

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 56

[Docket No. PY-98-006]

RIN 0581-AB56

Eligibility Requirements for USDA Graded Shell Eggs

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Agricultural Marketing Service (AMS) proposes to amend the regulations governing the voluntary shell egg grading program. Media reports in April 1998 raised concerns about the practice of repackaging eggs. The proposed revisions would provide that in order to be officially identified with a USDA consumer grademark, shell eggs must not have been previously shipped for retail sale. The proposal would also amend the definition of the term "eggs of current production" (currently eggs no older than 30 days) thereby making eggs that were laid more than 15 days before the date of packing ineligible for official grading. However, interested parties are invited to submit comments proposing other periods of time that are viewed as being more appropriate. AMS is particularly interested in receiving comments regarding the period of between 15 to 30 days. In addition, a definition of the term "shipped for retail sale" would be added to the regulations. These revisions would strengthen the integrity of the USDA grade shield by making ineligible for grading certain types of eggs.

DATES: Comments must be received on or before September 27, 1999.

ADDRESSES: Send written comments to Douglas C. Bailey, Chief, Standardization Branch, Poultry Programs, Agricultural Marketing Service, U.S. Department of Agriculture, STOP 0259, 1400 Independence Avenue, SW, Washington, D.C. 20250-

0259. Comments may be faxed to 202/690-0941.

State that your comments refer to Docket No. PY-98-006 and note the date and page number of this issue of the **Federal Register**.

Comments received may be inspected at the above location between 8:00 a.m. and 4:30 p.m., Eastern Time, Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Rex A. Barnes, Chief, Grading Branch, 202/720-3271.

SUPPLEMENTARY INFORMATION:

Background

AMS administers a voluntary grading program for shell eggs under the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621 *et seq.*). Any interested person, commercial firm, or government agency that applies for service must comply with the terms and conditions of the regulations and must pay for the services rendered. AMS graders monitor processing operations and verify the grade and size of eggs packaged into packages bearing the USDA grade shield. Plants in which these grading services are performed are called official plants. Currently in the United States, about one-third of the eggs marketed in shell form for human consumption are processed under the voluntary grading program.

Shell egg producers either pack their eggs at the site where the eggs are produced (an "in-line" operation), or ship their eggs to a processing facility or egg processor located elsewhere (an "off-line" operation). Egg processors also sell and ship eggs among themselves to accommodate local imbalances in supply. Once eggs are washed, sized, and packaged for retail sale, they are shipped to retailers for distribution to the ultimate consumer.

Occasionally a retail store may have an excess inventory of eggs. They may have overstocked for a seasonal promotion (e.g., Easter or Christmas) or the expiration date printed on the cartons may be approaching. Retailers either dispose of these eggs, give the eggs to local charitable feeding operations before the expiration date, or return the eggs to the processor. The processor may, in turn, repackage the eggs or process them into liquid, frozen, or dried egg products. If repackaged, the eggs are removed from their original package, such as a carton or open tray

(known as a "flat"), and placed into a new package which bears a pack date that is the same or different than on the original package. Eggs are usually, but not always, intermixed with other unprocessed eggs, rewashed, and regraded before repacking. The option of repackaging eggs has always been available to egg processors; there are no Federal regulations addressing the practice and Agency personnel have observed very little of it in official plants.

On April 7, 1998, a report was televised about an egg processor's practice of repackaging eggs. This report questioned the food safety and quality implications of this practice. This rule addresses the quality issues.

On April 17, 1998, USDA issued a written notice to the industry announcing suspension of the repackaging of eggs packed under the voluntary grading program while the Department reviewed its policies on egg repackaging. The suspension, effective April 27, ensured that eggs shipped for retail sale and returned were specifically ineligible for USDA-grade identification.

This proposed rule is the result of the Department's review of the repackaging issue. It would prohibit the USDA grade identification of eggs previously shipped for retail sale or eggs laid more than 15 days before date of packing. AMS is also requesting comments on alternate periods, particularly those between 15 and 30 days, that are viewed as being a more appropriate limit.

Eggs are at their peak of quality when they are laid and, over time, quality will decline. The rate of decline varies according to a variety of factors, with the most important being elapsed time since lay, storage temperature, and storage humidity. To maintain the integrity of the quality standards and the grade shield, only "eggs of current production" may be officially graded. AMS has defined those eggs to be shell eggs which have moved through usual marketing channels since the time they were laid and have not been held in refrigerated storage in excess of 30 days. In practice, AMS requires eggs being officially identified to be no older than 30 days on the day of packaging.

The first definition for "eggs of current production" was added to the regulations March 1, 1955, and included a 60-day requirement, which was

reduced to 30 days August 1, 1963. This definition allowed buyers and sellers to differentiate between relatively fresh eggs and cold storage or storage eggs. Commercial cold storage of eggs began in the U.S. around 1890, when egg production was seasonal. Until the 1950s, it was common for eggs to be held in refrigerated storage for up to 6 months. Cold storage could hold the spring and summer production surplus (about 50 percent of the annual production) for release during periods of relative scarcity in autumn and winter, thus avoiding drastic supply and price fluctuation. Modern breeding and flock management practices have virtually eliminated seasonal differences in egg production, so cold storage is no longer necessary or even practical. In addition, technological advances in the handling and marketing of shell eggs have reduced the time it takes for eggs to move through normal marketing channels and provide optimum conditions for maintaining egg quality.

Four dates are associated with the marketing of shell eggs. These, in order of occurrence, are the date of lay, the date of packaging, the expiration date, also known as the "Sell By" date, and the "Use By" date. The "Use By" date suggests the date after which product quality would likely be significantly diminished. Federal law does not require any of these dates to be present on shell egg packaging materials such as egg cartons. However, under the USDA grading program, the date of packaging is required, and if the expiration date is present, it can be no more than 30 days after the packaging date.

AMS believes that current shell egg marketing practices readily allow all processors to package shell eggs within 15 days of lay. However, as currently permitted by regulation, processors may on occasion repackage product returned from retail marketing channels or product stored in the processor's cooler that is approaching the current 30-day limit. In this way, processors can extend the number of days available to market the product by establishing a new, later expiration date. An April 1998 media story reported this practice and raised consumer awareness and concern about its food safety and quality implications.

This proposed rule responds to consumer concerns about product quality by proposing to make retail-returned eggs ineligible for official identification and proposing a shorter time limit for packaging shell eggs under the USDA grading program. This rule would not add or change any program requirements regarding the expiration date or the "Use By" date. By prohibiting retail-returned eggs and eggs

older than 15 days from being officially graded and packaged, AMS believes that consumers who purchase officially graded product will receive product that is free of unwanted variation in egg quality that may be caused by the occasional blending of older, lower quality eggs with more recently laid, higher quality eggs.

AMS has tentatively concluded that reducing the time between date of lay and date of packaging will enhance the quality of USDA consumer graded eggs. Differences in the internal quality of eggs are expressed in Haugh units, a standardized quality scale determined primarily by the height of the albumen, or "white", of a broken-out egg under laboratory conditions. In one case study, AMS found that, under proper storage conditions, the Haugh unit average for eggs approximately 15 days old was 72, whereas the Haugh unit average for eggs approximately 30 days old was 68. These findings are consistent with the loss of quality normally associated with eggs of increasing age.

AMS has also tentatively concluded that industry practice readily allows eggs to be packaged within a period shorter than the current 30 days from date of lay. Discussions with industry members and Agency personnel familiar with current industry practice suggest that a 15-day limit would allow sufficient time for both in-line and off-line processors to trade, ship, process, and package eggs. In order to provide consumers with high quality shell eggs, AMS identifies best operational practices for processors that pack officially identified eggs. Accordingly, AMS is proposing to require that all eggs graded by USDA be no older than 15 days on the day of packaging by amending the definition of current production to mean shell eggs that are no more than 15 days old.

However, while formulating this proposal, AMS understood from some in the industry that a 15-day period may be an undue burden in certain situations. For example, smaller size eggs are sometimes stored to accumulate sufficient volumes for processing, and heavy demand for processing during holiday periods may extend the time between the date of lay and date of packaging. Therefore, although AMS still believes that a 15-day limit between the date of lay and date of packaging would generally allow sufficient time for processors to trade, ship, process, and package eggs, we are inviting interested persons to submit comments proposing other periods of time that are viewed as being more appropriate. AMS is especially interested in receiving comments regarding other limits

between 15 to 30 days, for example a 21-day limit.

On May 19, 1998, the Food Safety and Inspection Service (FSIS) and the Food and Drug Administration (FDA) jointly published an advance notice of proposed rulemaking that set forth a farm-to-table strategy that may decrease the food safety risks associated with *Salmonella enteritidis* in shell eggs (63 FR 27502). The comment period closed August 17, 1998. The actions proposed by the two agencies included reviews of potential food safety risks associated with the practices of rewashing and repackaging shell eggs and of expiration dating practices that might mislead consumers. Future regulatory actions taken by FSIS and FDA would apply to all packaged shell eggs, including those packaged under USDA's voluntary grading program, which addresses quality.

Proposed changes

This proposed rule would further restrict the eligibility requirements for shell eggs packed under the voluntary AMS quality grading program.

The proposal would change the definition for *Eggs of current production* (§ 56.1) by specifying that the term denotes eggs that are no more than 15 days old. This definition would require eggs being officially identified to be no older than 15 days on the day of packaging instead of the present 30-day limit. Additionally, reference to the term "Refrigerator or storage eggs" that is used to define eggs held in excess of 30 days is removed because it is obsolete. It is a term that once referred to eggs which had been put into cold storage during periods of high production to be released during periods of relative scarcity. This is no longer industry practice and therefore the term is no longer needed.

The proposal adds a definition for the term *Shipped for retail sale* (§ 56.1). This term would mean shell eggs that are forwarded from the processing facility for distribution to the ultimate consumer. This includes eggs forwarded for sale to wholesalers, brokers, retailer warehouses, retailer stores, or other distribution points in the marketing chain.

Finally, the proposal revises the requirements of shell eggs to be identified with consumer grademarks (§ 56.40). Eggs "shipped for retail sale" that are returned to an egg processor would be ineligible for USDA consumer grade identification, even if they are eggs of current production.

Executive Order 12866 and Effect on Small Entities

This proposed rule has been determined to be significant for purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget (OMB). In addition, pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the AMS has considered the economic impact of this proposed rule on small entities and has determined that its provisions would not have a significant economic impact on a substantial number of small entities.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. The Small Business Administration defines small entities that produce and process chicken eggs as those whose annual receipts are less than \$9,000,000 (13 CFR 121.201). Approximately 550,000 egg laying hens are needed to produce enough eggs to gross \$9,000,000.

Currently, the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621 *et seq.*) authorizes a voluntary grading program for shell eggs. Shell egg processors that apply for service must pay for the services rendered. These user fees are proportional to the volume of shell eggs graded, so that costs are shared by all users. Shell egg processors are entitled to pack their eggs in packages bearing the USDA grade shield when AMS graders are present to certify that the eggs meet the grade requirements as labeled. Plants in which these grading services are performed are called official plants. Shell egg processors who do not use USDA's grading service may not use the USDA grade shield. There are about 700 shell egg processors registered with the Department that have 3,000 or more laying hens. Of these, 130 are official plants that use USDA's grading service and would be subject to this proposed rule. Of these 130 official plants, 14 meet the small business definition.

Repackaging is the practice of removing eggs from their original package and repacking them into a new package, with a pack date that is the same or different than on the original package. Eggs are at their peak of quality when they are laid and, over time, quality will decline. The repackaging of retail-turned eggs extends the time before those eggs reach the ultimate consumer. Since August 1, 1963, AMS has required eggs being officially

identified to be no older than 30 days on the day of packaging.

In April 1998, the Agency surveyed its graders in the 130 official plants to determine the repackaging practices of those plants. Results of the survey indicated that 4 of the 130 plants had infrequently repackaged retail-turned eggs into shielded cartons during the previous year, usually during the holidays. No official plants that meet the definition for small businesses repackaged retail-turned eggs into shielded cartons.

On April 27, 1998, AMS suspended by written notice to the industry the repackaging of eggs into packages bearing the USDA grade shield when retailers had returned those eggs to the processor. The proposed revisions would provide that in order to be officially identified with a USDA consumer grademark, shell eggs must not have been previously shipped for retail sale.

This proposal would also amend the definition of the term "eggs of current production," thereby making eggs that were laid more than 15 days before the date of packing ineligible for grading. AMS is also requesting comments on alternate periods, particularly those between 15 and 30 days, that are viewed as being a more appropriate limit. In addition, a definition of the term "shipped for retail sale" would be added to the regulations.

No adverse industry-wide impact has been observed since AMS suspended the repackaging of eggs returned by retailers, primarily because of the infrequent use of egg repackaging by official plants. Additionally, AMS believes that the proposed 15-day limit from date of lay to date of packaging for eggs officially identified with a USDA consumer grademark minimizes unwanted variations in egg quality while allowing sufficient time for the normal wholesale trading and shipping of shell eggs to be completed. AMS expects this limit to have little or no economic impact on shell egg producers or processors, including those that may be small businesses. Shell egg processors can market eggs that are not of current production by packaging them without USDA grade identification. Since the difference in economic return to processors between USDA graded versus non-USDA graded eggs is about one cent per dozen, the economic impact is minimal for official plants and non-official plants that may later elect to use the grading service. Optionally, processors may divert eggs to the production of liquid, frozen, and dried egg products. By doing so, they

can recoup approximately 50 percent of the products' original value.

AMS considered leaving the 30-day requirement unchanged. However, AMS believes industry advances now allow wholesale trading and shipping to be completed in time to allow shell eggs to be packaged by processors within 15 days of lay. By proposing to change the requirement to a shorter period, AMS and the industry can better ensure the quality of officially identified consumer grade eggs.

While formulating this proposal, AMS understood from some in the industry that a 15-day period may impose an undue burden in certain situations. For example, smaller size eggs are sometimes stored to accumulate sufficient volumes for processing, and heavy demand for processing during holiday periods may extend the time between the date of lay and date of packaging. Therefore, although AMS believes that a 15-day limit between the date of lay and date of packaging would generally allow sufficient time for processors to trade, ship, process, and package eggs, AMS is seeking comments about the impact of the proposed 15-day limit, particularly on small businesses. AMS is also interested in receiving comments regarding other limits between 15 to 30 days, for example a 21-day limit.

Executive Orders 12988 and 12898

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this rule.

Pursuant to Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations," AMS has considered the potential civil rights implications of this proposed rule on minorities, women, or persons with disabilities to ensure that no person or group shall be discriminated against on the basis of race, color, sex, national origin, religion, age, disability, or marital or familial status. This included those persons who are employees, program beneficiaries, or applicants for employment or program benefits in the voluntary shell egg grading program. Adoption of the proposed rule would not require official plants to relocate or alter their operations in ways that could adversely affect such persons or groups. Nor

would it exclude any persons or groups from participation in the voluntary shell egg grading program, deny any persons or groups the benefits of the grading program, or subject any persons or groups to discrimination.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection and recordkeeping requirements included in this rule, and there are no new requirements. The assigned OMB control number is 0581-0128.

List of Subjects in 7 CFR Part 56

Eggs and egg products, Food grades and standards, Food labeling, Reporting and recordkeeping requirements.

For reasons set forth in the preamble, it is proposed that 7 CFR part 56 be amended as follows:

PART 56—VOLUNTARY GRADING OF SHELL EGGS

1. The authority citation for part 56 continues to read as follows:

Authority: 7 U.S.C. 1621-1627.

2. Amend § 56.1 by revising the term *Eggs of current production* and adding a definition for the term *Shipped for retail sale* to read as follows:

§ 56.1 Meaning of words and terms defined.

* * * * *

Eggs of current production means shell eggs that are no more than 15 days old.

* * * * *

Shipped for retail sale means shell eggs that are forwarded from the processing facility for distribution to the ultimate consumer.

* * * * *

In § 56.40 paragraph (c) is revised to read as follows:

§ 56.40 Grading requirements of shell eggs identified with consumer grademarks.

(a) * * *
* * * * *

(c) In order to be officially identified with a USDA consumer grademark, shell eggs shall:

- (1) Be eggs of current production;
- (2) Not possess any undesirable odors or flavors; and
- (3) Not have previously been shipped for retail sale.

Dated: July 22, 1999.

Kenneth C. Clayton,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 99-19093 Filed 7-26-99; 8:45 am]

BILLING CODE 3410-02-P

FEDERAL TRADE COMMISSION

16 CFR Part 312

Children's Online Privacy Protection Rule

AGENCY: Federal Trade Commission.

ACTION: Initial regulatory flexibility analysis.

SUMMARY: The Commission is publishing this initial regulatory flexibility analysis to aid the public in commenting upon the small business impact of its proposed rule implementing the Children's Online Privacy Protection Act ("COPPA" or "the Act").

DATES: Written comments must be submitted on or before August 6, 1999.

ADDRESSES: Written comments should be submitted to Secretary, Federal Trade Commission, Room H-159, 600 Pennsylvania Avenue, NW, Washington, DC 20580. The Commission requests that commenters submit the original plus five copies, if feasible. To enable prompt review and public access, comments also should be submitted, if possible, in electronic form, on either a 5¼ or a 3½ inch computer disk, with a disk label stating the name of the commenter and the name and version of the word processing program used to create the document. (Programs based on DOS or Windows are preferred. Files from other operating systems should be submitted in ASCII text format.)

Alternatively, the Commission will accept comments submitted to the following e-mail address <kidsrule@ftc.gov>. Individual members of the public filing comments need not submit multiple copies or comments in electronic form. All submissions should be captioned: "Children's Online Privacy Protection Rule—IRFA Comment, P994504." Comments will be posted on the Commission's Web site: <<http://www.ftc.gov>>.

FOR FURTHER INFORMATION CONTACT: Toby Milgrom Levin, (202) 326-3156, Loren G. Thompson, (202) 326-2049, or Jill Samuels, (202) 326-2066, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, 601 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: This notice supplements the Commission's

initial notice of proposed rulemaking, 64 FR 22750 (Apr. 27, 1999), for a Children's Online Privacy Protection Rule, 16 CFR part 312, to implement the requirements of the Children's Online Privacy Protection Act of 1998 ("the Act"), title XIII, Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, 1112 Stat. 2681, ____ (Oct. 21, 1998). The Commission's notice of proposed rulemaking did not include an initial regulatory flexibility analysis pursuant to the Regulatory Flexibility Act (5 U.S.C. 603) based on a certification that the proposed rule will not have a significant economic impact on a substantial number of small entities (5 U.S.C. 605). See 64 FR 22761.

In the Notice of Proposed Rulemaking, the Commission concluded that the proposed rule's requirements are expressly mandated by the COPPA. In the Commission's view, the Act's requirements account for most, if not, all of the economic impact of the proposed rule, and the Commission's proposal adds little, if any, additional independent compliance burden to the statutory requirements. For example, as reiterated below, the proposed rule consistently incorporates the overall "performance" standards set forth in the statute rather than mandating any particular compliance method or approach. See 5 U.S.C. 603(c)(3). Moreover, certain provisions of the rule (e.g., definitions taken directly from the statute, enforceability of rule by the Commission and the states, severability of the rule's provisions) would appear to have no material effect on the costs or burdens of compliance under the rule for regulated entities, regardless of size. Thus, the marginal cost, if any, that would be imposed by the rule on regulated entities, including small entities, would not be substantial. Since the Regulatory Flexibility Act does not require an initial (or final) regulatory flexibility analysis when a "rule" will not have a significant economic impact on a substantial number of small entities (5 U.S.C. 605), such an analysis did not accompany the proposed rule.

Nonetheless, in its Notice of Proposed Rulemaking to implement the COPPA, the Commission expressly invited public comment on the proposed rule's effect on the costs, profitability, competitiveness of, and employment in small entities to ensure that no significant economic impact on a substantial number of small entities would be overlooked. See 64 FR 22761.

In response, the Commission received comments suggesting, among other things, that the Commission publish an initial regulatory flexibility analysis