward eliminating date label confusion and helping consumers to avoid wasting food. However, without achieving full participation by manufacturers and retailers across the country and reforming state laws that require specific date labeling language on certain food products, there will still be a variety of date labels on food packages causing consumer confusion. To ensure complete participation and reduce conflict with state

laws, federal reform is still needed.

Shortcomings and Recommendations for Reformng the Current Expiration Date System

The lack of standardized date labels creates uncertainty about whether past-date foods are safe to consume. In addition, the current system causes confusion among food donors and food recovery organizations, who may not know which past-date foods they can accept and distribute. State and local health departments also may be confused about what date labels mean and whether past-date food should be allowed to be sold or donated. Moreover, the lack of federal regulation allows states to restrict the donation of wholesome past-date food, causing wholesome, past-date food to be sent to landfills or incinerators instead of donated. This section explores each of these issues in turn.

The lack of standard date labels leads to a mistaken belief that past-date food is unsafe to consume, which causes unnecessary waste

Date labels currently display a variety of language that does not distinguish between indicators safety and indicators of quality. Although most date labels are meant as quality indicators, many consumers, food donors, health departments, and food recovery organizations believe that these labels communicate a food's safety. As a result, consumers and such organizations have concerns about the safety of offering past-date foods.[187] This confusion can hinder effective donation of past-date foods or their consumption by end recipients.

Survey Says...

- 37% of Americans report always or usually throwing away food that is close to or past the date on the package, and
- 84% report doing so at least occasionally.
- Consumers ages 18-34 are most likely to discard food based on its date label, while consumers over the age of 65 are least likely to do so.
- More than a third of Americans incorrectly believe that the federal government regulates date labels.

Source: Emily Broad Leib, Christina Rice, Roni Neff, Marie Spiker, Ali Schklair & Sally Greenberg, Consumer Perceptions of Date Labels: National Survey, Harvard Food Law and Pol'y Clinic, Nat'l Consumer Inst. And Johns Hopkinds Ct. for a Livable Future (May 2016), http://www.chlpi.org/wp-content/uploads/2013/12/Consumer-Perceptions-on-Date-Labels_May-2016.pdf.

As stated above, 84% of consumers have reported throwing away food past the date, out of concern about food safety.[188] This statistic indicates that consumers do not understand the relationship between date labels and food safety. As a result, consumers may be resistant to accepting past-date foods from food recovery organizations, even if these products are actually safe to eat.

Many employees of food recovery organizations have the same misunderstandings about date labels and food safety as consumers. Anecdotally, representatives from food recovery organizations report that volunteers at food recovery organizations are unsure about what past-date foods they can accept and distribute.[189] These organizations would need to spend considerable time and effort educating workers about the date labeling system in order to address these concerns. Instead, they could opt for the less time-consuming option and discard perfectly safe past-date food.

As described above in Section III: Enhance Liability Protections for Food Donations, potential donors, such as food retailers and manufacturers, experience similar confusion, and may also be reluctant to donate past-date foods due to liability concerns. In many cases, potential donors are prevented from donating past-date foods either due to restrictive state laws (described in more detail below) or by health department inspectors who misinterpret the meaning of date labels or state or local health codes with regard to the donation of past-date food.

Recommendation: ***Congress should establish standard label language that distinguishes between quality-based and safety-based labels, and educate consumers on the new meaning of date labels.*** In order to reduce food waste and facilitate the donation of wholesome past-date foods, Congress should pass legislation, or the FDA and USDA should work together to create uniform regulations, that standardize date labels throughout the nation and across foods. In order to educate consumers about the foods that can be safely consumed past their date and those that may pose some safety risks, such legislation or regulation should limit label language to two standard terms: one to indicate the quality date and one to indicate the safety date.

The use of the quality date on food products should be optional. However, if manufacturers choose to include a date for quality purposes, the label should utilize the term "best if used by." A representative national survey conducted

by the Harvard Law School Food Law and Policy Clinic, the National Consumers League, and Johns Hopkins Center for Livable Future has shown that "best if used by" is the phrase most easily understood by consumers as a quality indicator.[190] The FDA and the USDA should work together to compile a list of foods that pose some safety risk if consumed after the date, and require those food products to bear a safety date that utilizes the term "use by." This was one of the two phrases most easily understood by consumers as an indicator of safety in the aforementioned survey.[191]

A dual-label system with separate quality and safety labels would generally align the U.S. with most countries that regulate date labels, including the European Union.[192] Further, standardized date labeling would clarify which food can be safely donated and consumed past the date, reducing confusion among food donors, food recovery organizations, end recipients, and health departments by correcting the mistaken belief that all past-date foods are unsafe to consume. Because all of these stakeholders are used to seeing a range of labels on foods, education about the new label phrases will be necessary to help them understand the new labels and treat food appropriately.

The current date-labeling system allows for overly restrictive state laws to restrict or ban donation of safe, past-date foods

Due to the lack of federal date labeling regulation, most states have filled the void by requiring date labels on certain types of food. As mentioned above, twenty states have laws that unnecessarily restrict the sale or donation of past-date food. Since most foods generally remain safe to consume past their dates, these restrictions are not grounded in sound food science and pose an unnecessary barrier to the donation of wholesome food. For example, in Montana all milk must bear a "sell by" date of 12 days from the date of pasteurization and milk past this date cannot be sold or donated.[193] As a result, countless gallons of milk in Montana are needlessly discarded each day. Yet, milk sold in stores is generally pasteurized, a process that kills harmful pathogens and eliminates the risk of food-borne illness, even after the sell-by or use-by date.[194] Furthermore, the industry standard for milk is generally a quality date of 21 to 24 days after pasteurization, which is almost double the amount of time in Montana's law. [195]

Due to confusion about applicable state laws or misdirected concerns about food safety, health departments may also prevent the donation of past-date foods even in states where such donations are explicitly allowed. Massachusetts, for example, allows past-date foods to be sold and donated, so long as they are wholesome, clearly labeled as past-date, and separated from products that are not past-date.[196] However, food recovery organizations have indicated anecdotally that local health departments in several jurisdictions prevent them from donating past-date foods due to the mistaken belief that past-date food is unsafe to consume.

Recommendation: ***Allow for the sale or donation of foods after the quality date.*** In addition to standardizing date labels, Congress should pass legislation, or the FDA and USDA should create regulations, that bar states from prohibiting the donation or sale of foods past their quality dates. This change would still allow states to restrict the sale or donation of past-date foods that bear a safety date. It would also allow states to retain the power to regulate the sale or donation of products past the quality date, as long as they do not prohibit such sale or donation outright. Ensuring that food that bears a quality date is allowed to be sold or donated past such date can reduce the unnecessary waste of safe and wholesome past-date foods.

SECTION VI. BETTER MONITOR AND ENCOURAGE FOOD DONATION BY FEDERAL AGENCIES

In addition to encouraging food donation by private parties, the federal government can model best practices by donating surplus food from federal agencies and their contractors. In passing the Federal Food Donation Act of 2008, the federal government took the first step to encourage executive agencies and their contractors to donate excess food.[197] Although passage of the Act was a positive first step, the federal government should strengthen the Act in several key ways, in order to effectively reduce food waste at the federal level.

This section will begin by providing a brief overview of the Act and its requirements. The section will then identify the main shortcomings of the Act that limit its efficacy and provide recommendations for how the federal government can strengthen the Act to increase food donations and reduce the amount of food wasted by federal agencies and their contractors.

Overview of the Federal Food Donation Act of 2008

In 2007, food banks and other food recovery organizations received increased requests for emergency assistance; however, as food costs rose, these organizations struggled to meet their clients' needs.[198] The Federal Food Donation Act of 2008 unanimously passed in both the House and the Senate in response to this growing need for food donations to help food insecure individuals.[199]

The Act encourages all executive agencies that enter into contracts above $25,000 for the provision or sale of food or foodservice, or for the use of federal property by private parties for events where food is provided, to donate excess food to nonprofit organizations that serve or distribute food to food insecure Americans.[200] In order to comply with the Act, executive agencies must include a clause in all such contracts that encourage the contractor "to the maximum extent practicable and safe, to donate excess, apparently wholesome food to nonprofit organizations that provide assistance to food-insecure people in the United States."[201] The clause must also state that the government and the head of the executive agency are not responsible for the costs or logistics of safely transporting and distributing this excess food, and that both the agency and the contractor will be exempt from liability under the Bill Emerson Good Samaritan Food Donation Act, so long as each complies with its requirements.[202]

Shortcomings and Recommendations for the Federal Food Donation Act of 2008

Despite its good intentions, there are several improvements that can be made to the Act. First, because the Act does not require any reporting on the part of federal agencies or their contractors, there is no way to know how many executive agencies are actually donating surplus food. Further, the Act does not actually require any donation by federal agencies or their contractors; it merely requires agencies to encourage their contractors to donate. This section explores each of these issues in turn.

Little is known about the impact of the Act on food donations, or the recovery practices of agencies

Nearly a decade after its enactment, the Act's impact is unclear, because no data exists regarding whether any executive agencies or their contractors are actually donating excess food.[203] Because the Act does not contain a requirement that agencies or their contractors document food donations made pursuant to the Act, such information is not formally collected. Given the lack of data, it is impossible to determine the efficacy of the Act. The lack of a reporting requirement means that agencies and government contractors have little incentive to ensure food is donated.

> **Recommendation:** ***The Act should be amended to include a requirement that agencies and contractors track and report on the amount of food donated.*** A tracking and reporting requirement would spur the collection of important information about the current state of food donation among federal agencies. The amendment should require that contractors submit an annual report to the contracting agency with data indicating the amount of food that was donated.[204] The agency would then be responsible for submitting the contractors' reports to a central authority, such as the Office of Management and Budget, which would aggregate the data.[205]
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> The federal government could develop a streamlined process for food donation reporting by the agencies. For instance, since 2010, Los Angeles has encouraged all city departments and elected officials to donate appropriate surplus food and report on such donations.[206] To facilitate such reporting, the city's chief legislative analyst developed a form for use by city departments, which asks for information about the donating agency, the receiving organization, and the amount and type of food donated.[207] The federal government could similarly provide a streamlined documentation process for its agencies and contractors to report on food donation.

The Act does not require food donation

The Federal Food Donation Act does not require the donation of any food; rather, it only requires executive agencies to include a clause in their contracts encouraging contractors to donate.[208] This means that agencies and their contractors

are not required under the Act to make any actual changes to their practices. Executive agencies contract for significant amounts of food in their everyday operations. For example, the USDA has three cafeterias or dining rooms that serve meals and snacks throughout the day,[209] and the FDA's main office has two cafes and three kiosks serving breakfast, lunch, and snacks throughout the day.[210] Similarly, the U.S. Department of Veterans Affairs operates a large network of healthcare systems across the country, including hospitals and other medical centers or clinics, each of which has various foodservice operations that serve visitors and patients.[211] In addition, agencies often hold events across the country, such as conferences and meetings, that require large food contracts. Without a requirement that surplus food provided under these contracts be donated or offered for donation, the wholesome excess food from these cafeterias, kiosks, and external convenings can simply be discarded.

> **Recommendation:** ***The Act should be amended to require covered contracts to include language that mandates that agency contractors take steps to donate excess food by creating a written agreement with a food recovery organization.*** Mandating the insertion of stronger language and the formation, through a written agreement, of a relationship between the contractor and a food recovery organization would require agencies and contractors to take the necessary steps to begin donating wholesome food. In the event that the surplus food is not donated, contractors should be required to summarize in their annual report to the contracting agency the reasons for which the contractor was unable to donate, such as refusal by the food recovery organization or the organization's inability to accept such donations.
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> This proposed change to the Act should be accompanied by education and resources to facilitate donations by federal agencies and contractors. For example, the federal government can look to Los Angeles, which also adopted procedures and guidelines to assist the city's departments and contractors with food donation.[212] These guidelines and procedures provide much of the educational support this section recommends, such as step-by step processes for food donation.[213]

SECTION VII. FOOD SAFETY GUIDANCE FOR FOOD DONATIONS

One of the key barriers to food donation is a lack of knowledge about the procedures that must be followed in order to safely donate surplus foods. These knowledge gaps are prevalent among businesses and are exacerbated by absent or inconsistent food safety regulations at the state and local level. Businesses often do not know what steps they must take to donate certain foods safely, and health inspectors may be ill equipped to answer their questions or inconsistently enforce existing regulations. This means that potential donors often err on the side of caution and choose not to donate food. Further, health inspectors may discourage establishments from making food donations rather than educating them on how to donate safely.

Compounding the knowledge problem is a lack of regulatory language or guidance surrounding food safety best practices as they relate to food donation. Most food businesses that sell food to consumers, such as restaurants and retail food stores, are regulated under state law. However, the federal government plays a key role in influencing these state laws by providing model food safety regulations for restaurants and retail stores via the FDA Food Code, which is released every four years and has been adopted by all states.[214] The FDA Food Code does not include model language specifically related to food donation or food recovery. This means that regulations specifically relating to food donation are not on the radar of state food safety regulators and may not be included in state or local codes or are included inconsistently from one jurisdiction to another.

Because states generally base their food safety regulations on the models provided by the federal government, federal

The absence of references to food donation in federal food safety guidance upon which state governments rely, aggravated by shortcomings in the accessibility of guidance documents like the Comprehensive Resource for Food Recovery, leads to confusion that diminishes food donations.

guidance that clarifies best practices for food donation to donors and health inspectors has the potential to facilitate food donation. However, the only federally endorsed food donation guidance, the Comprehensive Resource for Food Recovery Programs (formally known as the Comprehensive Guidelines for Food Recovery Programs), is infrequently updated and not widely circulated.

The Comprehensive Resource for Food Recovery Programs (Comprehensive Resource) provides information on how to safely create and implement a food recovery program.[215] Although this helpful resource was recently updated, it is not included in the FDA Food Code itself, which means it is not readily accessible by state policymakers when they create their food safety regulations, and it is not familiar to health inspectors, who mostly study the FDA Food Code.

The absence of references to food donation in federal resources upon which state governments rely, aggravated by shortcomings in the accessibility of guidance documents like the Comprehensive Resource, leads to confusion that diminishes food donations. The Comprehensive Resource has the potential to encourage the adoption of food donation best practices, but only with improvements to its efficacy and its inclusion within, or linkages to, the FDA Food Code.

This section will provide some background on the FDA Food Code and the Comprehensive Resource. This section will then identify the main barriers to food donation that are aggravated by the way food safety information is circulated, and provide recommendations for how the FDA can help improve the circulation of food safety knowledge to facilitate food donation.

Overview of The FDA Food Code and the Comprehensive Resource for Food Recovery Programs

The FDA Food Code is a model code and reference document for state and local governments. It consists of model food safety standards for the food service and retail industries.[216] The FDA Food Code reflects the expertise and attention of the Conference for Food Protection (CFP), an organization made up of members from the food industry, government, and consumer groups who develop and promote food safety standards.[217] It is updated every four years to reflect the most recent food safety science.[218] The FDA Food Code is not binding law unless a state or local government chooses to adopt it, but it has a substantial impact on state food codes nonetheless. Because it reflects such trusted expertise, every state has adopted some version of the FDA Food Code, and some states update their food safety laws regularly to reflect the updates to the FDA Food Code.[219] This means that language in the FDA Food Code often finds its way into state and local regulations, and language absent from the FDA Food Code generally does not. The FDA Food Code does not include, and never has included, any instructions or guidance regarding food donations. As a result, relevant regulations are often absent or inconsistent on the state and local levels.

The Comprehensive Resource is a federally-endorsed food donation guidance intended for stakeholders involved in creating food recovery programs, with a focus on retail food establishments.[220] The Comprehensive Resource first was developed in the late 1990s in response to inquiries about safety in food recovery operations.[221] The initial guidelines were developed by the FDA and USDA in 1997, and were presented in 1998 to the CFP to be reviewed and accepted by the dozens of food safety experts that make up that body.[222] The CFP formed the Food Recovery Committee, made up of representatives from the food service and retail industries, hunger relief organizations, and regulatory agencies, to work with the FDA and USDA on developing the initial draft guidelines into the first version of the Comprehensive Resource.[223] The first version of the Comprehensive Resource was released in 2000, and it was updated in 2007 and 2016.[224] Like the FDA Food Code, the Comprehensive Resource is not law, but it provides guidance regarding policies and procedures that should be followed when implementing a food recovery program, including guidance on how to implement a food recovery program and food safety procedures based on the FDA Food Code.[225]

The Comprehensive Resource was originally proposed to be included as an annex to the FDA Food Code; however, the CFP ultimately decided to publish it as a separate document.[226] This decision means that it is not as widely disseminated as the FDA Food Code. In the most recent FDA Food Code, the 2013 edition, the Comprehensive Resource is only briefly referenced and summarized in the References annex to introduce users of the Food Code to the Comprehensive Resource.[227]

Shortcomings and Recommendations for Improving Food Safety Guidance for Food Donations

Together, the FDA Food Code and the Comprehensive Resource have the potential to be powerful tools to facilitate food donation. However, currently the FDA Food Code, which is the food safety resource most influential to state and local governments, does not reference food donation. Additionally, the Comprehensive Resource is not widely circulated and is not updated frequently enough.

Federal food safety resources influential to state and local regulations do not reference food donation

The FDA Food Code significantly impacts state and local food safety regulations; however, because it does not include any instructions or guidance regarding food donations, state and local food safety regulations generally do not include specific language addressing food recovery. By contrast, the Comprehensive Resource contains information that would be useful to a number of parties invested in food recovery, but it has relatively little practical effect as a standalone document. The lack of clear guidance around food safety for food donations hinders potential food donors from finding information about how to safely donate food. Even more importantly, it impacts the decisions of state and local food safety regulators and health inspectors.

Due to the lack of federal guidance about how food donations can be made safely, state food safety regulators may be hesitant to allow food donations. Further, in some states, local health departments are charged with interpreting and enforcing state regulations, and may also implement stricter local requirements.[228] As a result, food donors and food recovery organizations may not be able to get clear guidance on what food safety regulations cover their donations, or may be subject to multiple, inconsistent sets of food safety regulations, particularly if these organizations operate in multiple jurisdictions. Clear guidance on food donations in the FDA Food Code would position state regulators and state and local health inspectors to regulate food donation more consistently, and such guidance could help ensure that donors are knowledgeable about how to safely donate food.

> **Recommendation**: ***Include modernized and clarified guidance on food donations informed by food recovery organizations and donors operating at different scales and contexts in the FDA Food Code.*** in order to ensure that clear and consistent language is incorporated into state and local regulations, language regarding food safety for food donations should be included in the FDA Food Code. Much of the language in the Comprehensive Resource could easily be incorporated into the FDA Food Code. The CFP, whose expertise guides the development of FDA Food Code, should work with the FDA to better incorporate the Comprehensive Resource or its underlying suggestions into the next version of the FDA Food Code. Due to the ubiquity of the FDA Food Code,[229] including clear and up-to-date standard language on food donations in the Food Code would make it much more likely that such language becomes embedded in state and local laws and regulations.
>
> In establishing food donation language to be added to the FDA Food Code, such language should be developed with the input of a range of potential donors and food recovery organizations operating at different scales and contexts (such as farms, restaurants, and food service establishments that donate prepared foods). The language also should take into account the modernization of the food recovery landscape. Recent years have seen increased donations of perishable and prepared foods, the development of new technologies, such as waste-tracking tools and better packaging, and the emergence of innovative models for connecting donated food to those in need.[230] The CFP and the FDA should take care to ensure that the guidance addresses relevant food safety concerns while also being realistically implementable by food recovery organizations operating at different scales and responsive to the evolving food recovery landscape. As one example, whether or not a refrigerated vehicle is needed to safely transport donated foods depends on the type of food being donated and the length of time it will be in transit. Model language should allow for flexibility if food being transported is not perishable or is being transported only briefly, and not require a refrigerated vehicle if one is not needed for safety, as the cost could be prohibitive.

The Comprehensive Resource is not shared in a format that encourages its inclusion in relevant state and local regulations

The Comprehensive Resource contains information that would be valuable to a broad audience, including food businesses, food recovery organizations, institutions such as schools and universities, food advocates, and, health and safety officials. However, the Comprehensive Resource is difficult to find on the internet and lacks the widespread dissemination enjoyed by other food safety documents, like the FDA Food Code.[231] As a result, state and local food safety regulations generally do

not address food recovery. Moreover, businesses that wish to donate often do not know where to turn to learn about best practices for safety.

> **Recommendation:** ***The FDA and the CFP should work to distribute the Comprehensive Resource so that it reaches a wider audience.*** As mentioned above, the CFP should work to ensure that the Comprehensive Resource or its underlying suggestions reach the most important audience by including text regarding food donations as part of the next version of the FDA Food Code. However, whether or not it is incorporated into the Food Code, the CFP should go further to make the Comprehensive Resource more accessible by circulating it through additional platforms. Disseminating the Comprehensive Resource more widely would help prospective food donors in the retail sector to better understand potential food safety hazards and to implement best food safety practices for food donation. Moreover, it could also help regulators to better understand how food can be donated safely, thus breaking down unnecessary barriers to food donation and recovery.

The Comprehensive Resource is not regularly updated

Although it was recently updated, there were no updates to the Comprehensive Resource for the nine years between 2007 and 2016. This discontinuity is likely because the Food Recovery Committee, the body of the CFP that drafted the Comprehensive Resource, was retired in 2007.[232] The Comprehensive Resource should serve as a resource for businesses looking to bring themselves up to date on current food safety practices and trends in food recovery and donation. However, if it is not updated regularly, outdated information prevents the document from providing businesses with a current picture of hunger, food recovery activities, and food safety best practices, particularly given the evolving landscape of food recovery practices and technology mentioned above. The Comprehensive Resource also fails to reference the updated language and science in the FDA Food Code if it is not updated as frequently as the Food Code.

> **Recommendation:** ***The Comprehensive Resource should be updated every four years to reflect current food safety practices, data, language, and trends.*** The Comprehensive Resource should be updated every four years, the same rate the FDA Food Code has been updated since 2001.[233] Food safety and food recovery are not static. Trends in food recovery and models for food recovery organizations are changing quickly as technology rapidly advances.[234] Information about food safety and food science are also evolving. In order to provide the most useful guidance for individuals and businesses looking to become involved in food recovery, the Comprehensive Resource should be updated regularly to include up-to-date data, examples, food safety, food science, and terminology.

VIII. CONCLUSION

Forty percent of the food produced in the U.S. goes uneaten, resulting in 62.5 million tons of wasted food each year.[235] Food waste presents a grave threat to our economy, our health, and our environment. It has been estimated that redistributing just 30 percent of all the food lost in the United States could feed the nearly 40 million food insecure Americans their total diet.[236] Despite several policies enacted to encourage food donations, several current laws still perpetuate barriers to food recovery or fail to provide adequate protections or incentives for food donation. Addressing the barriers identified throughout this report can increase the amount of healthy, safe and wholesome food recovered across the food system that makes it to the tables of those in need. Below are specific actions Congress, the FDA and USDA can take to enhance food donations.

TABLE OF RECOMMENDATIONS

Congress

Amend the Bill Emerson Good Samaritan Food Donation Act to fill in liability gaps.

- Charge an executive agency with the responsibility for implementing and interpreting the Emerson Act.
- Provide liability protection to nonprofit organizations that either give food away for free or charge recipients a reduced fee.
- Provide liability protection for wholesome food donated directly to individuals in need by food producers or licensed food service establishments, including restaurants, food processors, institutional foodservice, retailers, farms, and others.
- Amend the Emerson Act so that foods must only comply with (or be reconditioned to comply with) federal, state, and local safety standards or safety-related labeling standards.
- Explicitly provide liability protection for the donation of past-date foods.

Expand federal tax incentives for food donation.

- Include an alternative tax credit that can be used by low-margin businesses, like some farms, in lieu of the enhanced deduction.
- Add a deduction or credit specifically to cover the cost of transporting donated food.
- Repeal the "no-charge" provision of IRC § 170(e)(3)(A) that restricts donated food from being "transferred by the donee in exchange for money, other property, or services."
- Amend the enhanced deduction to only require compliance with safety standards and safety-related labeling FDCA requirements.

Pass legislation standardizing expiration date labels.

- Establish standard label language that distinguishes between quality-based and safety-based date labels, and educate consumers on the new meaning of date labels.
- Allow for the sale or donation of foods past their quality date.

Amend the Federal Food Donation Act of 2008.

- Include a requirement that agencies and contractors track and report on the amount of food donated.
- Require covered contracts to include language that mandates that agency contractors take steps to donate excess food by creating a written agreement with a food recovery organization.

FDA

Determine safety and safety-related labeling standards.

- Working in concert with the USDA, issue guidance on which safety standards and safety-related labeling standards must be met for compliance with the Bill Emerson Good Samaritan Food Donation Act and the Enhanced Tax Deduction for food donations.

Reform expiration date labels.

- Initiate a rulemaking proceeding to regulate date labels on food products under FDA jurisdiction. In concert with the USDA, create uniform regulations to standardize date labels.
  - Create a dual-label system with one standard quality date label and one standard safety date label.
  - Compile a list of high-risk foods that should be required to display the safety label.
  - Create regulations that bar states from prohibiting the donation or sale of food products past their quality dates.

Work with the Conference for Food Protection to improve the Comprehensive Resource for Food Recovery Programs.

- Include in the FDA Food Code modernized and clarified guidance on food donations that has been informed by food recovery organizations and donors operating at different scales.
- Distribute the Comprehensive Resource so that it reaches a wider audience.
- Update the Comprehensive Resource every four years to reflect food safety practices, data, language, and trends.

USDA

Clarify liability protections for food donations.

- Even in the absence of Congressional action, USDA can take steps to provide guidance to clarify the meaning of terms in the Bill Emerson Good Samaritan Food Donation Act and raise awareness about the Act's protections.

Determine safety and safety-related labeling standards.

- Working in concert with the FDA, issue guidance on which safety standards and safety-related labeling standards must be met for compliance with the Bill Emerson Good Samaritan Food Donation Act and the Enhanced Tax Deduction for food donations.

Reform expiration date labels.

- Initiate a rule making proceeding to regulate date labels on food products under USDA jurisdiction. In concert with the FDA, create uniform regulations to standardize date labels.
  - Create a dual-label system with one standard quality date label and one standard safety date label.
  - Compile a list of high-risk foods that should be required to display the safety label.
  - Create regulations that bar states from prohibiting the donation or sale of food products past their quality dates.

APPENDIX A: STATE LIABILITY PROTECTION LAWS

State	Citation	Type of Protection		Protections Apply When End Recipient Pays for the Donated Food	Protections Apply to Direct Donations
		Civil	Criminal		
Alabama	Ala. Code 1975 § 20-1-6	x	x		
Alaska	Alaska Stat. § 17.20.346	x	x	x	
Arizona	Ariz .Rev. Stat. Ann. § 36-916	x		x	x
Arkansas	Ark. Code Ann. § 20-57-103	x	x	x	
California	Cal. Civ.Code § 1714.25	x			
Colorado	Colo. Rev. Stat. § 13-21-113	x	x		
Connecticut	Conn. Gen. Stat. Ann. § 52-557L	x	x	x	
Delaware	Del.Code Ann. Tit. 10, § 8130	x	x		
District of Columbia	D.C. Code § 48-301	x	x		
Florida	Fla. Stat. Ann. § 768.136	x	x		
Georgia	Ga. Code Ann. § 51-1-31	x	x	x	
Hawaii	Haw. Rev. Stat. § 145D-1—D-5	x	x		
Idaho	Idaho Code Ann. § 6-1301—1302	x	x		
Illinois	745 Ill. Comp. Stat. 50/1—50/4	x			
Indiana	Ind. Code § 34-30-5-1—34-30-5-2	x			
Iowa	Iowa Code Ann. § 672.1	x	x	x	
Kansas	Kan. Stat. Ann. § 65-687	x	x		
Kentucky	Ky. Rev. Stat. § 413.247—248	x	x		
Louisiana	La. Rev. Stat. Ann. § 9:2799	x			Only wild game
Maine	Me. Rev. Stat. tit. 14, § 166	x			
Maryland	Md. Code Ann. Cts. & Jud. Proc. § 5-634 Md. Code Ann. Health—Gen. § 21-322	x			
Massachusetts	Mass. Gen. Laws Ann. Ch. 94, § 328; 105 Mass. Code Regs. 520.119	x		x	**
Michigan	Mich. Comp. Laws Ann. § 691.1572	x		x	
Minnesota	Minn. Stat. Ann. § 604A.10	x			x
Mississippi	Miss. Code Ann. § 95-7-1	x			
Missouri	Mo. Rev. Stat. § 537.115	x	x		
Montana	Mont. Code Ann. § 27-1-716	x	x	x	
Nebraska	Neb. Rev. Stat. § 25-21,189	x		*	

APPENDIX A: STATE LIABILITY PROTECTION LAWS (Continued)

State	Citation	Type of Protection		Protections Apply When End Recipient Pays for the Donated Food	Protections Apply to Direct Donations
		Civil	Criminal		
Nevada	Nev. Rev. Stat. § 41.491	x			x
New Hampshire	N.H. Rev. Stat. § 508:15	x	x	x	x
New Jersey	N.J. Stat. Ann. § 24:4A-1—A5	x	x	x	
New Mexico	N.M. Stat. Ann. § 41-10-1—3	x	x		x
New York	N.Y. Agric. & Mkts. Laww § 71-y—z	x	x		
North Carolina	N.C. Gen. Stat. Ann. § 99B-10	x	x	x	
North Dakota	N.D. Cent. Code § 19-05.1-02—19-05.1-05	x	x		
Ohio	Ohio Rev. Code Ann. § 2305.37	x			
Oklahoma	Okla. Stat. Ann. tit. 76, § 5.6	x	x	x	
Oregon	Or. Rev. Stat. § 30.890	x	x	x	
Pennsylvania	10 Pa. Stat. Ann. § 351-58	x	x		
Rhode Island	R.I. Gen. Laws Ann. § 21-34-1—2	x	x	*	
South Carolina	S.C. Code Ann. § 15-74-10—40	x	x		
South Dakota	S.D. Codified Laws § 39-4-22—24	x	x		
Tennessee	Tenn. Code Ann. § 53-13-101—103	x	x		
Texas	Tex. Civ. Prac. & Rem. Code Ann. § 76.001—004	x	x	*	
Utah	Utah Code Ann. §§ 4-34-5, § 78B-4-502	x	x		
Vermont	Vt. Stat. Ann. tit. 12, § 5761—5762	x	x		x
Virginia	Va. Code Ann. § 3.2-5144	x			
Washington	Wash. Rev. Code Ann. § 69.80.031	x	x		
West Virginia	W. Va. Code, § 55-7D-1—4	x	x		
Wisconsin	Wis. Stat. Ann. § 895.51	x			
Wyoming	Wyo. Stat. Ann. § 35-7-1301	x			

* Food recovery organization must distribute the food for free in order to receive protection; donor is protected even if the food recovery organization charges

** Explicitly allows donation of past-date food, as long as the food is wholesome, separated from foods that are not past-date, and clearly labeled as past-date

APPENDIX B: STATE LEVEL TAX INCENTIVE LAWS

Legislation	Deduction or credit	Benefit	Eligible donors	Eligible food	Eligible recipients
Arizona ARIZ. REV. STAT. ANN. § 42-5074	Deduction	Gross proceeds of sales or gross income from donated food	Restaurants	Prepared food, drink, or condiment	Nonprofits that regularly serve free meals to the needy and indigent at no cost
Arizona ARIZ. REV. STAT. ANN. § 43-1025	Deduction	Full wholesale market price, or the most recent sale price (whichever is greater) of donated crops	Taxpayer engaged in the business of farming or processing agricultural crops	Agricultural crops	Nonprofits located in Arizona whose use of the crop is related to their tax-exempt status
California CAL. REV. & TAX. CODE § 17053.88	Credit	10% of inventory cost	Taxpayer responsible for planting, managing, and harvesting crops	Fresh produce	Food banks located in California
California CAL. REV. & TAX. CODE § 17053.12	Credit	50% of transportation costs	Taxpayer engaged in the business of processing, distributing, or selling agricultural products	Agricultural crops	Nonprofits
Colorado COLO. REV. STAT. § 39-22-536	Credit	25% of wholesale market price, up to $5,000 annually	All taxpayers	Agricultural crops (grains, fruit, vegetables), livestock, eggs, dairy	Nonprofit hunger-relief charitable organizations
Colorado COLO. REV. STAT. ANN. § 39-22-301	Credit	25% of wholesale market price, up to $1,000 annually	C-Corporations	Crops and livestock	Charitable organizations that do not collect money, other property, or services in exchange for product
District of Columbia D.C. CODE § 47-1806.14	Credit	50% of the value of the food commodity donation, up to 2,500 annually	All taxpayers	Food Commodities (vegetables, fruits, grains, mushrooms, honey, herbs, nuts, seeds, or rootstock grown in the District by urban farming or by a community garden)	District of Columbia food banks or shelters recognized as a tax-exempt organization

APPENDIX B: STATE LEVEL TAX INCENTIVE LAWS (Continued)

Legislation	Deduction or credit	Benefit	Eligible donors	Eligible food	Eligible recipients
Iowa Iowa Code §§ 190B.101-.106, 422.11E, 422.33(30)	Credit	15% of fair market value, up to $5,000 annually	Taxpayers that produce a food commodity	Any apparently wholesome food	Food banks and emergency feeding organizations
Kentucky Ky. Rev. Stat. Ann. § 141.392	Credit	10% of fair market value	Taxpayer who derives income from agricultural products	Edible agricultural products	Nonprofit food programs operating in Kentucky
Missouri Mo. Rev. Stat. § 135.647	Credit	50% of food or cash donation, up to $2,500 annually	All taxpayers	Cash or food that is not past-date	Local food pantries in the area where the donor resides in MO
Oregon Or. Rev. Stat. § 315.154 and 315.156	Credit	10% of wholesale market price	Taxpayer or corporation that grows crops or livestock	Crops and livestock	Food bank or other charitable organization in OR that distributes food without charge
South Carolina S.C. Code Ann. § 12-6-3750	Credit	$75 per carcass	Licensed meat packer, butcher, or processing plant	Deer	Nonprofits engaged in distributing food to needy; no portion of deer can be sold
Virginia VA Code Ann. § 58.1-439.12:12	Credit	30% of fair market value, up to $5,000 annually	Any person engaged in the business of farming	Food crops (grains, fruits, nuts, or vegetables)	Nonprofit food bank engaged in providing food to the needy; food can be sold to the needy or other nonprofits

Endnotes

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7 *Id.* § 1791(c)(1).
8 *Id.* § 1791(b)(1).
9 I.R.C. § 170(e)(3)(A)(ii) (2017).
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16 *Food Recovery Hierarchy*, U.S. Envtl. Prot. Agency, https://www.epa.gov/sustainable-management-food/food-recovery-hierarchy (last visited May. 2, 2016).
17 *Id.*
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[57] *Id.* § 1791 (b)(3).
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[60] *Id*.
[61] Univ. of Ark., *supra* note 46 at 3.
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[77] N.H. Rev. Stat. § 508:15 (2017).
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[86] FSIS Directive 7020.1, Verifying Donation of Misbranded and Economically Adulterated Meat and Poultry Products to Non-profit Organizations (U.S.D.A. 2016).
[87] *Id.*
[88] Cal. Civ. Code § 1714.25 (2017); Or. Rev. Stat. § 30.890 (2017).
[89] Harvard Food Law and Pol'y Clinic and Nat'l Res. Def. Council, *supra* note 39, at 19–20, 22.
[90] *E.g.,* Harvard Food Law and Pol'y Clinic and Nat'l Res. Def. Council, *supra* note 39, at 19–21; *Consumer Insight: Date Labels and Storage Guidance*,

WRAP (Nov. 2013), http://www.wrap.org.uk/content/consumer-insight-date-labels-and-storage-guidance.

91 Harvard Food Law and Pol'y Clinic and Nat'l Res. Def. Council, *supra* note 39, at 22.

92 "The Committee recognizes that the provision of food that is close to the date of recommended retail sale in and of itself is not grounds for finding gross negligence." H.R. Rep. No. 104-661, at 5 (1996).

93 Mass. Gen. Laws ch. 94, § 328 (2017).

94 *Id.* An open-dated food product contains a calendar date stamped on the product's package, and relates to the food's quality, not safety. *Food Product Dating*, U.S. Dep't. of Agric., Food Safety and Inspection Serv., (Dec. 2016), http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/food-product-dating/food-product-dating.

95 Three requirements must be met in order to sell or donate past-date foods in Massachusetts: (1) the food must be "wholesome" and its sensory qualities must not have "significantly diminished;" (2) the food must be separated from foods which are not past-date; and (3) the food must be clearly marked as being offered for sale after its sell by or best if used by date. 105 Mass. Code Regs. 520.119 (2017).

96 Although Massachusetts explicitly provides civil liability protection to donors and nonprofits that donate past-date foods, because there are several burdensome requirements that must be met before liability protection applies, Massachusetts state law is not a perfect example for purposes of this recommendation.

97 *Joint Hearing on Food Banks and Front-line Charities: Unprecedented Demand and Unmet Need: Joint Hearing Before the Subcomm. on Oversight & the Subcomm. on Income Security & Family Support of the H. Comm. on Ways & Means*, 111th Cong. (2009) (statement of Jim Larson, Program Development Director, Food Donation Connection); Press Release, Congressman Sandy Levin, Levin and Gerlach Introduce Bipartisan Bill to Encourage Food Donations (Aug. 1, 2013), http://levin.house.gov/press-release/levin-and-gerlach-introduce-bipartisan-bill-encourage-food-donations; *Feeding America Urges Swift Vote On Expired Tax Provisions*, Feeding Am. (June 8, 2012), http://www.feedingamerica.org/hunger-in-america/news-and-updates/press-room/press-releases/feeding-america-urges-swift-vote-on-expired-tax-provisions.html.

98 *See* H.R. 2029, 114th Cong. § 113 (2016) (codified at I.R.C. § 170(e)(3)(C)), https://www.congress.gov/bill/114th-congress/house-bill/2029.

99 *See* Ronald Fowler & Amy Henchey, Internal Reneue Serv., In-Kind Contributions 2 (1994), http://www.irs.gov/pub/irs-tege/eotopice94.pdf.

100 *Id*.

101 *See* I.R.C. § 170 (2017).

102 *See* Tax Reform Act of 1969, Pub. L. No. 91-172, § 201, 83 Stat. 487, 555 (1969) (codified as amended at I.R.C. § 170(e)(1)).

103 *See* Fowler and Henchey, *supra* note 100, at 8.

104 *Id.* at 2.

105 *See* Tax Reform Act of 1969, Pub. L. No. 91-172, § 201, 83 Stat. 487, 555 (1969) (codified as amended at I.R.C. §§ 170(e)(1), (2).

106 I.R.C. § 170(e)(1) (2017); Internal Revenue Serv., Charitable Contributions: For Use in Preparing 2014 Tax Returns (Jan. 13, 2015), http://www.irs.gov/pub/irs-pdf/p526.pdf (noting the amount of the deduction is FMV minus the amount of income gained had the product been sold at FMV).

107 A qualified organization includes: the federal government, any state government, or any political subdivision of the government; a corporation, trust, community chest, fund, foundation, that (1) is created or organized in the U.S.; (2) operates specifically for "religious, charitable, scientific, literary, education purposes"; (3) that does not use its net earnings to benefit a private individual; and (4) is tax exempt under section 501(c)(3) of the I.R.C. I.R.C. § 170(c) (2017).

108 *Id.* §§ 170(b),(c),(e)(3)(c).

109 *Id.* § 170(b)(1)(B)(i).

110 *Id.* § 170(b)(2)(A).

111 *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 2135, 90 Stat. 1525, 1928-29, (1976) (codified at I.R.C. § 170(e)(3)); *See* Fowler and Henchey, *supra* note 100, at 3.

112 *See* I.R.C. § 170(e)(3)(B).

113 *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 2135, 90 Stat. 1525, 1928-29, (1976) (codified as amended at I.R.C. § 170(e)(3)).

114 Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, § 305, 119 Stat. 2016, 2025 (codified at I.R.C. § 170(e)(3)(C)).

115 *See* Tax Increase Prevention Act of 2014, Pub. L. No. 113-295, § 126, 128 Stat. 4010, 4017; American Taxpayer Relief Act of 2012, Pub. L. No. 112–240, 126 Stat. 2313 (2013); Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 740, 124 Stat. 3296, 3319 (codified as amended at I.R.C. § 170(e)(3)(C)(iv)); Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 323, 122 Stat. 3765, 3874 (codified as amended at I.R.C. § 170(e)(3)(C)(iv)); Pension Protection Act of 2006, Pub. L. No. 109-280, § 1202, 120 Stat. 780, 1066 (codified as amended at I.R.C. § 170(e)(3)(C)(iv)).

116 H.R. 2029, 114th Cong. § 113(a) (2017) (codified at I.R.C. § 170(e)(3)(C)). The expansion of the enhanced deduction not only applies permanently to all business entities in future tax years, but it also applies retroactively for the 2015 tax year. H.R. 2029, 114th Cong. § 113(a) (2016) (codified at I.R.C. § 170(e)(3)(C)).

117 *See* H.R. 2029, 114th Cong. § 113 (2017) (codified at I.R.C. § 170(e)(3)(C)).

118 I.R.C. § 170(e)(3)(B).

119 *Id.* § 170(e)(1).

120 H.R. 2029, 114th Cong. § 113 (2017) (codified at I.R.C. § 170(e)(3)(C)(v)). Note, however, that the 2016 omnibus budget does not resolve other roadblocks to the donation of mislabeled but otherwise safe foods, such as the requirement that donated foods must comply with labeling standards in order for a donor to receive either the enhanced deduction or liability protection. *See* I.R.C. § 170(e)(3)(C)(iii) (2017); 42 U.S.C. § 1791. This section discusses these issues below.

121 H.R. 2029, 114th Cong. § 113 (2017) (codified at I.R.C. § 170(e)(3)(C)(iv)).

122 I.R.C. § 170(b)(2)(A).

123 *Id.* § 170(e)(3)(C)(ii).

124 *Id.*

125 *Id.* § 170(e)(3)(C)(iii)(I) .

126 *Id.* § 170(e)(1).

127 *Id.* § 170(e)(3)(A) (2017).

128 *Id.* § 170 (e)(3)(A)(i) (2017).

129 *Id.* § 170(e)(3)(A)(ii) (2017).

130 26 C.F.R. § 1.170A-4A(b)(4) (2017); *See* Fowler and Henchey, *supra* note 100, at 4.

131 I.R.C. § 170(e)(3)(A)(iv); *see* Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 331–50 (2017).
132 26 C.F.R. § 1.170A-4A(b)(3)(ii).
133 *Id.*
134 *Id.* § 1.170A-4A(b)(4).
135 I.R.C. § 170(e)(3)(A)(iv); *see* Federal Food, Drug and Costmetic Act, 21 U.S.C. §§ 331–50 (2017).
136 *See* 21 U.S.C. § 331 (2017).
137 26 C.F.R. § 1.170A-4A(b)(5)(i).
138 A farm is considered to be in the "critical zone," indicating potential financial issues, "if operating profits comprise less than 10 percent of the farm's gross cash farm income (GCFI) from the sale of commodities and other farm-related goods and services, together with Government payments." Robert Hoppe, U.S Dep't of Agric., Econ. Research Serv., Profit Margin Increases with Farm Size (Feb. 2, 2015), http://www.ers.usda.gov/amber-waves/2015/januaryfebruary/profit-margin-increases-with-farm-size/.
139 *See* Hoppe, *supra* note 139.
140 *See* Elizabeth Rosen, *Tax Credits vs. Tax Deductions*, U.S. Tax Ctr. (Aug. 28, 2013), http://www.irs.com/articles/tax-credits-vs-tax-deductions.
141 ReFED, *supra* note 2, at 10.
142 Ariz. Rev. Stat. Ann. §§ 42-5074, 43-1025 (2017); Cal. Rev. & Tax. Code §§ 17053.12, 17053.88 (West 2017); Colo. Rev. Stat. Ann. §§ 39-22-301, 39-22-536 (West 2017); D.C. Code Ann. § 47-1806.14 (West 2017); Iowa Code Ann. §§ 190B.101–.106, 422.11E, 422.33(30) (2017); Ky. Rev. Stat. Ann. § 141.392 (West 2017); Mo. Ann. Stat. § 135.647 (West 2017); Or. Rev. Stat. Ann. §§ 315.154, 315.156 (West 2017); S.C. Code Ann. § 12-6-3750 (2017); Va. Code Ann. § 58.1- 439.12:12 (West 2017).
143 California, Colorado, Iowa, Kentucky, Missouri, Oregon, South Carolina and the District of Columbia all offer tax credits for food donations. *See, e.g.,* Cal. Rev. & Tax. Code § 17053.12; *see* Ariz. Rev. Stat. Ann. §§ 42-5074, 43- 1025.
144 VA Code Ann. § 58.1-439.12:12 (West 2017).
145 Iowa Code Ann. § 190B.106 (2017).
146 Ky. Rev. Stat. Ann. § 141.392 (West 2017).
147 *See* Telephone Interview with Lauren Palumbo, Chief Operating Officer, Lovin' Spoonfuls (Nov. 15, 2015) (noting that the costs of trucks, all of which are refrigerated, repairs and maintenance, gas, and the driver's salary total about $45-55 per hour when collecting donations throughout the greater Boston area; Lovin' Spoonfuls recovers on average 50,000 pounds of food each week).
148 *See id.* (noting that the costs of trucks, all of which are refrigerated, repairs and maintenance, gas, and the driver's salary cost this food recovery organization $0.33 a pound and Lovin' Spoonfuls recovers on average 50,000 pounds of food each week).
149 *See, e.g.*, Van Zuiden, *supra* note 38, at 250–51.
150 Code général des impôts [Tax Code] art. 238 bis. (Fr.) *See also* Code général des impôts [Tax Code] art. 200 (Fr.) (allowing individuals to claim a tax credit for donating goods to charities worth 66% of the donated good's value, not to exceed 20% of an individual's annual income).
151 Rescrit n° 2009-44 (FE) du 21 juillet 2009 Régime du mécénat : justificatifs et dons alimentaires. [Rescript no. 2009-44 (FE) of July 21, 2009, Patronage scheme: food vouchers and donations.
152 Cal. Rev. & Tax. Code § 17053.12 (2017).
153 S.C. Code Ann. § 12-6-3750 (2017). *See* Charmaine Smith-Miles, *Hunters can help give food banks a boost*, Independent Mail (Sept. 26, 2012), http://www.independentmail.com/news/local/hunters-can-help-give-food-banks-a-boost-ep-407589679-348240571.html.
154 I.R.C. § 170(e)(3)(A)(ii) (2017).
155 *Fare and Square*, Philabundance, https://www.philabundance.org/learn/about-us/programs/fare-and-square/ (last visited Sept. 18, 2016).
156 Interview with Glenn Bergman, Executive Director, and Emma Kornetsky, Philabundance (Aug. 24, 2016).
157 I.R.C. § 170(e)(3)(A)(i).
158 VA. Code Ann. § 58.1-439.12:12(c).
159 *See* I.R.C. § 170(e)(3)(A)(ii).
160 26 C.F.R. § 1.170A-4A(b)(4) (2017); Fowler and Henchey, *supra* note 100, at 4.
161 *See* Bill Reighard, *supra* note 35.
162 U.S. Food and Drug Admin., *supra* note 86.
163 Harvard Food Law and Pol'y Clinic and Nat'l Res. Def. Council, *supra* note 39, at 6–8.
164 *Id*. at 17.
165 ReFED, *supra* note 2, at 33.
166 *Grocery Industry Launches New Initiative to Reduce Consumer Confusion on Product Date Labels*, Grocery Mfr. Ass'n (Feb. 15, 2017), http://www.gmaonline.org/news-events/newsroom/grocery-industry-launches-new-initiative-to-reduce-consumer-confusion-on-pr/.
167 Harvard Food Law and Pol'y Clinic and Nat'l Res. Def. Council, *supra* note 39, at 6–8.
168 Alabama, Idaho, Illinois, Missouri, Nebraska, New York, South Dakota, Tennessee, Utah.
169 N.H. Rev. Stat Ann. §184:30-g (2017); N.H. Code Admin. R. Agr. 1412.04 (2017).
170 31-3-5 R.I. Code R. §21-33-PBP 1.00 (2017); 31-3-5 R.I. Code R. § 6.0 (2017).
171 105 Mass. Code Regs. 520.119 (2017).
172 *See, e.g.*, Mont. Admin. R. 32.8.202 (2017).
173 *See, e.g.*, Wis. Admin. Code Agric. Trade & Consumer Prot. § 88.34(5)(a) (2017).
174 *See, e.g.*, 105 Mass. Code Regs. 520.119 (2017).
175 Mont. Admin. R. 32.8.202 (2017).
176 Harvard Food Law and Pol'y Clinic and Nat'l Res. Def. Council, *supra* note 39, at 13, 33-54.
177 In a few states like Montana and Pennsylvania manufacturers do not broad discretion to decide which foods will bear date labels and what language those labels will use. *See* Harvard Food Law and Pol'y Clinic and Nat'l Res. Def. Council, *supra* note 39, at 17.
178 Harvard Food Law and Pol'y Clinic and Nat'l Res. Def. Council, *supra* note 39, at 17.
179 *Id*.
180 *Id*.
181 Mary Bender Brandt *et al.*, *Prevalence of Food Safety, Quality, and Other Consumer Statements on Labels of Processed, Packaged Foods*, 23 Food Protection Trends 870, 872 (2003); U.S. Dep't of Agric., *supra* note 95.
182 Harvard Food Law and Pol'y Clinic and Nat'l Res. Def. Council, *supra* note 39, at 20-21.

183 Emily Broad Leib, Christina Rice, Roni Neff, Marie Spiker, Ali Schklair & Sally Greenberg, *Consumer Perceptions of Date Labels: National Survey*, Harvard Food Law and Pol'y Clinic, Nat'l Consumer Inst. And Johns Hopkinds Ct. for a Livable Future 2 (May 2016), http://www.chlpi.org/wp-content/uploads/2013/12/Consumer-Perceptions-on-Date-Labels_May-2016.pdf.

184 Broad Leib *et al.*, *supra* note 184, at 1.

185 Grocery Mfr. Ass'n, *supra* note 167.

186 *Id.*

187 Harvard Food Law and Pol'y Clinic and Nat'l Res. Def. Council, *supra* note 39, at 22.

188 Broad Leib *et al.*, *supra* note 184, at 1.

189 Harvard Food Law and Pol'y Clinic and Nat'l Res. Def. Council, *supra* note 39, at 22.

190 Broad Leib *et al.*, *supra* note 184, at 2.

191 *Id*. at 1.

192 According to the E.U. Food Labeling Directive, "food which is ready for delivery to the ultimate consumer or to a catering establishment" must bear "the appropriate durability indication," in the form of either a "best before" date or a "use by" date. Directive 2000/13 of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, Art. 3 (EC).

193 Mont. Admin. R. 32.8.203 (2016).

194 Ct. for Disease Control and Prevention, Food Safety and Raw Milk (Mar. 10, 2015), http://www.cdc.gov/foodsafety/rawmilk/raw-milk-index.html.

195 T Deak, *Food Technologies: Pasteurization*, *in* Encyclopedia of Food Safety, Volume 3 291, 223 (Yasmine Motarjemi, Gerald Moy, & Ewen Todd eds. 2014) (stating that HTST pasteurized milk is typically safe to consumer for 2-3 weeks).

196 105 Mass Code Regs. 520.119 (2017).

197 42 U.S.C. § 1792.

198 S. Rep. 110-338, at 2 (2008).

199 *Id.* at 1-2; Syd Mandelbaum, *Federal Food Donation Act Enacted Into Public Law*, PR Web (Dec. 14, 2008), http://www.prweb.com/releases/2008/12/prweb1745714.htm.

200 42 U.S.C. § 1792(a) (2017).

201 *Id.*

202 42 U.S.C. § 1792(b); 48 C.F.R. § 26.403.

203 *See* Press Release, Congressman Jerry McNerney, *Rep. McNerney Seeks to Improve Federal Contract Oversight and Address Food Waste*, (Jan. 28, 2016), https://mcnerney.house.gov/media-center/press-releases/rep-mcnerney-seeks-to-improve-federal-contract-oversight-and-address.

204 *See* Food Waste Accountability Act of 2016 H.R. 4382, 114th Cong. § 2 (2016). (including an example of a proposed reporting requirement).

205 *Id.*

206 Report from Gerry F. Miller, Chief Legislative Analyst, to Members of the Housing, Community and Economic Development Committee, *Surplus Food Policy and Procedure Guidelines*, Motion (Dec. 6, 2010), http://clkrep.lacity.org/onlinedocs/2009/09-2326_ca_12-08-10.pdf; Patrick J. McDonnell, City Council orders city-backed events to donate surplus food in hopes of 'eradicating hunger,' L.A. Times: LA Now: Southern California – This Just In (Dec. 8, 2010), http://latimesblogs.latimes.com/lanow/2010/12/la-council-orders-city-backed-events-to-donate-surplus-food-in-hopes-of-eradicating-hunger-.html.

207 *See* Miller, *supra* note 207, Attachment C.

208 42 U.S.C. § 1792(a).

209 *See USDA Headquarters Cafeteria Menus*, U.S. Dep't of Agric., Office of Operations, http://www.dm.usda.gov/oo/cafemenu.htm (last visited Apr. 6, 2017).

210 FDA Café, Sodexo, https://fda.catertrax.com/shopportal.asp?pageid=179&pageref=Caf%E9%A0Menu (last visited Apr. 6, 2017).

211 Locations, U.S. Dep't of Veterans Affairs, https://www.va.gov/directory/guide/division.asp?dnum=1 (last visited Feb. 1, 2017). For example, the VA Healthcare System in Boston has a cafeteria that is open during the week on each of its three campuses. Cafeteria & Retail Store, VA Boston Healthcare Sys., http://www.boston.va.gov/visitors/canteen.asp (last visited Feb. 1, 2017).

212 Miller, *supra* note 207, Attachment A. The Los Angeles Unified School District adopted a similar policy, and provides an easy-to-use summary of the guidelines for schools interested in donating surplus foods to food recovery organizations, including a model contract and clear FAQs. Office of the Chief Operating Officer, Food Services Div., Food Donation Process, REF-5634.0 (Oct. 31, 2011), http://achieve.lausd.net/cms/lib08/CA01000043/Centricity/Domain/126/Ref%20Guide%205634.0%20-%20Food%20Donation%20Policy%2010.31.11.pdf; *Los Angeles Unified School District Food Donation Policy*, Los Angeles Unified Sch. Dist. Bd. of Educ. (Sept. 19, 2016), http://achieve.lausd.net/cms/lib08/CA01000043/Centricity/Domain/126/Food%20Donation%20Program%20FAQs%209.19.16.pdf.

213 Miller, *supra* note 207, Attachment A.

214 Food and Drug Admin., Food Code (2013), http://www.fda.gov/downloads/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/UCM374510.pdf.

215 Food Recovery Committee, *supra* note 30, at 6.

216 *Id*. at 12; Food and Drug Admin., *supra* note 215.

217 *See generally*, Food and Drug Admin., *supra* note 215.

218 *Id*.

219 *Id*.

220 Food Recovery Committee, *supra* note 30, at 1.

221 *Id*. at 2.

222 *Id*.

223 *Id*.

224 Food Recovery Committee, *supra* note 30.

225 *Id*. at 2, 10, 12.

226 *Id*. at 2.

227 Food and Drug Admin., *supra* note 215, at app. 2 at 321–22.

228 *State Public Agency Classification: Understanding the Relationship Between State and Local Public Health,* Assoc. of State and Territorial

Health Officials & Nat'l Op. Research Ctr. at the Univ. of Chicago, (2012), http://www.astho.org/Research/Major- Publications/ASTHO-NORC-Governance-Classification-Report/; U.S. Food & Drug Admin., State and Retail and Food Service Codes and Regulations by State, http://www.fda.gov/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/ucm122814.htm (last visited Feb. 1, 2017).

229 As of 2012, all 50 states had adopted retail codes modeled after versions of the Food Code. The Food Code is intended as a model for government agencies at all levels that regulate restaurants, grocery stores, and other food service operations. *See* Food and Drug Admin., Introduction to the 2013 Food Code (2013), http://www.fda.gov/downloads/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/UCM374510.pdf.

230 ReFED, *supra* note 2, at 29-30.

231 *See generally* Food and Drug Admin., Real Progress in Food Code Adoption (Feb. 22, 2016), http://www.fda.gov/downloads/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/UCM476819.pdf.

232 *See Standing Committees*, Conference for Food Protection, http://www.foodprotect.org/administration/standing-committees/ (last visted Mar. 5, 2016).

233 *See* Food and Drug Admin., *supra* note 215, at iii-iv.

234 *See e.g.*, *How it Works*, Spoiler Alert, http://www.foodspoileralert.com/howitworks/ (highlighting an example of an innovative model that uses technology to facilitate food recovery).

235 ReFED, *supra* note 2, at 16.

236 Gunders, *supra* note 3, at 4.

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