



This document is scheduled to be published in the Federal Register on 09/16/2016 and available online at <https://federalregister.gov/d/2016-22246>, and on [FDsys.gov](http://FDsys.gov)

## **DEPARTMENT OF AGRICULTURE**

### **Agricultural Marketing Service**

#### **7 CFR Part 56**

**[Doc. No. AMS-LPS-15-0044]**

### **Amendment to the Definition of “Condition” and Prerequisite Requirement for Shell Eggs Eligible for Grading and Certification Stated in the Regulations Governing the Voluntary Grading of Shell Eggs**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Agricultural Marketing Service (AMS) will amend the Regulations Governing the Voluntary Grading of Shell Eggs to clarify the definition of “condition” and revise the prerequisite requirement for shell eggs eligible for voluntary USDA grading and certification.

**DATES:** This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** David Bowden, Chief, Standardization Branch, Quality Assessment Division; Livestock, Poultry, and Seed Program, Agricultural Marketing Service, U.S. Department of Agriculture; 1400 Independence Avenue, SW; Room 3932-S, STOP 0258; Washington, D.C. 20250, by facsimile to (202) 690-2746; or via e-mail to [David.Bowden@ams.usda.gov](mailto:David.Bowden@ams.usda.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

Section 203(c) of the Agricultural Marketing Act of 1946 (AMA) (7 U.S.C. 1621-1627) directs and authorizes the Secretary of Agriculture “to develop and improve standards of quality, condition, quantity, grade and packaging, and recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practices.” The U.S. Department of Agriculture (USDA) is committed to carrying out this authority in a manner that facilitates the marketing of agricultural products while maintaining the integrity of the USDA grademark. Shell egg grading is a voluntary program provided under AMA and offered on a fee-for-service basis. It is designed to assist in the orderly marketing of shell eggs by providing the official certification of egg quality, size, condition, and other factors.

This amendment is in accordance with recommendations stated in the 2012 Audit Report, USDA Controls Over Shell Egg Inspections, issued by the USDA Office of Inspector General (OIG). In that report, OIG stated the regulatory definition of “condition” for shell eggs was confusing as it relates to quality and food safety. OIG also stated the integrity of the USDA grademark for quality was not adequately protected from adulterated shell eggs.

AMS will revise the definition of “condition” to remove any food safety implications resulting from the use of the term “wholesomeness” and clarify that AMS’ role in grading and certification of shell eggs is solely for a quality determination. The revised definition will remove the term “wholesomeness” and state that “condition” is a characteristic detected by a sensory examination. The presence of microorganisms, specifically Salmonella Enteritidis (SE) or other pathogens, in the content of an egg cannot be detected during such an examination. The Food and Drug Administration

(FDA) and the USDA Food Safety and Inspection Service not AMS, maintain jurisdiction for food safety related issues associated with shell eggs.

AMS will also revise the prerequisite requirement of shell eggs eligible for USDA grading and certification. The revision will prohibit the use of SE-adulterated or recalled shell eggs from being presented to USDA for grading and certification. This action protects the integrity of the USDA grademark for quality and is consistent with current AMS policy implemented subsequent to the referenced 2012 OIG audit.

### **Comments**

A proposed rule to amend the definition of “condition” and prerequisite requirements for shell eggs eligible for grading and certification stated in the Regulations Governing the Voluntary Grading of Shell Eggs was published in the Federal Register (81 FR 23188) on April 20, 2016. Comments on the proposed rule were solicited from interested parties until June 20, 2016. One comment was received from a representative of an egg farmer’s organization. The comment received was in support of amending the definition of “condition” and the prerequisite requirements for shell eggs eligible for grading and certification. No changes were made to the proposed rule based on the comment received.

### **Executive Order 12866, 13175 and 13563**

USDA is issuing this final rule in conformance with Executive Orders 12866, 13175 and 13563. This rule has been reviewed under Executive Orders 12866, 13175 and 13563. The rule has determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget. The rule does not promote policies with tribal implications. Consistent with the

requirements of Executive Order 13563, the public has had the opportunity to review and comment on the rule; and, the rule also incorporates existing AMS policy on shell eggs eligible for USDA grading and certification.

### **Regulatory Flexibility Act**

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601-602, AMS has performed an initial regulatory flexibility analysis regarding economic effects of this final rule on small entities.

AMS is amending the Regulations Governing the Voluntary Grading of Shell Eggs, 7 CFR Part 56, to revise the definition of the term “condition” to clarify that it relates solely to a quality determination and not food safety. The current regulation definition for “condition” includes the term “wholesomeness” which denotes a food safety connotation. AMS’ role in grading and certification of shell eggs is for a quality determination only. By removing any food safety related terms from the current definition of “condition,” AMS will remove confusion or misunderstanding over use of the term.

Since this change is a technical correction and editorial in nature, and will not result in a change to the way service is provided to our customers, AMS has determined it will not have a financial impact on small entities that utilize our services.

AMS will also revise the prerequisite requirement of shell eggs eligible for USDA grading and certification. The revision will prohibit the use of SE-adulterated shell eggs or recalled shell eggs from being presented to USDA for grading and certification.

The FDA prohibits the use of SE-adulterated shell eggs from being sold to consumers. When shell eggs are suspected of being adulterated with SE, the packing

facility is obligated to test the shell eggs to assure only safe product is distributed to consumers. If shell eggs are found to be adulterated with SE, the FDA will issue a request to the packing facility to voluntarily recall the product, or will exercise its mandatory recall authority to return the product to the origin facility. The product must either be destroyed or reconditioned under FDA supervision.

Since SE-adulterated shell eggs or shell eggs that have been recalled are no longer eligible for distribution to consumers, but are either destroyed or reconditioned under the direction of the FDA, changing the AMS regulation will not have an impact on small entities since those shell eggs are deemed unfit for human consumption.

#### **Executive Order 12988**

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. When this final rule is adopted: (1) All State and local laws and regulations that are inconsistent with the rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings will not be required before parties may file suit in court challenging this rule.

#### **Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), OMB has approved the information collection and recordkeeping requirements included in this final rule, and there are no new requirements. The assigned OMB control number is 0581-0128, as approved on July 8, 2014.

AMS is committed to compliance with the Government Paperwork Elimination Act, which requires government agencies in general to provide the public the option of

submitting information or transacting business electronically to the maximum extent possible.

**E-Government Act**

AMS is committed to complying with the E-Government Act of 2002 to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to government information and services, and for other purposes.

**List of Subjects in 7 CFR Part 56**

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

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

**PART 56 –VOLUNTARY GRADING OF SHELL EGGS**

1. The authority citation for 7 CFR part 56 continues to read as follows:

**Authority:** 7 U.S.C. 1621 et seq.

2. Amend § 56.1 by revising the definition of Condition to read as follows:

**§ 56.1 Meaning of words and terms defined.**

\* \* \* \* \*

Condition means any characteristic detected by sensory examination (visual, touch, or odor), including the state of preservation, cleanliness, soundness, or fitness for human food that affects the marketing of the product.

\* \* \* \* \*

3. Amend § 56.40 by revising paragraphs (c)(2) and (3) and adding paragraphs (c)(4) and (5) to read as follows:

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

\* \* \* \* \*

(c) \* \* \*

- (2) Not possess any undesirable odors or flavors;
- (3) Not have previously been shipped for retail sale;
- (4) Not originate from a layer house environment determined positive for the presence of Salmonella Enteritidis (SE), unless the eggs from the layer house have been sampled and have tested negative for the presence of SE in the eggs; and
- (5) Not originate from eggs testing positive for SE, or not have been subject to a product recall.

Dated: September 12, 2016

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Elanor Starmer  
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Agricultural Marketing Service

[FR Doc. 2016-22246 Filed: 9/15/2016 8:45 am; Publication Date: 9/16/2016]