

# Legal Fact Sheet

## New York Food Donation: Tax Incentives

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Federal tax incentives provide important financial incentives that make food donation more cost-effective and economically beneficial. These tax incentives have been extraordinarily successful in motivating food donation. In the past, federal tax incentives for food donations were limited to C- corporations.<sup>1</sup> After the incentives were temporarily expanded to cover more businesses in 2005, food donations across the country rose by 137% in 2006.<sup>2</sup> Following a series of temporary extensions, Congress subsequently made the expansion permanent in 2015,<sup>3</sup> providing all businesses with added incentive to increase food donations and prevent food waste. At the federal level, tax incentives are available in the form of general or enhanced deductions, each of which are discussed in this fact sheet.

In addition to the federal tax incentives, some states have enacted state-level tax incentives as well. As of January 2018, New York State provides a state-level tax incentive in the form of a tax credit for farmers that donate food. Some New York farmers are therefore eligible for both federal and state-level tax incentives.<sup>4</sup>

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### Federal Tax Incentives

#### How are the tax incentives calculated?

**General (non-enhanced) tax deduction:** Businesses that donate inventory may claim a tax deduction in the amount of the property's basis,<sup>5</sup> which is usually the value of the property's cost to the business, and is often lower than the fair market value (the value at which goods can be sold). Businesses other than C-corporations— including S-corporations,<sup>6</sup> sole proprietorships,<sup>7</sup> and some LLCs<sup>8</sup> — cannot deduct more than either 30% or 50% of the business' total taxable income each year, depending on the type of organization to which the business is donating.<sup>9</sup> C-corporations generally cannot deduct more than 10% of their taxable income each year.<sup>10</sup>

**Enhanced tax deduction:** The enhanced tax deduction provides an extra incentive for donation by allowing the donating business to deduct the lesser of (a) twice the basis value of the donated food or (b) the basis value of the donated food plus one-half of the food's expected profit margin (if the food were to be sold at fair market value).<sup>11</sup> Under the enhanced deduction, all businesses may deduct up to 15% of their taxable income for food donations.<sup>12</sup>

*Example: A grocery store donates potatoes with a fair market value of \$100. The basis value of these potatoes was \$30. The expected profit margin is the fair market value minus the basis value (\$100 - \$30), which is \$70. Under the enhanced deduction, the grocery store is eligible 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*

*The enhanced deduction would be \$60, which is substantially higher than the general deduction (the \$30 basis value).*

Businesses that do not account for inventories and are not required to capitalize indirect costs<sup>13</sup> will have the option to calculate the basis value at 25% of the products' fair market value.<sup>14</sup> Businesses also have the option to calculate the fair market value of certain products—i.e., those that cannot be sold because of failure to meet internal standards, lack of a



market, or similar reasons—by using the price of the same or substantially similar, saleable food items.<sup>15</sup>

### How can a donating business know if they are eligible for a tax deduction?

**General tax deduction requirements:** In order for a charitable contribution to qualify for a federal tax deduction, the donation must be used for charitable purposes and given to a qualified organization as laid out under section 170 of the Internal Revenue Code (IRC).<sup>16</sup>

**Enhanced tax deduction requirements:** In order to qualify for the enhanced tax deduction, a business must donate to a recipient organization that meets several criteria. First, the recipient must be a qualified 501(c)(3) not-for-profit as defined by the IRC.<sup>17</sup> Additionally, the donor and recipient must meet the following requirements:<sup>18</sup>

(A) The recipient must use the donated food in a manner consistent with the purpose constituting that organization's exempt status under IRC 501(c)(3), which means that the donated food must be used exclusively for charitable purposes;

(B) The food must be used for the care of the ill, needy, or infants;

(C) The food may not be transferred by the recipient organization in exchange for money, other property, or services; however, the recipient organization may charge another organization a nominal amount for "administrative, warehousing, or other similar costs."<sup>19</sup>

*Example: If a business donates food to a food bank (the recipient organization), the food bank may not charge a soup kitchen for the donated food, and the soup kitchen may not charge the individuals eating at the soup kitchen. The food bank can, however, charge the soup kitchen a nominal fee for reimbursement of the costs of storing the food in a warehouse;<sup>20</sup>*

(D) The donating business must receive a written statement from the recipient organization.<sup>21</sup> The statement must describe the contributed property and represent that the property will be used in compliance with the requirements outlined above;<sup>22</sup> and

(E) The donated property must satisfy the requirements of the Federal Food, Drug, and Cosmetic Act (FDCA) at the time of donation and for the preceding 180 days.<sup>23</sup> 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 donation, and any similar property held by the donor during the 180 days prior to donation was also held in compliance with the FDCA.<sup>24</sup>

The 2018 Tax Cuts and Jobs Act maintains the enhanced tax deduction and does not alter how this deduction is calculated. However, any taxable income remaining after deductions are taken will be subject to the new corporate rate of 21%, rather than the prior corporate rate of 35%.<sup>25</sup>

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### State Tax Incentives

Beginning in 2018, New York provides a tax credit to farmers who donate qualifying food to a food pantry, food bank, or other emergency program operating in the state of New York.<sup>26</sup> In contrast to a tax deduction, which reduces a taxpayer's taxable income, a tax credit is a direct reduction in the amount of taxes owed.

Farmers can claim a tax credit in the amount of 25% of the fair market value of the food donated, capped at \$5,000 per year.<sup>27</sup>



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*Example: A farmer donates apples with a fair market value of \$1,200 to an eligible food bank. The farmer can claim a tax credit of 25% x \$1,200 = \$300.*

Qualifying foods must be grown or produced in the state of New York. Furthermore, they must be apparently wholesome and meet all quality and labeling standards, even though the food may not be readily marketable due to appearance, age, freshness, grade, size, surplus, or other conditions.<sup>28</sup>

Farmers are eligible for the tax credit if they are New York resident taxpayers and farming within the state is their primary source of income.<sup>29</sup> In order to receive the credit, farmers must present a receipt, letter, or other communication from the eligible donation site showing: the name of the pantry, the date and location of the donation, and a reasonably detailed description of the donation.<sup>30</sup>

Eligible donation sites are food banks, food pantries, or other emergency programs operating in New York State that qualify as IRC § 501(c)(3) tax-exempt organizations.<sup>31</sup> Farmers can also make donations to eligible sites through a third party entity, such as a nonprofit food aggregator or agricultural cooperative, so long as the third party is also a tax-exempt organization that can provide the eligible farmer with a receipt for the donation.<sup>32</sup>

## Conclusion

In sum, businesses in the state of New York may claim the general or enhanced federal tax deductions for food donations. Furthermore, eligible farmers in the state of New York may also claim a state tax credit.

<sup>1</sup> See I.R.C. § 170(e)(3)(C) (2017), <https://www.law.cornell.edu/uscode/text/26/170>

<sup>2</sup> *Feeding America Urges Swift Vote On Expired Tax Provisions*, FEEDING AM. (June 8, 2012), <http://www.feedingamerica.org/about-us/press-room/feeding-america-urges-swift-vote-on-expired-tax-provisions.html>.

<sup>3</sup> See I.R.C. § 170(e)(3)(C) (2017).

<sup>4</sup> Note that farmers who allow gleaning organizations to harvest and donate surplus crops are eligible to benefit from applicable tax incentives provided they meet all other eligibility criteria.

<sup>5</sup> See *id.* § 170(e)(1); *Charitable Contributions: For Use in Preparing 2017 Tax Returns*, I.R.S., DEP'T OF THE TREASURY, Jan. 24, 2018, at 11, <http://www.irs.gov/pub/irs-pdf/p526.pdf> (noting the amount of the deduction is the fair market value minus the amount of income gained had the product been sold at fair market value).

<sup>6</sup> I.R.C. § 170(b)(1)(B)(i); I.R.C. § 1363(b).

<sup>7</sup> I.R.C. § 170(b)(1)(B)(i); *Sole Proprietorships*, I.R.S., <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Sole-Proprietorships> (last visited Jan. 31, 2018).

<sup>8</sup> I.R.C. § 170(b)(1)(B)(i); *Single Member Limited Liability Companies*, I.R.S., <https://www.irs.gov/businesses/small-businesses-self-employed/single-member-limited-liability-companies> (last visited Jan. 31, 2018). Whether an LLC will be treated as an individual for tax purposes—and hence be subject to the 30% total charitable contribution cap—depends on the number of members in the LLC. *Id.*

<sup>9</sup> I.R.C. § 170(b)(1)(A).

<sup>10</sup> *Id.* § 170(b)(2)(A).

<sup>11</sup> See *id.* § 170(e)(3)(B); 26 C.F.R. § 1.170A-4A(b)(4) (2017).

<sup>12</sup> See *id.* § 170(e)(3)(C)(iii).

<sup>13</sup> See *id.* § 170(e)(3)(C)(iv)(I), (II).

<sup>14</sup> See *id.* § 170(e)(3)(C)(iv).

<sup>15</sup> See *id.* § 170(e)(3)(C)(v).

<sup>16</sup> See *id.* § 170(b), (c), (e)(3)(c).

<sup>17</sup> See *id.* § 170(e)(3).

<sup>18</sup> 26 C.F.R. § 1.170A-4A(b).

<sup>19</sup> *Id.* § 1.170A-4A(b)(3).

<sup>20</sup> *Id.*

<sup>21</sup> I.R.C. § 170(e)(3)(iii).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* § 170(e)(3)(iv).



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<sup>24</sup> 26 C.F.R. § 1.170A-4A(b)(5).

<sup>25</sup> See H.R. 1, An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018, 115<sup>th</sup> Congress (2017-2018).

<sup>26</sup> NY CLS TAX §210-B(52)(a), (d).

<sup>27</sup> NY CLS TAX §210-B(52)(a). Fair market value is determined by the standards set forth under section 170(e)(3)(C)(v) of the internal revenue code. NY CLS TAX §210-B(52)(a). Fair market value is determined by taking into account the price at which the same or substantially the same food items (as to both type and quality) are sold by the taxpayer at the time of the contribution (or, if not so sold at such time, in the recent past). I.R.C. 170(e)(3)(C)(v).

<sup>28</sup> See NY CLS TAX §210-B(52)(c); *Farm Donations to Food Pantry Credits*, N.Y. STATE DEP'T OF TAXATION AND FINANCE (last updated Jan. 24, 2018), <https://www.tax.ny.gov/bus/farm-donations-credit.htm>.

<sup>29</sup> See NY CLS TAX §210-B(52)(b); *Farm Donations to Food Pantry Credits*, N.Y. STATE DEP'T OF TAXATION AND FINANCE (last updated Jan. 24, 2018), <https://www.tax.ny.gov/bus/farm-donations-credit.htm>. The statute specifies that an eligible farmer is a taxpayer whose federal gross income from farming is at least two thirds of excess federal gross income, with excess federal gross income defined as federal gross income above \$30,000. NY CLS TAX §210-B(52)(b). The New York Department of Taxation and Finance has interpreted this to refer to farmers whose "income is primarily attributed to farming activity in the State..." See *Farm Donations to Food Pantry Credits*, N.Y. STATE DEP'T OF TAXATION AND FINANCE, <https://www.tax.ny.gov/bus/farm-donations-credit.htm> ((last updated Jan. 24, 2018).

<sup>30</sup> See NY CLS TAX §210-B(52)(f).

<sup>31</sup> See NY CLS TAX §210-B(52)(d).

<sup>32</sup> *Farm Donations to Food Pantry Credits*, N.Y. STATE DEP'T OF TAXATION AND FINANCE, <https://www.tax.ny.gov/bus/farm-donations-credit.htm> (last updated Jan. 24, 2018).

