To: West Virginia Food and Farm Coalition
**From: Steven Xie, Law Student; Ona Balkus, Senior Clinical Fellow, Harvard Food Law and Policy Clinic**
**Date: January 20, 2016**
**Re: Creating a Tax Incentive for Food Donation in West Virginia**

# I. Introduction[1]

Today, 22 percent of West Virginians struggle to afford enough nutritious food for themselves or their families.[2] This gives West Virginia the third highest food insecurity rate in the nation.[3] At the same time, 40 percent of America's food supply ends up wasted.[4] This waste has serious environmental consequences, stemming from squandered land, labor, energy, and water.[5] America produces more than enough food to feed our population, but tons of wholesome, healthy food goes unharvested or unsold, often ending up in landfills or compost piles. Finding ways to increase recovery of this wholesome food could simultaneously provide healthy food to people in need, benefit local farms and businesses, and reduce the amount of wasted food.

The West Virginia Food and Farm Coalition identified state-level tax incentives for farmers donating food as one of its priority areas, following its June 2015 Spring Leadership Training. The Coalition asked the Harvard Food Law and Policy Clinic to research and develop policy recommendations for this type of tax incentive. After initial research, Coalition representatives and the Harvard team decided to expand the research to consider tax incentives for both farmers and other West Virginia food businesses donating food. We hope these recommendations will be useful for the Coalition's policy advocacy strategy going forward.

This report starts in Section II by describing the process of food recovery and identifying both the opportunities and challenges faced by West Virginia farmers and businesses interested in donating excess food. Section III examines the current federal tax incentives for food donations, and explains how these federal incentives fall short of benefiting local farms and small businesses. Section IV describes how other states have developed state-level tax incentives to support food donation. Based on these findings, in Section V this report considers how West Virginia policymakers can enact new tax incentives to incentivize food donations by local farms and businesses and strengthen West Virginia's economy and public health.

[1] For their gracious assistance in advising us on food donation practices in West Virginia, we would like to thank Cheryl Brown (West Virginia University), Andy Crihfield (Crihfield Farms), Lauren Kemp (The Wild Ramp), Joshua Lohnes (West Virginia FOODLINK), Mary Oldham (Mountain Harvest Farm), Jean Simpson (Manna Meal), Elizabeth Spellman (West Virginia Food & Farm Coalition), Stephanie Tyree (West Virginia Community Development Hub; West Virginia Food & Farm Coalition), and Lesley Yost (West Virginia University College of Law).
[2] How Hungry Is America?, Food Research & Action Center 2 (Apr. 2015), http://frac.org/pdf/food_hardship_2014.pdf.
[3] Id.
[4] Dana Gunders, Wasted: How America Is Losing Up to 40 Percent of Its Food from Farm to Fork to Landfill, National Resources Defense Council 1 (Aug. 2012), http://www.nrdc.org/food/files/wasted-food-ip.pdf.
[5] See Harvard Food Law & Policy Clinic & Nat. Res. Def. Council, The Dating Game: How Confusing Food Date Labels Lead to Food Waste in America 5 (2013).

## II. Food Recovery: Challenges and Opportunities

Food recovery is generally defined as the practice of guiding safe-to-eat, surplus food to the table, rather than to a landfill.[6] Any food-related business, including farmers, grocery stores, farmers' markets, restaurants, manufacturers, and public and private institutions, can participate in food recovery. These businesses can donate to a number of organizations, such as food banks, food pantries and low-cost retailers, which can prepare and distribute this food. All of these organizations work by identifying excess food, intercepting it before it enters the waste stream, and putting it into alternative distribution channels where it becomes accessible to consumers who can use the food.

While there exist a number of food recovery efforts, only about 10% of available, edible food is currently recovered in the U.S.[7] This is likely due to the many barriers businesses face to donating excess food, including the significant cost of sorting, packaging, storage, transportation, and labeling of this food. [8] Food businesses are generally low-margin organizations. They may leave surplus food in the field or throw it away, even if they would prefer to donate it, because the costs of donation would burden their already limited staff and resources.[9] While there is a federal tax incentive that can help to defray some of these expenses, it is limited in both its benefits and coverage. For reasons explained below, the federal tax incentive does not adequately assist many of the West Virginia farms and other small businesses that could benefit from a tax incentive the most.

A state-level tax incentive for food donations would help West Virginia by supporting local businesses, reducing wasted food, and improving the nutritional quality of food donations available to those in need. West Virginia has 21,000 farms, many of which have excess food of high nutritional quality.[10] At the same time, there is concern that the food donated by large grocery stores can be of varying quality.[11] Thus people dependent on food banks may have poor access to healthy foods, furthering public health challenges in the state. Since local businesses are often benefiting least from the present tax incentive structure, implementing a state-level incentive would help local farmers and small businesses, who may be more likely to donate fresh foods than large grocery stores. Increasing donations from local farms and businesses, which would include fruits, vegetables, and other healthy, wholesome foods, would benefit West Virginians who utilize food recovery organizations.

### *A Note on the Cost of a Tax Incentive*

Given the current West Virginia budgetary restrictions, one significant challenge in enacting any kind of tax incentive is the financial implication of such a policy. Yet a tax incentive for food donation is an extremely

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[6] Legal Guide to Food Recovery, U. Ark. L.L.M. Dep't of Agric. & Food Law 1 (2013), http://law.uark.edu/documents/2013/06/Legal-Guide-To-Food-Recovery.pdf.
[7] Dana Gunders, Wasted: How America Is Losing Up to 40 Percent of Its Food from Farm to Fork to Landfill, National Resources Defense Council 14 (Aug. 2012), http://www.nrdc.org/food/files/wasted-food-ip.pdf.
[8] *See, e.g.*, Eleanor Goldberg, Tax Break Would Enable Farmers, Small Businesses To Donate Enough Food For 100 Million Meals, Huffington Post (Apr. 22, 2015), http://www.huffingtonpost.com/2015/04/22/farmers-donation-tax-deduction_n_7110320.html.
[9] See id. See also telephone interview with Cheryl Brown, Director, Farmers' Market Gleaning Project, (Oct. 8, 2015); telephone interview with Jean Simpson, Executive Director, Manna Meal Soup Kitchen (Oct. 8, 2015).
[10] U.S. Dep't of Agric., 2012 Census of Agriculture, West Virginia State Data Table 678 (2014).
[11] See telephone interview with Joshua Lohnes, WV FOODLINK (September 29, 2015); See Dinesh Ramde, Food Pantries Request Healthier Donations Over Bulk Junk Food This Christmas, Huffington Post (Jan. 21, 2012), http://www.huffingtonpost.com/2011/11/21/food-pantries-healthy-food-donations_n_1104973.html.

cost-efficient policy. Any state money provided through such a program directly incentivizes a farm or food business to donate food by covering part of their costs. If a farm or food business does not donate, they receive no tax benefits and no state money is spent. Thus, the state funds are going solely toward their intended purpose. A tax incentive would likely be especially affordable in its first year, as donors would have less awareness of the opportunity. In the first year after Iowa enacted a food donation tax credit, 79,060 pounds of produce were donated in the state, but organizations only applied for credits on just over half of that produce, revealing that many people did not know about or chose not to apply for the credit.[12] In addition to encouraging donations of healthy, wholesome food, the tax incentive can support low margin businesses, like farms, that will be able to recuperate some of the cost invested in producing food that they are unable to sell. Lastly, the long-term investment in the public health of West Virginia's residents, particularly those served by emergency food programs, will likely reduce health expenditures, increase productivity, and improve the overall economic well-being of the state.

## III. Federal Tax Incentives for Food Donations

The federal government has recognized the importance of food donation and provides tax deductions to incentivize businesses to donate food. As of December 2015, all businesses are eligible for an enhanced tax deduction for donating food.[13] Businesses that are eligible for the enhanced tax deduction must donate to charitable organizations that meet certain requirements to receive the enhanced deduction. Those businesses that donate to organizations that do not meet these requirements, and therefore cannot claim the enhanced deduction, can still claim a general tax deduction for donating property, including food, that generally is significantly less than the enhanced deduction but still provides a financial incentive.[14]

To qualify for the enhanced deduction, the business must donate food to a non-profit organization that distributes the food without charge in order to fulfill its charitable mission.[15] While all businesses are eligible for this enhanced deduction, many small farmers do not make enough earned income to pay much, if any, in federal income taxes, so the enhanced deduction will likely not be helpful for them.

By passing a state-level tax incentive, West Virginia could help even the playing field between corporations eligible for the enhanced federal tax deduction and smaller West Virginia farms and businesses that are not benefitting from the federal deduction. Through enacting a state-level tax incentive, West Virginia can tailor the incentive to target those farms and businesses that have wholesome, healthy food to donate and just need an extra financial incentive to recuperate some of their costs and make food donation an economically viable practice for their business.

## IV. State Tax Incentives for Food Donations

A growing number of states around the country are realizing that they can spur increased food donation in their states by providing state-level tax incentives for food donation that are broader and more tailored to

[12] E-mail from John Good, Fiscal and Policy Analyst, Research & Analysis Division, Iowa Dep't of Revenue to Cory Berkenes, State Director, Iowa Food Bank Association (on file with author).

[13] See H.R. 2029, 114th Cong. § 113 (2015) (to be codified at I.R.C. § 170(e)(3)(C) (2016)).

[14] See I.R.C. § 170(e)(1) (2015), http://www.law.cornell.edu/uscode/text/26/170; Ronald Fowler & Amy Henchey, Exempt Organizations – Continuing Professional Education Articles: In-Kind Contributions, Internal Revenue Serv. 2 (1994), http://www.irs.gov/pub/irs-tege/eotopice94.pdf.

[15] Federal Enhanced Tax Deduction for Food Donation: A Legal Guide, Harvard Food Law and Policy Clinic and the Food Recovery Project at U. Ark. (Nov. 2015), http://www.chlpi.org/wp-content/uploads/2013/12/Food-Donation-Fed-Tax-Guide-for-Pub-2.pdf (An updated version of this guide that reflects December 2015 changes to federal law will be published in January 2016).

small farms and businesses than the federal tax incentives. Currently, eight states offer tax incentives specifically targeted at food recovery efforts: Arizona, California, Colorado, Iowa, Kentucky, Missouri, Oregon, and South Carolina.[16] Other states, such as Maryland and New York, have seen active efforts in recent years to introduce tax incentives targeted at food recovery.[17] Each state law is unique, responding to their constituencies and the specific circumstances of food businesses and food recovery organizations in their states.

It is also important to note that many other states that do not have specific food donation tax incentives still offer other tax incentives for charitable donations that include food donations. West Virginia offers tax incentives for cash donations to charitable organizations, but not in-kind donations such as food.[18] This memo is limited to a discussion of state laws that offer tax incentives specifically for food donation, which can be either the only charitable giving incentive available for food donations, or can be an additional incentive on top of the general charitable giving incentive in a state. Table 1 describes the state-level tax incentives specifically for food donations in eight states;[19] a discussion of the key provisions in each of these incentives follows.

## Table 1: Existing State-level Tax Incentives

| Legislation | Deduction or credit | Benefit | Eligible donors | Eligible food | Eligible recipients |
|---|---|---|---|---|---|
| **Arizona** Ariz. Rev. Stat. § 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. § 43-1025 | Deduction | 10% of the wholesale market price | 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 |

[16] Ariz. Rev. Stat. Ann. §§ 42-5074, 43-1025 (2015); Cal. Rev. &Tax. Code §§ 17053.12, 17053.88 (2015); Colo. Rev. Stat. §§ 39-22-301, 39-22-536 (2015); Iowa Code § 190B.101-.106 (2015); Ky. Rev. Stat. Ann. § 141.392 (West 2015); Mo. Rev. Stat. § 135.647 (2015); Or. Rev. Stat. §§ 315.154, 315.156 (2015); S.C. Code Ann. § 12-6-3750.

[17] See Md. H.B. 0359 (2015), http://mgaleg.maryland.gov/webmga/frmMain.aspx?pid=billpage&stab=01&id=HB0359&tab=subject3&ys=2015RS; N.Y. Assembly Bill A5585 (2015), http://open.nysenate.gov/legislation/bill/A5583-2015.

[18] West Virginia allows certain charitable organizations, including food recovery nonprofits, to provide tax credit vouchers in exchange for cash donations. However, this credit does not apply to food donations. See Neighborhood Investment Program, West Virginia Department of Commerce, http://www.wvcommerce.org/people/communityresources/communityrevitalization/neighborhoodinvestmentprogram/default.aspx (last visited Nov. 11, 2015).

[19] Ariz. Rev. Stat. Ann. §§ 42-5074, 43-1025 (2015); Cal. Rev. &Tax. Code §§ 17053.12, 17053.88 (2015); Colo. Rev. Stat. §§ 39-22-301, 39-22-536 (2015); Iowa Code § 190B.101-.106 (2015); Ky. Rev. Stat. Ann. § 141.392 (West 2015); Mo. Rev. Stat. § 135.647 (2015); Or. Rev. Stat. §§ 315.154, 315.156 (2015); S.C. Code Ann. § 12-6-3750.

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|---|---|---|---|---|---|
| **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. § 39-22-301[20] | 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 |
| **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 |

[20] Cannot be combined with Colo. Rev. Stat. § 39-22-536.

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|---|---|---|---|---|---|
| **Oregon** Or. Rev. Stat. § 315.154 and 315.156 | Credit | 15% 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 | $50 per carcass | Licensed meat packer, butcher, or processing plant | Deer | Nonprofits engaged in distributing food to needy; no portion of deer can be sold |

As illustrated in Table 1, state governments have taken a variety of approaches to encouraging food donation. This section will compare the features of the various states' methods in order to help determine the most appropriate tax incentive for West Virginia.

## A. Would a tax credit or tax deduction be more effective?

Today, seven states offer tax credits for food donations, while the federal government and the state of Arizona utilize tax deductions.[21] A deduction reduces a taxpayer's taxable income, which is then used to determine the amount of taxes they owe.[22] A charitable deduction for food donations is an itemized deduction that lowers a taxpayer's taxable income.[23] When every applicable itemized deduction is subtracted from a taxpayer's taxable income, this number determines the taxpayer's adjusted gross income.[24] The taxpayer does not pay taxes on the deducted amount; instead the adjusted gross income determines the amount of taxes owed. [25] The amount of savings from the deduction varies depending on this adjusted gross income's marginal tax rate. For example, if a taxpayer has a marginal tax rate of 30%, a deduction of $1,000 provides the taxpayer with a total savings of $300.

By contrast, a tax credit is a direct dollar-for-dollar subtraction from the amount of taxes the taxpayer owes.[26] Thus, a $500 tax credit would reduce the amount of taxes a taxpayer is required to pay by $500.[27] For example, Colorado's tax credit for food donations allows taxpayers to receive a tax credit worth 25% of the market price, so a food donation that could have been sold for $500 at market price would reduce one's taxes by $125.[28] Because a tax credit equally benefits taxpayers in low and high tax brackets, it is relatively more generous to small, low-income businesses than a tax deduction would be.

Recently, Drake University Law School calculated how Iowa's tax credit for food donation (equal to 15% of the donated food's market value, up to $5,000 a year) compares to the Iowa charitable contribution

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[21] California, Colorado, Iowa, Kentucky, Missouri, Oregon and South Carolina all offer tax credits for food donations. See, e.g., Cal. Rev. & Tax. Code § 17053.12 (West 2015); see I.R.C. § 170 (West 2014); Ariz. Rev. Stat. §§ 42-5074, 43-1025 (LexisNexis 2015).
[22] 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.
[23] See id.
[24] See id.
[25] See id.
[26] See id.
[27] See id.
[28] Colo. Rev. Stat. § 39-22-536 (2015).

deduction (100% of the food's value, with a cap of 50% of the taxpayer's income).[29] Like West Virginia, Iowa has a progressive state income tax.[30] The study found that the tax credit did a better job of targeting funds at small and medium-sized businesses than the tax deduction.[31] Only businesses that donated more than $55,000—which would require an income of at least $110,000, due to the deduction's cap—fared better under the tax deduction.[32]

### B. How generous should a tax incentive be?

Of the six states that offer tax credits rather than deductions, the values of these credits range from 10% to 50% of the donated food's market value.[33] Some states also cap their total credits at a fixed amount; for example, while Missouri offers the most generous tax credit at 50% of the donated food's market value, total credits are capped at $2,500.[34] This means that donors in Missouri only have a financial incentive to donate up to $5,000 worth of food. By contrast, one of California's incentives credits only 10% of the donated food's value, but is uncapped. Some other states have no cap on the amount of credit businesses can claim.[35]

Arizona is the only state that has opted to offer a tax deduction instead of a tax credit. Arizona's tax deduction is for the full market value of the donated food and is not capped at any amount.[36] For large businesses, the lack of an annual limit could enable substantially more savings than under other states' tax credit schemes. Small businesses with smaller donation volumes likely do not benefit from Arizona's deduction scheme, given its low deduction percentage, as much as they would from a tax credit.

The method for determining the value of donated food also varies from state to state. Most states determine the value of the food donated based on its fair market value. [37] In California, however, the value of one of its tax credits is determined based on the inventory costs to the farmer, that is to say the costs and indirect costs of producing the donated produce.[38] The former approach is more advantageous for the farmer since the fair market value of the food is almost always higher than its inventory cost.

### C. Who should be eligible to donate food?

Existing state-level tax incentives vary significantly in terms of which donors are eligible to claim benefits. Iowa, Kentucky, and Missouri allow any state taxpayer to claim their tax credits for food donation.[39] On the

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[29] See Kelly Nuckolls, Donation Options, Drake University Law School (2014), http://www.law.drake.edu/clinicsCenters/agLaw/docs/farmFoodTaxCredit-incomeChart.pdf.
[30] Iowa State Income Tax Rates, Salary Wizard, http://swz.salary.com/salarywizard/layouthtmls/swzl_statetaxrate_IA.html (last visited Nov. 12, 2015).
[31] See Nuckolls, *supra* note 29.
[32] See id.
[33] Ariz. Rev. Stat. Ann. §§ 42-5074, 43-1025 (2015); Cal. Rev. &Tax. Code §§ 17053.12, 17053.88 (2015); Colo. Rev. Stat. §§ 39-22-301, 39-22-536 (2015); Iowa Code § 190B.101-.106 (2015); Ky. Rev. Stat. Ann. § 141.392 (West 2015); Mo. Rev. Stat. § 135.647 (2015); Or. Rev. Stat. §§ 315.154, 315.156 (2015).
[34] Mo. Rev. Stat. § 135.647 (2015).
[35] See, e.g., Cal. Rev. & Tax. Code §§ 17053.12, 17053.88 (2015); Ky. Rev. Stat. Ann. § 141.392 (West 2015); Or. Rev. Stat. §§ 315.154, 315.156 (2015).
[36] See Ariz. Rev. Stat. § 43-1025 (2015).
[37] Ariz. Rev. Stat. § 43-1025 (2015); Colo. Rev. Stat. § 39-22-301 (2015); Ky. Rev. Stat. Ann. § 141.392 (West 2015).
[38] New Legislation – Credit for Fresh Fruits or Fresh Vegetable Donations, CA Franchise Tax Bd. (Feb. 2012), https://www.ftb.ca.gov/professionals/taxnews/2012/February/Article_6.shtml.
[39] See Iowa Code §§ 190B.101-.106 422.11E, 422.33(30) (2015); Ky. Rev. Stat. Ann. § 141.392 (West 2015)**;** Mo. Rev. Stat. § 135.647 (2015).

other hand, Arizona limits its deduction to restaurants and farmers,[40] California limits one of its credits to farmers,[41] and Colorado limits one of its tax credits to C-Corporations.[42] Unless other groups are covered by separate tax incentives, such restrictions may miss out on encouraging donations from large swaths of the supply chain, representing a lost opportunity for reduced waste and increased food access.

### D. Who should be eligible to receive food donations?

Like the federal tax deduction, state-level tax incentives are often limited to donations to charitable organizations. Some states, like California, specify that only "food banks" qualify as donees.[43] Kentucky only provides its tax credit for donations to "nonprofit food programs," which are defined in part as "surplus food collection and distribution programs operated and established to collect donated food for redistribution to persons in need."[44] Certain states, like Arizona, explicitly bar eligible recipient organizations from charging clients for the food.[45]

Limiting eligible recipients to food banks or other organizations that distribute food for free ignores the growing number of entrepreneurial food recovery non-profits that use alternative strategies for food recovery and distribution. For instance, The Daily Table is a pilot food store that opened in the summer of 2015 in Dorchester, Massachusetts.[46] Using wholesome, healthy food that otherwise would go to waste, the Daily Table sells nutritious food and meals at a low cost to community residents. The Daily Table receives this food largely as donations from area grocery stores, wholesale distributors, and food producers.[47] Salvage grocery stores, which typically sell slightly damaged or past-date food at a steep discount, are another example of a food recovery model where people can choose to save money on less-than-perfect food, while significantly decreasing the amount of food that goes to waste.[48] Innovative food recovery models such as these examples should be supported by allowing their donors to claim the same tax incentives as donors who give to more traditional food recovery models.

### E. What foods should qualify for the incentive?

Most states also limit the kinds of food that qualify for tax benefits. Other than Missouri,[49] all states limit their incentives to crops, livestock, or agricultural commodities.[50] These regimes are structured in varying ways. For instance, Colorado allows both the donation of crops and livestock, [51] whereas California limits one of its tax credits to the donation of fruits and vegetables only. [52]

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[40] See Ariz. Rev. Stat. §§ 42-5074, 43-1025 (2015).
[41] See Cal. Rev. & Tax. Code § 17053.88 (2015).
[42] See Colo. Rev. Stat. § 39-22-301 (2015).
[43] See Cal. Rev. & Tax. Code § 17053.88 (2015).
[44] Ky. Rev. Stat. Ann. § 141.392 (West 2015).
[45] Ariz. Rev. Stat. § 43-1025 (2015).
[46] See Jenna Russell & Jenn Abelson, Putting expired foods to healthy use, Boston Globe, Feb. 26, 2013, http://www.bostonglobe.com/business/2013/02/25/former-trader-joe-executive-wants-sell-inexpensive-prepared-meals-made-from-expired-food/Cyz1TwTAEFbQnWxn0teNsN/story.html.
[47] Id.
[48] Brad Tuttle, Salvage Grocery Stores: Who Cares About Sell-By Dates if You're Saving Money?, Time (Aug. 05, 2009), http://business.time.com/2009/08/05/salvage-grocery-stores-who-cares-about-sell-by-dates-if-youre-saving-money/.
[49] Missouri's tax incentive also covers cash donations to food pantries. Mo. Rev. Stat. § 135.647 (2015).
[50] Arizona also provides an incentive for donated restaurant foods in addition to agricultural products. *See* Ariz. Rev. Stat. § 42-5074 (2015). Iowa's incentive is limited to food produced by the taxpayer. *See* Iowa Code §§ 190B.101-.106 422.11E, & 422.33(30).
[51] Colo. Rev. Stat. § 39-22-301 (2015).
[52] Cal. Rev. & Tax. Code § 17053.88 (2015).

Some states restrict donations in other, more nuanced ways. For example, Iowa provides no tax credit for the donation of damaged or sub-standard products, such as products with damaged packaging or cosmetically flawed produce.[53] While the impetus behind this kind of restriction is understandable, being overly focused on cosmetic appearances or other minor factors prevents many consumers from accessing foods that are perfectly edible and that do not present heightened health or safety risks. In many food recovery outlets, these foods are prepared into healthy products like sauces and soups, where the original appearance of the produce is not discernable for the end user. Further, cosmetically flawed foods are often the ones that cannot be sold in stores so are most commonly available for donation. Missouri does not provide its tax credit for donations of foods that are past their expiration dates, despite the fact that expiration dates are almost never markers of food safety.[54] Such restrictions promote, rather than prevent, avoidable food waste and keep wholesome food from being recovered.

### F. Should other donation expenses be covered?

California and South Carolina are the only states to offer tax incentives for certain expenses businesses incur when donating food, rather than just for the food donation itself. California has a tax credit that covers the transportation costs directly associated with donating agricultural products. The credit amounts to 50% of the transportation costs paid or incurred by the taxpayer in connection with the transportation of the donated food.[55] South Carolina provides a tax credit for licensed meat packers, butchers, or processing plants that contract with charitable organizations to process deer for donation to needy clients.[56] The deer in question are typically hunted for sport, meaning that it would make less sense to compensate the "producers"—in this case, hunters—for donating their surplus animals. Instead, South Carolina's scheme recognizes that processing costs represent the most significant cost barrier for recovering this particular food source. The tax credit accordingly invests a small amount of state money to recover a large amount of high-value meat for low-income households. South Carolina and California's approaches illustrate the possibility of crafting a tax incentive to target specific, high-return expenses that may have an outsized positive effect on food recovery practices. For example, given the long distances between farms and food pantries in West Virginia, a transportation tax credit may be remarkably effective in spurring increased donations.[57]

## V. Recommendations for West Virginia

In developing tailored recommendations for a West Virginia food donation tax incentive, the authors conducted interviews with West Virginia farms, retailers, and non-profit organizations to better understand small farms and food business in West Virginia, their capacity to donate food, and how the emergency food network operates in West Virginia. Based on these interviews and online legal research, this section proposes several recommendations on how West Virginia could structure a tax incentive to effectively increase food donations and support small businesses and farms in the state.

[53] Iowa Code §§ 190B.101-.106 422.11E, 422.33(30) (2015).
[54] Most date labels tell when the company believes its product will be at its "peak quality," not when it will be unsafe to eat. See Harvard Food Law & Policy Clinic & Nat. Res. Def. Council, The Dating Game: How Confusing Food Date Labels Lead to Food Waste in America 19-21 (2013).
[55] Cal. Rev. & Tax. Code § 17053.12 (2015).
[56] See S.C. Code Ann. § 12-6-3750 (2015).
[57] See telephone interview with Andy Crihfield, Crihfield Farms (Oct. 23, 2015).

## A. Offer a tax credit rather than a tax deduction.

Because the value of a tax deduction depends on the business's marginal tax rate, tax deductions favor large, high-income businesses. By contrast, a tax credit can noticeably benefit any farm or business, even those that sit in relatively low tax brackets. A tax credit for food donations would therefore be more beneficial to West Virginia's farms and retailers, which tend to be small to medium-sized businesses. In fact, several local stakeholders suggested that a tax credit would do more than a tax deduction to encourage businesses to donate.[58]

## B. Place a reasonable limit on the tax credit's value.

With the same goal of targeting incentives to small, local businesses, this report recommends placing a reasonable limit on the value of tax credits each business can claim in a year. Such a limit would maintain the affordability of the legislation while ensuring that a broad range of small and medium-sized businesses can access the incentive. As an incentive will be relatively more impactful for small businesses, it makes sense to gear the incentive toward these businesses. Other states that have annual limits on their food donation credits have chosen caps ranging from $2,500 to $5,000.[59] This is a cap on the credit taken, not the value of the food donated. In Colorado, which offers 25% of the donated food's market value as a credit with a $5,000 annual limit,[60] a business can donate $20,000 worth of food each year before reaching the cap.

## C. Base the tax credit on the food's fair market value.

For the states with a tax incentive for food donations, every state but California bases its incentive on a portion of the food's market value, not its inventory cost. The former approach is better for businesses, as it is both more generous (the market value will almost always exceed its inventory cost) as well as less cumbersome (inventory costs are more difficult to track). When determining what percentage of the donated food's market value to offer as a credit, it may be useful to look at other states' incentives. These incentives range from 10% of the food's market value (Arizona and Kentucky) to 50% (Missouri).[61]

## D. Include additional tax credits for transportation costs associated with donating food.

From interviews with West Virginia farms and food pantries, it is clear that the cost of transporting donations from businesses to recipients is a major barrier to food donation.[62] Given that farms and other potential donors are often located far from West Virginia's metropolitan areas, transportation costs to food recovery organizations can be substantial. West Virginia could lessen the burden these businesses face by adopting an incentive modeled after California's, which offers donors a tax credit equal to 50% of the transportation costs incurred in transporting donated food.[63]

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[58] See, e.g., telephone interview with Andy Crihfield, Crihfield Farms (Oct. 23, 2015); telephone interview with Lauren Kemp, Co-Founder, The Wild Ramp Farmers' Market (Oct. 21, 2015).
[59] Colo. Rev. Stat. § 39-22-536 (2015); Mo. Rev. Stat. § 135.647 (2015).
[60] Colo. Rev. Stat. § 39-22-301 (2015).
[61] Ariz. Rev. Stat. § 43-1025 (2015); Ky. Rev. Stat. Ann. § 141.392 (2015); Mo. Rev. Stat. § 135.647 (2015).
[62] See telephone interview with Cheryl Brown, Director, Farmers' Market Gleaning Project (Oct. 8, 2015); telephone interview with Jean Simpson, Executive Director, Manna Meal Soup Kitchen (Oct. 8, 2015).
[63] Cal. Rev. &Tax. Code § 17053.12 (2015).

### E. Include all taxpayers as eligible donors for the incentive.

Given that many small West Virginia businesses cannot benefit from the federal enhanced deduction for food donations, a state-level incentive would be important to all small businesses. Farmers, retailers, and all other businesses should be able to benefit from the tax incentive. Limiting the credit to farmers, like a few states have done, would represent a missed opportunity to incentivize businesses from other sections of the supply chain to donate food. Restaurants, grocery stores, and other small businesses all have excess food that they could donate to non-profit organizations. In interviews, many stakeholders have indicated that small businesses may be just as well positioned as farmers to utilize a food donation tax incentive.[64] Recognizing this, states such as Colorado and Missouri allow all taxpayers to claim credit for food donations.[65] Alternatively, a state could offer two separate tax incentives, one targeted toward farmers and the one toward other businesses, as this would offer flexibility in tailoring the tax incentive. A tax incentive for all businesses also helps to diversify the food that non-profits receive: for example, farms may donate more fresh produce, while grocery stores may donate more meat and dairy.

### F. Include more than just fruits and vegetables when designating eligible foods.

Based on interviews with West Virginian farms, farmers' markets, and food pantries, it seems that local farmers are most likely to donate fresh fruits and vegetables due to their perishability. Since produce cannot be stored for long periods, farmers are likelier to donate produce near the end of its freshness than hold on to it.[66] In contrast, products like meat, eggs and dairy are less likely to be donated because they last longer and in some cases can be frozen until the next market day.[67] Still, having a broad list of eligible food products is beneficial because it allows for more food donations, as well as a more balanced diet for those in need. In order to avoid encouraging donations of unhealthy foods, such as soda and candy, it is advisable to draft a specific list of foods that will be covered by the incentive. This list should include nutritious staples such as produce, meat, dairy, eggs, and grains. As an example, Colorado's tax incentive covers "livestock, big game . . . eggs, milk, [and] agricultural crops, including but not limited to grains, fruits, and vegetables."[68]

### G. Make all non-profit organizations eligible for the tax incentive, with no restrictions on the resale of donated food.

Some states have a "no resale" limitation for food recovery organizations in their tax incentives, meaning that if the food recovery organization sells or exchanges the donated food, the food donor is not eligible for the benefit.[69] One explanation behind such "no resale" clauses is that they ensure the government is not indirectly subsidizing for-profit activity, which would be contrary to the underlying goals of the charitable deduction scheme. However, requiring that the recipient be a certified 501(c)(3) non-profit organization and that the food be used in a manner related to the recipient's exempt purpose (as required in the federal tax incentive) will ensure that the food is being used in a way that support those in need, and should alleviate this concern.[70]

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[64] See telephone interview with Lauren Kemp, Co-Founder, The Wild Ramp Farmers' Market (Oct. 21, 2015); telephone interview with Cheryl Brown, Director, Farmers' Market Gleaning Project (Oct. 8, 2015).
[65] Colo. Rev. Stat. § 39-22-536 (2015), Mo. Rev. Stat. § 135.647 (2015).
[66] See telephone interview with Cheryl Brown, Director, Farmers' Market Gleaning Project (Oct. 8, 2015).
[67] See id.
[68] Colo. Rev. Stat. § 39-22-536 (2015),
[69] See, e.g., Colo. Rev. Stat. § 39-22-301 (2015).
[70] I.R.C. § 170(e)(3)(A)(i) (West 2014).

While food pantries are still the dominant food recovery players in West Virginia, other areas of the nation are seeing a surge in entrepreneurial non-profits providing food to the needy through social enterprise. Some of these organizations, such as the Daily Table mentioned above, are charging customers a low price to cover the organization's operations and create a sustainable business model. Should similar non-profit organizations arise in West Virginia, donors interested in giving food to these organizations should benefit equally from the tax incentive. To cover these organizations, an incentive can define eligible recipient organizations as "all non-profits, including those that sell or exchange the donated goods."

### H. Increase resources for education and infrastructure related to food donations.

When speaking with local businesses, one frequent concern was a lack of awareness of the existing federal tax incentive.[71] If any state-level tax incentive is to successfully increase food donations, local businesses and recipient non-profits must have knowledge of the incentive and its parameters. State government agencies should educate local stakeholders—farmers, grocery stores, and other food businesses—in order to raise awareness of both the federal tax incentive and any state-level tax incentive that is implemented.

In order to increase food donations, state and local governments also must improve connections between potential donors (farms, restaurants, grocers, etc.) and recipients (food banks, food pantries and entrepreneurial non-profits). The lack of contact between the two groups was an obstacle brought up by many stakeholders.[72] One action policymakers can take to remedy this problem is to set up an online database of potential donors and recipients. Through these databases, parties could contact each other about food donations. One example of such a database is Spoiler Alert, a Boston-based start-up. Spoiler Alert is an app that allows farmers, retailers, and other businesses to conveniently broadcast the food available to donate, as well as crucial information such as quantity, must-go-by date (the date by which the donor believes the food must be exchanged), and transportation requirements.[73] Food recovery organizations can view this information and contact the donor to discuss their interest and arrange a pick-up or delivery.[74] By bringing together donor and recipient organizations, companies such as Spoiler Alert can dramatically reduce the transaction costs of food donation. The state can encourage relationships between donor and recipient organizations by supporting entrepreneurs in setting up a similar program, or authorizing a state agency to set up a similar network.

## VI. Conclusion

While food insecurity is a major challenge facing West Virginia today, businesses face many costs and logistical challenges to donating excess food. A state-level tax incentive for food donations would support West Virginia's agricultural economy, strengthen ties between local businesses and consumers, reduce the amount of wasted food, and improve the healthy options available to state residents that use emergency food outlets. This report has synthesized features of tax incentives from other states, combined with West Virginia-specific research and interviews, to develop recommendations for legislation that would be effective in West Virginia. A tax incentive for food donations would give local farms and businesses financial incentives that make food donation economically viable for their business.

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[71] See telephone interview with Cheryl Brown, Director, Farmers' Market Gleaning Project (Oct. 8, 2015); telephone interview with Lauren Kemp, Co-Founder, The Wild Ramp Farmers' Market (Oct. 21, 2015).
[72] See telephone interview with Cheryl Brown, Director, Farmers' Market Gleaning Project (Oct. 8, 2015); telephone interview with Jean Simpson, Executive Director, Manna Meal Soup Kitchen (Oct. 8, 2015); telephone interview with Lauren Kemp, Co-Founder, The Wild Ramp Farmers' Market (Oct. 21, 2015).
[73] See How It Works, Spoiler Alert (2015), http://foodspoileralert.com/howitworks.
[74] See id.

# Appendix

Below are the full texts of California Revenue & Tax Code § 17053.88 and Missouri Revised Statute § 135.647, two tax incentive programs for food donations. While not every aspect of these two laws matches the recommendations given in this report, they may provide useful language as West Virginia devises its own tax incentive.

**California Revenue & Tax Code § 17053.88**

(a) In the case of a qualified taxpayer who donates fresh fruits or fresh vegetables to a food bank located in California under Chapter 5 (commencing with Section 58501) of Part 1 of Division 21 of the Food and Agricultural Code, for taxable years beginning on or after January 1, 2012, and before January 1, 2017, there shall be allowed, without regard to the taxpayer s method of accounting, as a credit against the net tax (as defined by Section 17039), an amount equal to 10 percent of the cost that would otherwise be included in inventory costs under Section 263A of the Internal Revenue Code, or that would be required to be included in inventory costs under Section 263A of the Internal Revenue Code, but for the exception for farming businesses contained in Section 263A(d) of the Internal Revenue Code, with respect to those fresh fruits or fresh vegetables.

(b) For purposes of this section, qualified taxpayer means the person responsible for planting a crop, managing the crop, and harvesting the crop from land.

(c) If the credit allowed by this section is claimed by the qualified taxpayer, any deduction otherwise allowed under this part for that amount of the cost paid or incurred by the qualified taxpayer that is eligible for the credit shall be reduced by the amount of the credit provided in subdivision (a).

(d) The donor shall provide to the nonprofit organization the estimated value of the donated fresh fruits or fresh vegetables and information regarding the origin of where the donated fruits or vegetables were grown, and upon receipt of the donated fresh fruits or fresh vegetables, the nonprofit organization shall provide a certificate to the donor. The certificate shall contain a statement signed and dated by a person authorized by that organization that the product is donated under Chapter 5 (commencing with Section 58501) of Part 1 of Division 21 of the Food and Agricultural Code. The certificate shall also contain the type and quantity of product donated, the name of donor or donors, the name and address of the donee nonprofit organization, and, as provided by the donor, the estimated value of the donated fresh fruits or fresh vegetables and its origins. Upon the request of the Franchise Tax Board, the qualified taxpayer shall provide a copy of the certification to the Franchise Tax Board.

(e) In the case where the credit allowed by this section exceeds the net tax, the excess may be carried over to reduce the net tax in the following year, and for the six succeeding years if necessary, until the credit has been exhausted.

(f) Using the information available to the Franchise Tax Board from the certificates required under subdivision (d) and subdivision (d) of Section 23688, the Franchise Tax Board shall report to the Legislature on or before December 1, 2014, and each December 1 thereafter until the inoperative date specified in subdivision (g), regarding the utilization of the credit authorized by this section and Section 23688.The Franchise Tax Board shall also include in the report the estimated value of the fresh fruits and fresh vegetables donated, the county in which the products originated, and the month the donation was made.

(g) (1) A report to be submitted pursuant to subdivision (f) shall be submitted in compliance with Section 9795 of the Government Code.
(2) The requirement for submitting a report imposed under subdivision (f) is inoperative on January 1, 2016, pursuant to Section 10231.5 of the Government Code.

(h) This section shall remain in effect only until December 1, 2017, and as of that date is repealed.

**Missouri Revised Statute § 135.647**

135.647. 1. As used in this section, the following terms shall mean:

(1) "Local food pantry", any food pantry that is:

(a) Exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986, as amended; and

(b) Distributing emergency food supplies to Missouri low-income people who would otherwise not have access to food supplies in the area in which the taxpayer claiming the tax credit under this section resides;

(2) "Taxpayer", an individual, a firm, a partner in a firm, corporation, or a shareholder in an S corporation doing business in this state and subject to the state income tax imposed by chapter 143, excluding withholding tax imposed by sections 143.191 to143.265.

2. (1) Beginning on March 29, 2013, any donation of cash or food made on or after January 1, 2013, shall be eligible for tax credits as provided by this section.

(2) For all tax years beginning on or after January 1, 2007, any taxpayer who donates cash or food, unless such food is donated after the food's expiration date, to any local food pantry shall be allowed a credit against the tax otherwise due under chapter 143, excluding withholding tax imposed by sections 143.191 to 143.265, in an amount equal to fifty percent of the value of the donations made to the extent such amounts that have been subtracted from federal adjusted gross income or federal taxable income are added back in the determination of Missouri adjusted gross income or Missouri taxable income before the credit can be claimed. Each taxpayer claiming a tax credit under this section shall file an affidavit with the income tax return verifying the amount of their contributions. The amount of the tax credit claimed shall not exceed the amount of the taxpayer's state tax liability for the tax year that the credit is claimed, and shall not exceed two thousand five hundred dollars per taxpayer claiming the credit. Any amount of credit that the taxpayer is prohibited by this section from claiming in a tax year shall not be refundable, but may be carried forward to any of the taxpayer's three subsequent taxable years. No tax credit granted under this section shall be transferred, sold, or assigned. No taxpayer shall be eligible to receive a credit pursuant to this section if such taxpayer employs persons who are not authorized to work in the United States under federal law.

3. The cumulative amount of tax credits under this section which may be allocated to all taxpayers contributing to a local food pantry in any one fiscal year shall not exceed one million seven hundred fifty thousand dollars. The director of revenue shall establish a procedure by which the cumulative amount of tax credits is apportioned among all taxpayers claiming the credit by April fifteenth of the fiscal year in which the tax credit is claimed. To the maximum extent possible, the director of revenue shall establish the procedure described in this subsection in such a manner as to ensure that taxpayers can claim all the tax credits possible up to the cumulative amount of tax credits available for the fiscal year.

4. Any local food pantry may accept or reject any donation of food made under this section for any reason. For purposes of this section, any donations of food accepted by a local food pantry shall be valued at fair market value, or at wholesale value if the taxpayer making the donation of food is a retail grocery store, food broker, wholesaler, or restaurant.

5. The department of revenue shall promulgate rules to implement the provisions of this section. Any rule or portion of a rule, as that term is defined in section 536.010, that is created under the authority delegated in this section shall become effective only if it complies with and is subject to all of the provisions of chapter 536 and, if applicable, section 536.028. This section and chapter 536 are nonseverable and if any of the powers vested with the general assembly pursuant to chapter 536 to review, to delay the effective date, or to disapprove and annul a rule are subsequently held unconstitutional, then the grant of rulemaking authority and any rule proposed or adopted after August 28, 2007, shall be invalid and void.

6. Under section 23.253 of the Missouri sunset act:

(1) The program authorized under this section shall be reauthorized as of March 29, 2013, and shall expire on December 31, 2019, unless reauthorized by the general assembly; and

(2) This section shall terminate on September first of the calendar year immediately following the calendar year in which the program authorized under this section is sunset; and

(3) The provisions of this subsection shall not be construed to limit or in any way impair the department's ability to redeem tax credits authorized on or before the date the program authorized under this section expires or a taxpayer's ability to redeem such tax credits.