



February 17, 2021

Docket No. FSIS-2020-0030

Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service
1400 Independence Avenue SW, Mailstop 3758, Room 6065
Washington, DC 20250-3700

Re: Docket No. FSIS-2020-0030; Guidance: Donation of Eligible Meat and Poultry Products to Non-Profit Organizations

The Food Law and Policy Clinic (FLPC) at Harvard Law School would like to thank the USDA for the opportunity to submit these comments regarding FSIS’s “Guideline to Assist with the Donation of Eligible Meat & Poultry Products to Non-Profit Organizations” (Docket No. FSIS-2020-0030).

FLPC serves partner organizations and communities by providing legal and policy guidance on cutting-edge food system issues. FLPC focuses on increasing access to healthy foods, supporting sustainable and equitable food production, and reducing waste of healthy, wholesome food. In particular, in the past ten years, FLPC has worked with nonprofit organizations, food businesses, startups, and government at all levels in the U.S. and other countries to help further an understanding of the laws and policies that can ensure safe, wholesome food does not go to waste. Based on this work, we strongly support FSIS’ efforts to streamline and facilitate the food donation process for both food producers and recipient non-profit organizations. Much of our work has focused on the need for more guidance and clarification in the area of food safety for food donations,¹ and FSIS’ Guideline to Assist with the Donation of Eligible Meat & Poultry Products to Non-Profit Organizations (“Guideline”) is an important step towards ensuring safe, wholesome food can be donated instead of wasted.

FSIS’ new Guideline clarifies and refines the Agency’s policy towards the donation of meat and poultry to non-profit organizations. The aim of the Guideline is to promote food donation in order to help combat the problem of the needless waste of food that is safe and edible.² In the Guideline, FSIS clarifies existing rules related to food donation safety (e.g., that

¹ See e.g., HARVARD FOOD LAW & POL’Y CLINIC & NATURAL RES. DEF. COUNCIL, DON’T WASTE, DONATE: ENHANCING FOOD DONATIONS THROUGH FEDERAL POLICY [Hereinafter DON’T WASTE, DONATE], 21 (2017), <https://www.nrdc.org/sites/default/files/dont-waste-donate-report.pdf>.

² U.S. DEP’T OF AGRIC., FSIS GUIDELINE TO ASSIST WITH THE DONATION OF ELIGIBLE MEAT & POULTRY PRODUCTS TO NON-PROFIT ORGANIZATIONS, DOCKET NO. FSIS-2020-0030, 4 (2020).

producers may donate “sample” products) and alters its policy regarding temporary labels to make it easier for organizations to donate food that is misbranded or otherwise still safe to eat.³

We commend FSIS for providing clarity to food donors and recovery organizations. In this comment, we will discuss how the Guideline facilitates food donation by promoting the message that food is generally able to be donated unless there is a specific safety concern, streamlining the process for donating misbranded and economically adulterated foods, and clarifying that voluntary date labels are not indicators of food safety. However, we have also identified five areas that could use further explanation and have provided recommendations herein on how FSIS can provide more clarity for food donation organizations.

I. FSIS’ Guideline Clarifies Many Aspects of Food Donation Regulations

Throughout the United States, food donors and food recovery organizations have expressed confusion over which foods may or may not be donated.⁴ This confusion exists in large part because there is a lack of regulatory language or agency guidance to explain how the complex regulatory schemes promulgated by the FDA and USDA relate to donation or recovery of food that is not able to be sold.⁵ The Food Waste Reduction Alliance found that over half of food manufacturers considered regulatory constraints to be a barrier to food donation,⁶ and a quarter of restaurants thought the same.⁷ These regulations are often impenetrable for many organizations.⁸ This confusion also affects food safety officials and health inspectors. A survey of state food safety officials in all fifty states found that most states do not have any regulations or guidance that address food safety for food donation.⁹ The vast majority of state food safety officials believed model language would be a helpful resource to support states in creating guidance on food safety for food donations.¹⁰ By issuing clarifying guidance to demystify safety regulations that apply to food donation, FSIS is helping to enable donors to donate food with confidence that they are complying with USDA regulations, to ensure that FSIS staff is empowered to facilitate donation of safe foods, and ultimately to reduce the waste of healthy, wholesome foods.

³ *Id.* at 7.

⁴ HARVARD FOOD LAW & POL’Y CLINIC, FOOD SAFETY REGULATIONS AND GUIDANCE FOR FOOD DONATIONS: A 50-STATE SURVEY OF STATE PRACTICES [hereinafter FOOD SAFETY FOR DONATIONS], 1 (2018), https://www.chlpi.org/wp-content/uploads/2013/12/50-State-Food-Regs_March-2018_V2.pdf.

⁵ *Id.* at 11.

⁶ FOOD WASTE REDUCTION ALLIANCE, ANALYSIS OF U.S. FOOD WASTE AMONG FOOD MANUFACTURERS, RETAILERS, AND RESTAURANTS, 17 (2016), http://www.foodwastealliance.org/wp-content/uploads/2013/05/FWRA-Food-Waste-Survey-2016-Report_Final.pdf.

⁷ *Id.* at 32.

⁸ *See, e.g.*, HARVARD FOOD LAW & POL’Y CLINIC, UNITED STATES RECOMMENDATIONS: FOOD DONATION LAW AND POLICY, 4 (2020) <https://www.chlpi.org/wp-content/uploads/2013/12/USA-Recommendations-2020.pdf>.

⁹ FOOD SAFETY FOR DONATIONS, *supra* note 4 at 6-7.

¹⁰ *Id.* at 9.

A. Specifying that only certain products are ineligible for donation promotes the message that food in general is able to be donated.

FSIS' structure of the Guideline is written in a way that makes clear that the default rule is that meat and poultry should be eligible for donation, rather than having the default be that food cannot be donated. This approach allows for interested parties to assume that food products are eligible for donation unless they are included in one of the few ineligible categories that will prevent any unsafe food from being donated. FSIS highlights that food is ineligible for donation only in a few select circumstances, namely: if it is adulterated or if it is an experimental product.¹¹ The Guideline is clear and well-formatted, conveying its information in a way that is accessible to meat and poultry establishments that are seeking to see if their products may be donated. By clarifying that food may be donated unless it is adulterated or experimental, the message conveyed is one that promotes the donation of food rather than discourages such activities.

B. Clarifying that economically adulterated or misbranded products may still be eligible for donation will help prevent safe food from being discarded.

Food products that have been mislabeled are not necessarily unsafe for consumption. In fact, sometimes food is not offered for sale specifically because there was a mistake or error in the labeling. Separating economically adulterated and misbranded products from other forms of adulteration, and clarifying that economically adulterated products can be donated is a clear and straightforward way of balancing the reduction of food waste with the safety of consumers. This Guideline allows for donors and recipients of economically adulterated food to have increased confidence that such food is still safe for human consumption.

FSIS' clarification that donation of economically adulterated or misbranded products is allowed so long as they contain a "Not for Sale" label is also consistent with the goal of ensuring such food not find its way back into the market. By requiring the statement "Not for Sale," the Guideline allows food to be donated if it is mislabeled in ways that does not make it unsafe, while avoiding any concerns of fraud regarding its market value. The previous temporary label approval process was correctly dismissed, as it is burdensome and unnecessary to request temporary label approval if there are no health concerns raised by the product. By requiring a temporary label only for foods that contain ingredients of public health concern or have export-specific labels, FSIS's Guideline allows for organizations to more easily donate food that is safe to consume.

The distinction that the Guideline makes between economic adulteration and other forms of adulteration is also clear and consistent with other recent FSIS policies.¹² Using similar language creates consistency in the overall approach towards economically adulterated products that FSIS has adopted.

¹¹ FSIS GUIDELINE DOCKET NO. FSIS-2020-0030, *supra* note 2 at 9.

¹² *E.g.*, U.S. DEP'T OF AGRIC., FSIS DIRECTIVE 7020.1: VERIFYING DONATION OF MISBRANDED AND ECONOMICALLY ADULTERATED MEAT AND POULTRY PRODUCTS TO NON-PROFIT ORGANIZATIONS (Jan. 26, 2016).

C. The guidance on the donation of past-date products is clear and consistent with previous USDA guidance on standard quality date labels.

FSIS' Guideline clarifies the meaning of voluntary date labels that are often a source of confusion, and correctly promotes the donation of food past its quality date as a safe practice. Many Americans are uncertain about the meaning of date labels on packaging, and a majority of adults in the United States incorrectly identify the meaning of terms such "best by" or "sell by".¹³ Contrary to the understanding of most Americans, food date labels are generally intended as indicators of freshness or quality, not indicators of when a product will become unsafe. According to estimates by ReFED, confusion over date labels results in \$2.4 billion in waste per year.¹⁴ This confusion over date labels extends to donors and recipients of donated food as well, with much time being spent educating food donors and anti-hunger organizations about the meaning of date labels.¹⁵ Furthermore, some states and localities even prohibit donation of food past the date, on the mistaken belief that it is unsafe to consume past-date foods.¹⁶

FSIS has previously clarified that the use of "best if used by" or "sell by" labels is voluntary and that such labels indicate quality, not safety.¹⁷ In 2016, FSIS released guidance recommending that all meat and poultry producers standardize their date labels on packages to use the term "Best if Used By" when a date label is used to indicate product quality.¹⁸ This Guideline is consistent with that 2016 guidance, clarifying that food can be donated past date. The Guideline rightly suggests that rather than rely on the date label, food recovery organizations should check for spoilage, recognizing that voluntary date labels are generally quality indicators and are ultimately unable to inform consumers regarding product safety. While food past the "Best if Used By" date or other quality date is not unsafe, if in the future, a different date label is used to indicate food safety concerns, donation past-date of foods with such label may not be advisable. The Guideline also is consistent with numerous recommendations to allow for the donation of food past a quality date.¹⁹ This policy reflects the fact that food may be safe and wholesome despite being past its quality date, and there should be no restriction on donation of wholesome food simply because that date has passed.

¹³ HARVARD FOOD LAW AND POL'Y CLINIC AND NAT'L RES. DEF. COUNCIL, *THE DATING GAME: HOW CONFUSING FOOD LABELS LEAD TO FOOD WASTE IN AMERICA* [hereinafter *DATING GAME*], 19 (2013), <http://www.chlpi.org/wp-content/uploads/2013/12/dating-game-report.pdf>;

¹⁴ *Standardized Date Labels*, ReFED, <https://insights-engine.refed.com/solution-database/standardized-date-labels>.

¹⁵ *DATING GAME*, *supra* note 13 at 22.

¹⁶ *Id.* at 21.

¹⁷ 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>.

¹⁸ *See id.*

¹⁹ *E.g.*, *DON'T WASTE, DONATE*, *supra* note 1 at 21; *see also* ReFED, *A ROADMAP TO REDUCE U.S. FOOD WASTE BY 20 PERCENT 73* (2016), http://www.refed.com/downloads/ReFED_Report_2016.pdf.

II. Points of Clarification and General Recommendations

Recommendation 1: Clarify the "Donation Flowchart" to show certain state inspected and passed products can also be eligible for donation.

In the Donation Flowchart²⁰ on page seven of the Guideline, FSIS successfully distills the common questions food donors face when dealing with meat and poultry products, identifying which foods can generally be donated. The Flowchart is easy to comprehend and covers the most significant issues in this space. Overall, the Flowchart will be a welcome tool for food donors and make it easier for safe products to avoid waste and get to those who need them. However, the diagram suggests that products not federally inspected and passed are ineligible for donation, which contradicts current practice and later portions of the Guideline.

Under the Cooperative Interstate Shipment ("CIS") program, certain state-inspected facilities can operate in the same manner as those that are federally inspected.²¹ The CIS program allows state-inspected facilities to operate under state food inspection protocols but also meet federal standards.²² As a result, facilities that operate as part of the CIS program can participate in interstate commerce.²³ There are currently eight states²⁴ and eighty-eight facilities participating in the CIS program.²⁵ The Donation Flowchart implies that non-federally-inspected meat and poultry products are categorically ineligible for donation, but that goes against the "Donating State-Inspected Products" section of the Guideline. As the Guideline later notes, goods produced in facilities operating under the CIS program are eligible for interstate donation.²⁶ And, even if a facility does not participate in the CIS program, according to the Guideline, it can still donate food products within the state where the facility is inspected.²⁷ Given the CIS program's purpose and the Guideline's instructions, the Flowchart should be amended to reflect that even products that are not federally-inspected can be donated in these circumstances. Perhaps the diagram can include a mini-flowchart for state-inspected products to show donors whether their products are eligible for in-state or out-of-state donation. The Donation Flowchart will become more accurate and user-friendly if these clarifications are made.

Recommendation 2: Provide insight on the Bill Emerson Good Samaritan Act ("Emerson Act") and increase awareness of liability protections among potential food donors.

The FSIS should add a section to the Guideline to provide insight on the Bill Emerson Good Samaritan Food Donation Act in order to lessen liability concerns for potential food

²⁰ FSIS GUIDELINE DOCKET NO. FSIS-2020-0030, *supra* note 2 at 7.

²¹ *Id.* at 12.

²² COOPERATIVE INTERSTATE SHIPMENT (CIS) PROGRAM BROCHURE, U.S. DEP'T OF AGRIC. (Oct. 2016), <https://www.fsis.usda.gov/wps/wcm/connect/d6c1664f-674e-4e46-bf79-1184ca1a8949/CIS-Brochure.pdf?MOD=AJPERES>.

²³ *Id.*

²⁴ These states are; Indiana, Iowa, Maine, Missouri, North Dakota, Ohio, Vermont, Wisconsin. *See Currently Participating States*, U.S. DEP'T OF AGRIC (last updated Jan. 6, 2021), <https://www.fsis.usda.gov/wps/portal/fsis/topics/inspection/state-inspection-programs/cis/states-participating>.

²⁵ *See Cooperative Interstate Shipment (CIS) Establishments*, U.S. DEP'T OF AGRIC. (last updated Jan. 21, 2021), <https://www.fsis.usda.gov/wps/portal/fsis/topics/inspection/state-inspection-programs/cis/CIS-Establishments>.

²⁶ FSIS GUIDELINE DOCKET NO. FSIS-2020-0030, *supra* note 2 at 12.

²⁷ *Id.*

donors. The Guideline offers an excellent opportunity to generate awareness and emphasize existing comprehensive immunity for potential liability stemming from food donations. For many establishments, the fear of liability is a strong deterrent to donating food.²⁸ A survey done by the Food Waste Reduction Alliance found that 25 percent of retailers and 50 percent of food manufacturers mentioned liability concerns as a central factor cutting against donating food.²⁹ Given the protections that the Emerson Act provides, the persistence of fear of liability among potential donors is concerning, and USDA should take steps to address it whenever possible. The Emerson Act establishes a federal baseline for civil and criminal liability to food donors and nonprofit food recovery organizations as long as the donation meets specific requirements.³⁰ The broad liability protection afforded by the Emerson Act aims to incentivize food donations; however, donors often remain unaware of the protections. Even though the Guideline will help donors follow USDA instructions on how to donate food, they may still choose not to donate for fear of legal liability in the unlikely event someone gets sick, thus, including this information in the same place could make the Guideline even more useful.

The Guideline is a critical document that will inform many establishments and facilities on food donation. A brief section in the Guideline on the Emerson Act and its role in the food donation landscape will reduce liability fears among donors, and help USDA meet its duty to raise awareness of the Emerson Act.³¹ Ultimately, as more potential donors become aware of the Emerson Act and its coverage, it will ensure that a more significant proportion of safe, edible food products avoid ending up in landfills.

Recommendation 3: Clarify the guidance on Custom Meat Processing and Slaughter.

The table outlining whether one is allowed to donate meat slaughtered and/or processed under an exemption to federal inspection states that custom slaughtered/processed meat is not eligible for donation.³² While the statement may be correct for interstate donation, it does not reflect the current practice at the state level. Under existing regulations, a custom slaughtering and/or processing facility does not have to register with the FSIS or undergo an FSIS approval process.³³ Instead, state and local authorities permit and inspect facilities exempted from federal inspection.³⁴ Therefore, the relevant licensing requirements and general operational rules for custom processing/slaughter facilities are set at a local or state level. While the FSIS continues to review compliance with FMIA and regulatory requirements, this is done on an annual basis.³⁵

States and local authorities have an essential role in regulating custom meat slaughter/process, and there are donation programs that incorporate meat products originating

²⁸ 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/>.

²⁹ FOOD WASTE REDUCTION ALL., *supra* note 6 at 14.

³⁰ 42 U.S.C.A §1791.

³¹ Agriculture Improvement Act, H.R. 2, 115th Cong. § 12504(e)(1) (2018).

³² FSIS GUIDELINE DOCKET NO. FSIS-2020-0030, *supra* note 2 at 10.

³³ 9 CFR §303.1; *see also* U.S. DEP'T OF AGRIC., FSIS GUIDELINE FOR DETERMINING WHETHER A LIVESTOCK SLAUGHTER OR PROCESSING FIRM IS EXEMPT FROM THE INSPECTION REQUIREMENTS OF THE FEDERAL MEAT INSPECTION ACT, 5 (2018).

³⁴ *Id.*

³⁵ *Id.*

from such facilities.³⁶ Therefore, under this section, there could be a footnote stating that states regulate most custom butchering, and that donors should look to state or local authorities for guidance on whether such products can be donated. Given the prevalence of such donation programs at the state level, especially for game meat, federal guidance on this matter might unduly interfere with state policy.³⁷ The Guideline can instruct custom slaughter facilities to check with their relevant state authorities about the ability to donate meat products. As one option, the meat donation table can borrow the language from the poultry table immediately below it and state “Yes, intrastate” for such donations. Also, since game meat technically is under FDA’s jurisdiction, the table should be more equivocal on whether facilities can donate such foods to account for possible FDA regulations, in addition to any state laws as noted above. Clarifying the table will help avoid confusion and potential jurisdictional concerns, as well as invalidating donation practices that are currently allowed and encouraged under state law in many states.

Recommendation 4: Clarify that the Donations Recipients mentioned in the document are not exclusive but illustrative.

Under the “Donations Recipients” section on page eleven, the Guideline lists schools and non-profit fundraisers as two possible destinations for donations. While these are two important examples of potential recipients, they do not establish the full list of possible recipients. In its literature, the USDA has stated that food banks, food pantries, soup kitchens, and homeless shelters are other important food recipient organizations.³⁸ The Guideline should make it clear that the list it provides in that section is not meant to be exhaustive, or should add a longer list of potential recipients. For those donors that will rely on the Guideline, the Guideline should make clear that other donation recipients are possible.

Recommendation 5: Further explain the purpose of the Retail Exemption section.

It is unclear what the last section of the Guideline on “Retail Exemption” adds to the document. In the immediately preceding “Relabeling” section, the Guideline already covers the retail exemption’s main points and discusses its implications for possible interstate or intrastate donations. While the document appears to differentiate these sections as labeling and preparation, the distinction does not come across clearly. Instead, the redundancy is confusing and does not provide any additional guidance. Accordingly, we recommend that the FSIS clarify the retail exemption guidance or consider removing that section.

³⁶ See *Hunters for the Hungry Program*, Feeding Texas, <http://www.feedingtexas.org/solutions/hunters-for-the-hungry/> .

³⁷ Alaska, Connecticut, Kentucky, Montana, Nevada, and New Mexico are some states which have laws that permit the donation of game meat. See e.g. ALASKA ADMIN. CODE tit.18 § 31.205 (2017); CONN. GEN. STAT. ANN. § 26-78a (West 2017); KY. REV. STAT. ANN. § 217.217 (West 2017); MONT. CODE ANN. 87-1-293 (West 2017); NEV. ANN. CODE ANN. 446.128 (West 2017); N.M. CODE R. § 7.6.2.9.

³⁸ See *Donating*, U.S. DEP’T OF AGRIC., <https://www.usda.gov/foodlossandwaste/donating>.

III. Conclusion

Harvard Law School's Food Law and Policy Clinic applauds FSIS for creating this important Guideline on the issue of food safety rules for meat and poultry donations. While there are several areas that could be explained more clearly to avoid confusion, overall FSIS' Guideline is an excellent example of the needed federal leadership to support the recovery of healthy surplus food and to reduce food waste. This Guideline will make it easier for food donors to make their surplus food available, and will allow non-profit organizations to more easily obtain and distribute food that is both safe and wholesome, while also ensuring that unsafe food is not donated.

Thank you for your consideration of FLPC's comments and recommendations.

Sincerely,

A handwritten signature in cursive script that reads "Emily Broad Leib".

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