



UNITED STATES

UNITED STATES
RECOMMENDATIONS
FOOD DONATION
LAW AND POLICY

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About The Global Food Donation Policy Atlas

The Global Food Donation Policy Atlas is a first-of-its-kind initiative to promote better laws around food donation in order to help address both food loss and food insecurity. This project maps the laws affecting food donation in countries across the globe, in order to: help practitioners understand national laws relating to food donation; compare laws across countries and regions; analyze legal questions and barriers to donation; and share best practices and recommendations for overcoming these barriers. The project is a partnership between Harvard Law School Food Law and Policy Clinic and The Global FoodBanking Network. To learn about and compare the food donation laws and policies for the countries FLPC has researched to date, visit www.atlas.foodbanking.org.

About the Harvard Law School Food Law and Policy Clinic

The Harvard Law School Food Law and Policy Clinic (FLPC) serves partner organizations and communities by providing guidance on cutting-edge food system legal and policy issues, while engaging law students in the practice of food law and policy. Our focus is on increasing access to healthy foods, supporting sustainable food production and food systems, and reducing waste of healthy, wholesome food. For more information, visit www.chlpi.org/FLPC.



About The Global FoodBanking Network

The Global FoodBanking Network is an international non-profit organization that nourishes the world's hungry through uniting and advancing food banks in more than 40 countries. GFN focuses on combating hunger and preventing food waste by providing expertise, directing resources, sharing knowledge and developing connections that increase efficiency, ensure food safety, and help food banks reach more people facing hunger. For more information visit www.foodbanking.org.



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ABOUT THESE RECOMMENDATIONS

This document is a product of The Global Food Donation Policy Atlas, a partnership between the Harvard Law School Food Law and Policy Clinic (FLPC) and the Global FoodBanking Network (GFN).¹ The Atlas project is an innovative partnership designed to map the laws and policies affecting food donation in 15 countries over the course of two years and to provide a comparative legal analysis based on these findings. For each of these countries, the Global Food Donation Atlas project will produce a Legal Guide to identify the laws relevant to food donation in that country. While the landscape differs across geopolitical borders, the legal guides recognize universal issues that impact efforts to reduce food loss and waste and increase food recovery. These issues include food safety, date labeling, liability, taxes and government grants or funding programs.

In-country interviews with relevant stakeholders, including food banks and other food recovery organizations, food donors, government officials, and legal experts, further informed the content of the legal guide and revealed priority actions for law and policy change. Based on these findings, FLPC has developed specific recommendations for each country. These recommendations are intended to serve as a companion to the legal guides, though both documents may stand alone. The purpose of these recommendations is to highlight select actions for improving upon laws, policies and programs relevant to food loss, waste, and donation.

The present document sets forth recommendations focused on the United States, where about 63 million tons of food winds up in landfills, costing the U.S. about \$218 billion each year to grow, process, transport and dispose of food that is never eaten.² At the same time, 11.1 percent of U.S. households was food insecure in 2018.³ The discussion below provides a brief overview of the legal issues most pertinent to food donation, which are explained in more detail in the United States legal guide. The recommendations included in this report are not exhaustive, but offer select best practices and policy solutions to reduce food loss and waste and combat food insecurity through stronger food donation laws and policies in the United States.



SUMMARY OF RECOMMENDATIONS

The recommendations contained in this document aim to provide a starting point for stakeholders in the United States to strengthen the legal and policy framework relevant to food donation. Food banks and other organizations whose mission is to reduce food waste and increase food donation (collectively referred to as “food recovery organizations”), donors, and policymakers should consider additional opportunities to advance food donation and reduce food waste. In summary, the recommendations are as follows:

To ensure that food is donated safely and does not pose risks to recipients, as well as provide clarity to encourage food donors, the federal government should:

- Amend federal food safety legislation or federal agency regulations to feature donation-specific sections.
- Produce and disseminate clarifying guidance on food safety requirements relevant to donation.
- Update the FDA Food Code to include model language on food safety for donations.

To ensure that quality-based date labels do not result in the disposal of food that is otherwise safe for consumption or donation, the federal government should:

- Standardize and clarify date labels.
- Expressly permit the donation of food after the quality date.
- Promote consumer education and awareness on the meaning of date labels.

To ensure concern for liability arising out of donating food does not deter potential donors, the federal government should:

- Mandate that an agency, most likely USDA, provide regulations interpreting and answering common questions about the Emerson Act and raise awareness about the Act’s protections.
- Broaden the Emerson Act to provide liability protection for food donated directly to individuals in need by food producers and licensed food service establishments.
- Clarify that donated food need only comply with safety standards or safety-related labeling standards.
- Explicitly provide liability protection for the donation of past-date food.
- Provide liability protection to food recovery organizations that charge recipients a low price.

To ensure that food donors and food recovery organizations are sufficiently incentivized to engage in food donation, the federal government should:

- Provide alternative tax credits for farms and small businesses that do not benefit from the enhanced deduction.
- Provide a specific tax incentive to offset the cost of logistics and transportation.
- Modify the federal enhanced tax deduction to better support innovative food donation practices.

INTRODUCTION

Nearly forty percent of food produced in the United States is wasted, while one in eight Americans struggles to satisfy their food needs.⁴ Food is wasted at each stage of production: some food never leaves the farm (or another source), while other foods spoil or are otherwise wasted by producers, wholesalers, and retailers.⁵ Finally, much of the food purchased by consumers is thrown out, often due to misinformation about food safety and date labeling on the package.⁶

The United States has addressed some of the underlying concerns contributing to food waste through advisory opinions and regulations on date labeling, liability protections and tax incentives for food donations, as well as through educational programs and resources shared by federal agencies. These include the Bill Emerson Good Samaritan Food Donation Act, the provisions of the Internal Revenue Code related to charitable donations of food, new funding in the Farm Bill, various federal agency programs and technical assistance and, recently, the Winning on Reducing Food Waste Federal Interagency Strategy. In addition to utilizing those tools, some states and localities utilize organic waste bans or food waste diversion requirements.⁷

Each year, about 63 million tons of food winds up in landfills, costing the U.S. about \$218 billion each year to grow, process, transport and dispose of food that is never eaten.⁸ The land allocated to grow food, the use of scarce resources like water, the fossil fuels used to ship it, and the space used to store it are all wasted when food ends up in a landfill. To illustrate, food waste consumes 21 percent of all fresh water, 19 percent of fertilizer, and 18 percent of cropland in the U.S.⁹ As it decomposes, this food emits methane, a greenhouse gas 25 times more potent than carbon dioxide.¹⁰ The biggest tragedy is that while millions of tons of food needlessly go to waste, about 11 percent of American households experience food insecurity, meaning that they lack access to a sufficient amount of food to lead an active, healthy lifestyle.¹¹

EACH YEAR, ABOUT 63 MILLION TONS OF FOOD WINDS UP IN LANDFILLS, COSTING THE U.S. ABOUT \$218 BILLION EACH YEAR TO GROW, PROCESS, TRANSPORT AND DISPOSE OF FOOD THAT IS NEVER EATEN.

The following sections briefly summarize some of the most common legal issues relevant to food donation, as identified and described in more detail in the Legal Guide, and offer policy recommendations to address these challenges.

LEGAL CHALLENGES & POLICY RECOMMENDATIONS

Food Safety for Donations

Issue Overview

In many countries, a key barrier to the donation of surplus food is the lack of knowledge or readily available guidance regarding safety procedures for food donation. Potential donors are often uncertain as to which food safety regulations apply to donated food, as opposed to food offered for sale, as well as the steps necessary to safely donate food in compliance with applicable regulations. As a result, safe, surplus food that could have been redirected to populations in need is instead destined for landfills.

Federal regulation of food safety is enshrined in several statutes, with the most important being the Food, Drug, and Cosmetic Act (FDCA), Poultry Products Inspection Act, Federal Meat Inspection Act, Egg Products Inspection Act, and Perishable Agricultural Commodities Act.¹² Authority to develop standards and enforce these acts extends across multiple agencies, though the Food and Drug Administration (FDA) and U.S. Department of Agriculture (USDA) are the two primary agencies. These federal agencies develop specific requirements and inspect food production and processing at farms, food manufacturing facilities, and slaughterhouses.

However, U.S. federal food safety legislation, and the regulations developed by FDA and USDA, generally do not mention the food safety practices that should be followed for food donations. With the exception of a recent USDA directive allowing donation of food with certain labeling flaws,¹³ there also is no guidance regarding food safety for food donations by facilities that are regulated and inspected by FDA and USDA. Further, food banks and food recovery organizations also struggle to understand whether they are subject to inspections under federal laws, and what practices they should follow.¹⁴ Despite the outstanding legal questions, the clear liability protection provided under federal law for food donors and food recovery organizations (discussed below), coupled with the federal agencies' stated goals to support food waste reduction, should provide comfort to food donors that donation is allowed and supported under federal law.

This issue is perpetuated at the state and local level as well. While food processing and slaughter and processing of meat are regulated by federal agencies, food safety laws that apply to food establishments — like restaurants, cafeterias, and retail stores — vary by state and locality. However, state food safety laws generally do not have clear donation-specific sections because they are based on the model Food and Drug Administration (FDA) Food Code,¹⁵ which does not have any language on food safety for food donations. As a result of the lack of such language, potential donors must sort through the full food code or any other applicable regulations and figure out which pieces apply. The health inspectors that conduct safety inspections also do not have good guidance on how to evaluate food safety and often give conflicting or overly risk-averse messages to food donors.

Understanding which food safety requirements apply to donated food is important for minimizing potential harm to donation recipients, and ensuring that food safe for consumption is donated rather than discarded. However, the current system lacks clarity for food donors and food recovery organizations as to the applicable provisions.

Recommended Policy Actions

1. AMEND FEDERAL FOOD SAFETY LEGISLATION OR FEDERAL AGENCY REGULATIONS TO FEATURE DONATION-SPECIFIC SECTIONS.

In order to eliminate the uncertainty around which food safety provisions apply to the safety of donated food, these laws should be updated to feature donation-specific chapters. Creating a donation-specific section of the Food Drug and Cosmetics Act and the federal acts regulating safety for meat, poultry, and eggs would significantly ease the burden on food donors and food recovery organizations seeking to ensure compliance with relevant food safety provisions and may increase food donation.

2. PRODUCE AND DISSEMINATE CLARIFYING GUIDANCE ON FOOD SAFETY REQUIREMENTS RELEVANT TO DONATION.

Clear guidance from FDA and USDA—the two food safety enforcement agencies—on provisions or other requirements that apply to donated food would ease concerns of food donors and food recovery organizations, and likely lead to increased and safer donation. This guidance should provide clear information about how to address donations from facilities regulated directly by FDA or USDA, as well as address the provisions that apply to food banks and food recovery organizations. The agencies should coordinate with donors and food recovery organizations to produce any guidance.

3. UPDATE THE FDA FOOD CODE TO INCLUDE MODEL LANGUAGE ON FOOD SAFETY FOR DONATIONS.

In addition to providing guidance for entities they regulate directly, FDA should update the FDA Food Code or produce and disseminate clarifying guidance regarding restaurant and retail food safety that can help state regulators identify how the Food Code and other food safety laws apply to donations. A survey FLPC conducted in 2017 shows that most states feel they would benefit from such guidance or model language—respondents to a survey of officials at state food safety agencies in all 50 states overwhelmingly reported that model language would be helpful to state efforts to create food safety regulations or guidance for food donation.¹⁶ Making such model language or guidance available to states, health inspectors, and food establishments will clarify that donation is allowed and supported, and will help more food to be safely donated. Though the Food Code is published by the FDA, the recommendations for what changes to make to the Food Code come from an expert body called the Conference for Food Protection (CFP), which examines and reports on best practices for food safety. Thus, the addition of language regarding food safety for donations in the FDA Food Code can be suggested by the CFP or added by FDA directly.

Date Labeling

Issue Overview

A major driver of food waste and obstacle to food donation is the general misconception about the date labels such as “sell by,” “use by,” or “best by,” affixed to food products. Many donors and consumers interpret these date labels as indicators of the safety of food. Despite this interpretation, for the vast majority of foods, date labels indicate freshness or quality rather than food safety, and few foods become more likely to carry foodborne illnesses over time. Nevertheless, food donors and food recovery organizations being cautious about food safety may discard food once the date has passed even if the food is perfectly safe to donate and consume.

In countries that have measured the impact of date labels, research has found that consumers generally confuse date labels as indicators of safety rather than quality. In the United Kingdom, for example, researchers found that consumers discarded about 22% of food that they could have eaten due to confusion over date labeling.¹⁷ Similarly, 84% of Americans report that they throw away food after the expiration date passes due to safety concerns, even if there is minimal risk of a foodborne illness at that time.¹⁸ This confusion occurs in the home but also impacts food businesses’ willingness to donate as well as stigma against past-date food among food donation recipients.

In the United States, there is currently no federal system regulating “sell by,” “best by,” “use by,” and other date labels used on food.¹⁹ FDA and USDA encourage, but do not require, the food industry to use the phrase “Best if Used By” on products if a date label is meant to indicate quality.²⁰ As a result of this lack of federal regulation, each state decides individually whether and how to regulate date labels. Manufacturers have broad discretion over 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,²¹ leading to the unnecessary waste of wholesome food. Despite the fact that most date labels are not safety indicators, twenty states even restrict or forbid the sale or donation of past-date foods, creating unnecessary barriers to the donation of safe, wholesome food.²²

Internationally, most date label regulations, including the standards in place throughout the European Union, utilize a dual label system that requires food to bear only one of two standard labels: a standard quality label on foods where the date is intended as an indicator of quality, or a standard safety label on foods that carry an increased safety risk past the date and should be discarded.²³ ReFED found in its *Roadmap to Reduce U.S. Food Waste by 20 Percent* that standardizing date labels was the most cost effective of 27 potential solutions and has the capacity to divert 398,000 tons of food waste per year and provide \$1.8 billion per year in economic value.²⁴

Recommended Policy Actions

1. STANDARDIZE AND CLARIFY DATE LABELS.

The federal government should require that manufacturers or retailers who choose to affix date labels on foods use one of two prescribed labels, and prohibit states from requiring any date labeling language aside from these two standard phrases. Companies should have the option of using either a quality label, discard label, or neither, but should be required to use the proper standard language if they choose to include a date label on the food. If a company chooses to use a date to communicate quality, they should be required to use the phrase “BEST If Used By.” If a company chooses to use a date to communicate when a food should be discarded for safety reasons, they should be required to use the phrase “USE By.” The “USE By” language should only be used on high-risk, ready-to-eat foods that present risks of foodborne illness if consumed past-date, foods such as deli meats and unpasteurized cheeses.²⁵ The Food Date Labeling Act of 2019, introduced in Congress, would codify these standard labels.²⁶

National research has shown that “BEST If Used By” is the phrase most easily understood by consumers as a quality indicator, and that “USE By” communicates safety.²⁷ This language also comports with the language selected in the Product Code Dating Initiative, a voluntary industry initiative to standardize date labels launched by the Food Marketing Institute and the Grocery Manufacturers Association (now known as the Consumer Brands Association).²⁸ This voluntary initiative is an important first step toward eliminating date label confusion and helping consumers to avoid wasting food. However, even with participation by many food manufacturers and retailers, because the initiative is voluntary there will still be a variety of date labels on food packages causing consumer confusion. Government agencies also cannot conduct education about the industry standard labels because the labels currently are not legally required or enforced. Furthermore, in more than half of all states, existing labeling laws conflict with the voluntary standards for some food items, blocking full utilization of the standard terms.²⁹

Therefore, to ensure complete participation and reduce conflicts with state laws, the U.S. government should enshrine these terms in law. Aligning federal language with industry’s Product Code Dating Initiative would ensure a smooth transition, because businesses that comply with the industry standard would not have to change their labeling language again and consumers would not have to adjust to different language.

2. EXPRESSLY PERMIT THE DONATION OF FOOD AFTER THE QUALITY DATE.

In addition to standardizing date labeling language, Congress should expressly allow for the sale or donation of foods after the quality date. Currently, 20 states restrict or prohibit the sale or donation of past-date food, even though the date generally is intended to indicate quality rather than safety.³⁰ Because foods are still safe past their peak quality date, federal legislation should bar states from prohibiting the sale or donation of food past the “BEST If Used By” date. States could still be allowed to restrict the past-date sale or donation of foods bearing the “USE By” labels that communicate that a food item should be discarded past the date. Barring prohibitions on the sale or donation of wholesome food will reduce waste and set a positive example for consumers regarding the safety of food past the quality date. Further, eliminating state bans on sale or donation of food past the quality date could increase the amount of safe food that reaches those in need, and reduce the stigma on receipt of such foods.

3. PROMOTE CONSUMER EDUCATION AND AWARENESS ON THE MEANING OF DATE LABELS.

If standard date labels are set by law, the U.S. government should launch a consumer awareness campaign to educate the public on the meaning of the two standard date label phrases. As trusted government agencies charged with protecting consumers, USDA and FDA are in a unique position to reduce confusion around date labels, especially if they can partner with the private sector to streamline messaging about date labels. If date labeling language is standardized, educating consumers about the meaning of the standard date labeling terms is essential to ensure that consumers make informed decisions about when to discard food products and what can be done with food past a quality date.

Liability Protection for Food Donations

Issue Overview

Many potential food donors, including grocers and retailers, cite fear of liability as a primary deterrent to donating food.³¹ A 2016 survey conducted by the Food Waste Reduction Alliance, 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 retailers and wholesalers and 50 percent of food manufacturers cite liability concerns as one of the main barriers to food donation.³²

In the United States, since 1996 the Bill Emerson Good Samaritan Food Donation Act (Emerson Act) has provided comprehensive liability protections against both civil and criminal lawsuits for food donors and the nonprofits that receive and redistribute food donations.³³ 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;³⁴
- (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;”³⁵
- (3) The nonprofit organization that receives the donated food must distribute it to needy individuals;³⁶ and
- (4) The end recipient must not pay anything of monetary value for the donated food.³⁷

Despite this longstanding and comprehensive protection, as noted, many food producers, manufacturers, and food service establishments fear liability that may come from someone being sickened by donated food. The U.S. government can take several steps to address these persistent liability concerns. First, the federal government can provide clear guidance and raise awareness about the provisions of the Act. Second several provisions in the Act could be broadened to better align with the food recovery landscape, and provide protection for common food donation activities that are not mentioned in the Emerson Act.

Recommended Policy Actions

1. MANDATE THAT AN AGENCY, MOST LIKELY USDA, PROVIDE REGULATIONS INTERPRETING AND ANSWERING COMMON QUESTIONS ABOUT THE EMERSON ACT AND RAISE AWARENESS ABOUT THE ACT’S PROTECTIONS.

The most pressing opportunity is in increasing awareness about the Emerson Act and its provisions. Numerous existing and prospective donors remain unaware of these protections. The protection has never been used in court, and no federal agency has been mandated by Congress to provide guidance or resources related

to the Emerson Act. Congress should require USDA to take authority for the Act and to develop regulations clarifying the meaning of some of the Act's key terms, such as "apparently wholesome food." USDA could also raise awareness of the Act's protections, helping to increase the amount of food being donated. In the 2018 Farm Bill, Congress took steps in this direction by mandating that USDA create a Food Loss and Waste Liaison who would, "raise awareness of the liability protections afforded under the Bill Emerson Good Samaritan Food Donation Act."³⁸ However, USDA needs clearer language to delineate its authority over the Act in order to put out regulations interpreting and clarifying the Act.

2. BROADEN THE EMERSON ACT TO PROVIDE LIABILITY PROTECTION FOR FOOD DONATED DIRECTLY TO INDIVIDUALS IN NEED BY FOOD PRODUCERS AND LICENSED FOOD SERVICE ESTABLISHMENTS.

Under the Emerson Act, only donations to a nonprofit organization that then distributes the food to those in need are protected. Often food is wasted because getting it to a nonprofit organization is difficult or does not make sense. For example, surplus food from school meals often could be distributed directly to needy students and their families, rather than being sent to a food recovery organization, and at the end of the night, restaurants may have a few extra plates of food that is too little to send to a food bank and too perishable to keep until the next day. Amending the Emerson Act to also protect direct donations to those in need will allow donors to distribute food through additional methods.

The types of direct donations that are offered protection could be limited to those made by donors that provide low-risk products or that have food safety training and licensure. For example, in the case of farmers, the donations are of low-risk foods, like surplus produce, and in the case of licensed food businesses, the food is donated by businesses already required to undergo food safety training, meaning that they know how to safely handle food for donation. As one example, protecting direct donations will ensure perishable food—including food that has already been cooked—will be more likely to reach those in need quickly rather than being thrown away because of a lack of time to get the food to those in need before it spoils. Providing farmers and licensed food establishments with liability protection when they distribute food directly can help ensure that surplus food reaches people more quickly, thereby reducing the costs of food recovery, increasing the amount of food available for donation, and making it easier to donate perishable foods.

3. CLARIFY THAT DONATED FOOD NEED ONLY COMPLY WITH SAFETY STANDARDS OR SAFETY-RELATED LABELING STANDARDS.

To receive Emerson Act protection, donated food must comply with all quality and labeling laws. However, some labeling requirements in food safety laws are not necessary to ensure that food is safe for consumption. These requirements impose increased costs and undue burden that deter food donation. In January of 2016, the USDA eliminated certain labeling requirements for donations of wholesome meat and poultry with minor labeling errors, such as incorrect net weight, thereby making the donation of these foods easier.³⁹ While this is a substantial step in the right direction, it is limited to meat and poultry, meaning that all other food products must still comply with some unnecessary labeling requirements. Often food is thrown away because of an error in its labeling, but if that error is not relevant to safety, donation of the food should still be protected. Removing the requirement that donated food comply with all quality and labeling standards, and instead clarifying which standards are necessary for safety, can increase the amount of food donated and decrease the cost of donation.

4. EXPLICITLY PROVIDE LIABILITY PROTECTION FOR THE DONATION OF PAST-DATE FOOD.

Many donors and nonprofit food recovery organizations are afraid that donation of past-date food will place them outside the Emerson Act's protections. The House Committee report attached to the Emerson Act indicated that

date labels do not provide reliable guidance about food safety and that donation of near-or-past-date food would not necessarily lead to the loss of liability protection.⁴⁰ However, this language is not included in the Emerson Act itself, thus many donors do not know that past-date food donations should receive protection. Adding a clarifying provision to the Act can align the requirements with Congress's intent when it passed the law, and alleviate liability concerns among donors and nonprofits.

5. PROVIDE LIABILITY PROTECTION TO FOOD RECOVERY ORGANIZATIONS THAT CHARGE RECIPIENTS A LOW PRICE.

Emerson Act protection is only available when food is given to the end recipients for free. However, the facilities and resources needed to successfully recover and process surplus food make donation costly for both donors and food recovery organizations. Allowing nonprofit organizations to establish sustainable funding sources helps to cover labor, transportation, administrative, and other costs. For example, social supermarkets and nonprofit grocery stores sell donated food or surplus items at a very low cost. Such models can also provide an alternative for low-income customers who cannot or do not utilize food pantries or are looking for ways to supplement their pantry use. Expanding the Act's protections beyond traditional models of food recovery by allowing protection for nonprofits that sell donated food at a low price can stimulate the development of sustainable new food recovery methods.

Taxes

Issue Overview

Food donation helps to mitigate the costs of hunger and stimulate the economy, but it can also be expensive, as food donors must allocate time and money to recover, package, store, and transport surplus food that otherwise would be discarded, usually at no cost. Taxes can either help to offset these expenses and create an incentive to donate, or they can create an additional barrier to donation, one which contributes to greater food loss and waste. With respect to tax incentives, corporate donors may be more likely to donate surplus food to food banks if they receive a charitable deduction to offset the cost of transportation and logistics.

In the United States, transportation and storage costs are often cited as the main expenses that manufacturers, retailers, and restaurants need to overcome to donate food.⁴¹ Fortunately, federal tax incentives encourage food recovery by helping to defray a portion of the cost of food donation. Food donors are eligible for either a general deduction (deducting the basis value of the charitable contribution)⁴² or an enhanced deduction (based on the fair market value, and often nearly double the general deduction) for qualified food donations.⁴³ Such tax incentives have been extraordinarily successful at incentivizing food donation. For example, when the enhanced deduction for food donations was temporarily expanded to cover more donor businesses in 2005, food donations across the country rose by 137 percent the following year.⁴⁴ Recognizing the effectiveness of tax incentives and the importance of food recovery, Congress permanently expanded the enhanced tax deduction for food donation to all businesses through the Protecting Americans from Tax Hikes (PATH) Act of 2015, a part of the 2016 omnibus budget.⁴⁵ Under this measure, a wider range of businesses, such as farms, independent restaurants, small grocery chains, delis, and bakeries, became eligible to claim the deduction.⁴⁶ Although this expansion is a very welcome and significant step, these tax incentives could be further enhanced to boost food donations, especially from farms and small businesses, and to support the development of innovative food recovery models.

Recommended Policy Actions

1. PROVIDE ALTERNATIVE TAX CREDITS FOR FARMS AND SMALL BUSINESSES THAT DO NOT BENEFIT FROM THE ENHANCED DEDUCTION.

As noted above, businesses can receive an enhanced deduction for food donations, but deductions like this are not beneficial to all businesses. A tax deduction reduces taxable income.⁴⁷ However, because the value of a deduction is contingent on the amount of taxable income, a deduction is typically a less effective incentive for businesses that operate with a low profit margin, like many farms.⁴⁸ Yet, 10 million tons of food are lost on farms every year, demonstrating a lost opportunity to recover significant amounts of food.⁴⁹

To better incentivize these low profit margin businesses, Congress should provide an alternative tax credit that these businesses can choose to claim instead of the enhanced deduction. Small businesses benefit more from tax credits because tax credits lower the overall amount of taxes owed. At the very least, this option should be available to small farmers. Farmers in particular spend a lot of resources to raise their produce and often have larger costs associated with preparing and transporting food to donate, so any additional support can help to offset their investments. Over a dozen states have recognized this opportunity and offer tax incentives specifically targeted at agricultural food recovery efforts.⁵⁰

However, this still leaves farmers without additional financial support in many states. Because most farms do not find the federal enhanced deduction to be beneficial, the federal government should offer a tax credit instead that is available just for farmers as an alternative to the federal deduction.

2. PROVIDE A SPECIFIC TAX INCENTIVE TO OFFSET THE COST OF LOGISTICS AND TRANSPORTATION

The cost of transporting food from the donor to a food recovery organization is common to all donations of food but is a difficult cost to cover. Under the current tax scheme, donors can receive deductions for donated food but are unable to recover the costs of transportation. This cost must be absorbed by the donor or the intermediary nonprofit organization. Creating a new tax incentive specifically tailored to offset the costs of logistics and transportation can lead to greater food donation. Specifically creating a tax incentive for logistics and transportation will encourage businesses to donate transportation services and generate resources to support transportation costs of food recovery organizations, who struggle to transport such food for free. Further, the tax incentive should be available to donors that pay food recovery organizations to transport donated food.

3. MODIFY THE FEDERAL ENHANCED TAX DEDUCTION TO BETTER SUPPORT INNOVATIVE FOOD DONATION PRACTICES.

Similar to the Emerson Act, the federal enhanced tax deduction does not apply if the end recipient pays even a low price for the food. This requirement discourages donors from donating to innovative food recovery organizations, like social supermarkets, because they would be unable to claim the enhanced deduction. This requirement is unnecessary because the incentives also require the recipient food recovery organization to be a nonprofit, meaning that any money raised by selling donated food would be re-invested in their social mission to serve more individuals in need. The enhanced tax deduction should be expanded to support food donations to a nonprofit whether the food is then given away for free or at a reduced price that covers the cost of handling and transporting the donated food.

CONCLUSION

While these policy recommendations are intended to help strengthen food donation in the United States, they are not exhaustive. Those committed to reducing food loss and waste and promoting food recovery should seek the advice of legal experts, policymakers, and other stakeholders to identify the most effective and feasible policy interventions.

ENDNOTES

- ¹ The Global Food Donation Policy Atlas project would not be possible without the support of the Walmart Foundation. The Walmart Foundation is not responsible for the content of this document or the views contained herein. The content of this document should not be interpreted as legal advice; those seeking legal advice should speak to an attorney licensed to practice in the applicable jurisdiction and area of law.
- ² See *A Roadmap to Reduce U.S. Food Waste by 20 Percent*, REFED 16 (2016), https://www.refed.com/downloads/ReFED_Report_2016.pdf (<https://perma.cc/9SW3-KP2Y>) [hereinafter “A Roadmap to Reduce U.S. Food Waste”].
- ³ Alisha Coleman-Jensen et al., *Key Statistics & Graphics: Food Security Status of U.S. Households in 2018* (Sept. 04 2019), U.S.D.A., <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/key-statistics-graphics.aspx#foodsecure>.
- ⁴ *Food Waste*, NATURAL RES. DEF. COUNCIL, <https://www.nrdc.org/issues/food-waste> (last visited Mar. 9, 2020).
- ⁵ Linda S. Cantor, et. al., *Estimating and Addressing America’s Food Losses* 20, FOOD REV. 2 (Jan. 1997), <http://gleaningusa.com/PDFs/USDA-Jan97a.pdf>.
- ⁶ Norbert L.W. Wilson, et. al, *Food Waste: The Role of Date Labels, Package Size, and Product Category* (2017). FOOD QUALITY AND PREFERENCE, 35 (2017).
- ⁷ *Disposal Bans & Mandatory Recycling in the United States*, NATURAL RES. DEF. COUNCIL (2017).
- ⁸ See *A Roadmap to Reduce U.S. Food Waste*, *supra* note 2 at 16.
- ⁹ *27 Solutions to Food Waste*, ReFED, <https://www.refed.com/?sort=water-conservation> (last visited Mar. 9, 2020) (<https://perma.cc/W55W-R67S>).
- ¹⁰ See *A Roadmap to Reduce U.S. Food Waste*, *supra* note 2 at 16.
- ¹¹ Alisha Coleman-Jensen et al., *supra* note 3 at 6.
- ¹² 21 U.S.C. §§ 301-392 (2012); 21 C.F.R. § 1.4 (2012); 15 U.S.C. §§ 1451-1461 (2012); 21 C.F.R. § 10.40 (2013); 7 U.S.C. 499 (2012); 21 U.S.C. § 2201-52 (2012). See also, U.S. Dep’t of Agric., Food Safety & Inspection Serv., *A Guide to Federal Food Labeling Requirements for Meat and Poultry Products* 6 (2007).
- ¹³ FSIS DIRECTIVE 7020.1: VERIFYING DONATION OF MISBRANDED AND ECONOMICALLY ADULTERATED MEAT AND POULTRY PRODUCTS TO NON-PROFIT ORGANIZATIONS, U.S. DEP’T OF AGRIC. FOOD SAFETY & INSPECTION SERV. (Jan. 26, 2016), <https://www.fsis.usda.gov/wps/wcm/connect/25e1becc-4201-4cc0-a707-c9ed38a2f01c/7020.1.pdf?MOD=AJPERES>.
- ¹⁴ See e.g., *USDA Revises Guidance on Date Labeling to Reduce Food Waste*, U.S. DEP’T OF AGRIC. (Dec. 14, 2016), <https://www.fsis.usda.gov/wps/wcm/connect/FSIS-Content/internet/main/newsroom/news-releases-statements-and-transcripts/news-release-archives-by-year/archive/2016/nr-121416-01> (noting that “FSIS has also begun recognizing food banks as “retail-type” establishments, which allows food banks (under certain circumstances) to break down bulk shipments of federally-inspected meat or poultry products, wrap or rewrap those products, and label the products for distribution to consumers.”)
- ¹⁵ See *generally Food Code (2017)*, U.S. FOOD & DRUG ADMIN. <https://www.fda.gov/downloads/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/UCM595140.pdf> (<https://perma.cc/P8B9-2LJ2>) [hereinafter “Food Code”].
- ¹⁶ *Id.* at 9.
- ¹⁷ US GAO. DATE LABELS ON PACKAGED FOODS: USDA AND FDA COULD TAKE ADDITIONAL STEPS TO REDUCE CONSUMER CONFUSION, GAO-19-407 (SEPT. 2019) <https://www.gao.gov/assets/710/701238.pdf>.
- ¹⁸ HARVARD LAW SCHOOL FOOD LAW AND POLICY CLINIC [FLPC] AND NATURAL RESOURCES DEFENSE COUNCIL [NRDC], DON’T WASTE, DONATE: ENHANCING FOOD DONATIONS THROUGH FEDERAL POLICY 19 (2017) <http://www.chlpi.org/wp-content/uploads/2013/12/Dont-Waste-Donate-March-2017.pdf>.
- ¹⁹ FLPC and Natural Resources Defense Council, *THE DATING GAME: HOW CONFUSING FOOD DATE LABELS LEAD TO FOOD WASTE IN AMERICA* 2 (2013), <https://www.nrdc.org/sites/default/files/dating-game-report.pdf> [hereinafter *DATING GAME*].
- ²⁰ See Frank Yiannas, *Letter to the Food Industry*, U.S. FOOD & DRUG ADMIN (May 23, 2019); Press Release, U.S. Dep’t of Agric., *USDA Revises Guidance on Date Labeling to Reduce Food Waste* (Dec. 14, 2016), <https://www.fsis.usda.gov/wps/portal/FSIS/newsroom/news-releases-statements-transcripts/news-release-archives-by-year/archive/2016/nr-121416-01>.
- ²¹ Roni A. Neff et al., *Misunderstood Food Date Labels and Reported Food Discards: A Survey of U.S. Consumer Attitudes and Behaviors*, 86 WASTE MGMT, 123, 123 (2019).
- ²² See *DATING GAME*, *supra* note 19.
- ²³ Directive 2000/13/EC of the European Parliament and the Council on the approximation of the laws of the Member States Relating to the Labelling, Presentation, and Advertising of Foodstuffs, 2000 O.J. (L 109), Art. 3 (“E.U. Food Labeling Directive”). The Directive is implemented in Great Britain by the Food Labelling Regulations 1996 (FLR). According to the FLR, food ready for delivery to the ultimate consumer or to catering establishments must carry an “appropriate durability indication,” in the form of either a “best before” date or a “use by” date. Great Britain Food Labelling Regulations 1996, 1996 No. 1499 (20)–(22) (U.K.).
- ²⁴ See *A Roadmap to Reduce U.S. Food Waste*, *supra* note 2, at 33.
- ²⁵ REFED, *REFED DATE LABEL STANDARDIZATION TOOL* 6 (2017), <https://www.refed.com/downloads/ReFED-Standardization-Package.pdf>.
- ²⁶ See *Food Date Labeling Act of 2019* (H.R. 3981), 116th Cong. (2019).
- ²⁷ FLPC, NAT’L CONSUMERS LEAGUE & JOHNS HOPKINS CTR. FOR A LIVABLE FUTURE, *CONSUMER PERCEPTIONS OF DATE LABELS: NATIONAL SURVEY 2* (2016), http://www.chlpi.org/wp-content/uploads/2013/12/Consumer-Perceptions-on-Date-Labels_May-2016.pdf; NEFF ET AL., *supra* note 29, at 127.
- ²⁸ *Grocery Industry Launches New Initiative to Reduce Consumer Confusion on Product Labels*, GROCERY MANUFACTURERS OF AM. (Feb. 15, 2017), <http://www.gmaonline.org/news-events/newsroom/grocery-industry-launches-new-initiative-to-reduce-consumer-confusion-on-pr/>.
- ²⁹ See FLPC, *DATE LABELS: THE CASE FOR FEDERAL LEGISLATION* 6 (2019), https://www.chlpi.org/wp-content/uploads/2013/12/date-labels-issue-brief_June-2019.pdf.
- ³⁰ See *DATING GAME*, *supra* note 19, at 12.
- ³¹ See James Haley, *The Legal Guide to the Bill Emerson Good Samaritan Food Donation Act*, 2013 ARK. L. NOTES (Aug. 8, 2013), <http://media.law.uark.edu/arklawnotes/2013/08/08/the-legal-guide-to-the-bill-emerson-good-samaritan-food-donation-act/>.
- ³² *Analysis of U.S. Food Waste Among Food Manufacturers, Retailers, and Restaurants*, FOOD WASTE REDUCTION ALLIANCE 17, 24 (2016), http://www.foodwastealliance.org/wp-content/uploads/2013/05/FWRA-Food-Waste-Survey-2016-Report_Final.pdf.
- ³³ 42 U.S.C. § 1791.
- ³⁴ *Id.* § 1791 (c).
- ³⁵ *Id.* §§ 1791 (b)(1), (b)(2).
- ³⁶ *Id.* § 1791 (c)(2).
- ³⁷ *Id.* § 1791 (b)(3).
- ³⁸ Agriculture Improvement Act, H.R. 2, 115th Cong. § 12504(e)(1) (2018).
- ³⁹ FSIS DIRECTIVE 7020.1, *supra* note 13 at 2–3.
- ⁴⁰ H.R. Rep. No. 104-661, at 5 (1996) (“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.”).
- ⁴¹ *Analysis of U.S. Food Waste*, *supra* note 32 at 17.
- ⁴² I.R.C. § 170(e)(1) (2017).

⁴³ *Id.* § 170(e)(3)(B); Ronald Fowler & Amy Henchey, *In-Kind Contributions*, INTERNAL REVENUE SERV. 3–4 (1994), <https://www.irs.gov/pub/irs-tege/eotopice94.pdf>.
⁴⁴ FLPC, OPPORTUNITIES TO REDUCE FOOD WASTE IN THE 2018 FARM BILL 14 (2017), http://www.chlpi.org/wp-content/uploads/2013/12/Opportunities-to-Reduce-Food-Waste-in-the-2018-Farm-Bill_May-2017.pdf [hereinafter “OPPORTUNITIES TO REDUCE FOOD WASTE”].
⁴⁵ 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.
⁴⁶ *Id.* The Protecting Americans from Tax Hikes Act of 2015 permanently expanded eligibility for the enhanced deduction for food donations from only C-corps to all businesses, significantly increasing the range of businesses able to benefit from the incentive.
⁴⁷ OPPORTUNITIES TO REDUCE FOOD WASTE, *supra* note 44, at 14.
⁴⁸ *Id.*
⁴⁹ 27 *Solutions to Food Waste*, *supra* note 9.
⁵⁰ See ARIZ. REV. STAT. ANN. §§ 42-5074, 43-1025 (2016); CAL. REV. & TAX. CODE §§ 17053.12, 17053.88 (West 2016); COLO. REV. STAT. ANN. §§ 39-22-301, 39-22-536 (West 2016); D.C. CODE ANN. § 47-1806.14 (West 2016); IOWA CODE ANN. § 190B.101-.106 (2015); KY. REV. STAT. ANN. § 141.392 (West 2016); MO. ANN. STAT. § 135.647 (West 2016); OR. REV. STAT. ANN. §§ 315.154, 315.156 (West 2016); S.C. CODE ANN. § 12-6-3750 (2016); VA. CODE ANN. § 58.1-439.12:12 (West 2016). Additionally, the New York Senate recently passed a bill (S1606) establishing a tax credit for farmers who donate food to a food bank or emergency food program. See <https://www.nysenate.gov/legislation/bills/2017/S1606> (<https://perma.cc/HSK4-TPXT>).



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