



**DEPARTMENT OF AGRICULTURE**

**Food Safety and Inspection Service**

**9 CFR Parts 327, 351, 354, 355, 381, 500 and 592**

**[Docket No. FSIS 2019-0001]**

**RIN 0583-AD78**

**Establishing a Uniform Time Period Requirement and Clarifying Related Procedures for the Filing of Appeals of Agency Inspection Decisions or Actions**

**AGENCY:** Food Safety and Inspection Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** The Food Safety and Inspection Service (FSIS) is proposing to amend its regulations to establish a uniform time period requirement for the filing of appeals of certain Agency inspection decisions or actions.

**DATES:** Comments must be received on or before [INSERT DATE 60 DAYS AFTER PUBLICATION].

**ADDRESSES:** FSIS invites interested persons to submit comments on this proposed rule. Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal:* This website provides the ability to type short comments directly into the comment field on this Web page or attach a file for lengthier comments. Go to <https://www.regulations.gov>. Follow the on-line instructions at that site for submitting comments.
- *Mail:* Send to Docket Clerk, U.S. Department of

Agriculture, Food Safety and Inspection Service, 1400 Independence Avenue SW, Mailstop 3758, Washington, DC 20250- 3700.

- *Hand- or courier-delivered submittals:* Deliver to 1400 Independence Avenue SW, Washington, DC 20250-3700.

*Instructions:* All items submitted by mail or electronic mail must include the Agency name and docket number FSIS-2019-0001. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to <https://www.regulations.gov>.

*Docket:* For access to background documents or comments received, call (202) 205-0495 to schedule a time to visit the FSIS Docket Room at 1400 Independence Avenue SW, Washington, DC 20250-3700.

**FOR FURTHER INFORMATION CONTACT:** Rachel Edelstein, Assistant Administrator, Office of Policy and Program Development, Food Safety and Inspection Service, U.S. Department of Agriculture; Telephone: (202) 205-0495.

**SUPPLEMENTARY INFORMATION:**

**Background**

Current regulatory requirements for appeals of FSIS decisions or actions related to inspection activities appear across multiple subsections of the FSIS regulations. For example, several subsections specify time period requirements for the filing of appeals between 48 hours and ten days. The

majority of the subsections specify no time period requirement. The action being proposed would establish a unified appeals time period requirement of 30 calendar days from receipt of notification of the contested inspection decision or action. As such, for some specific types of decisions or actions, currently prescribed appeals filing deadlines would be lengthened. However, in general, new deadlines for appeals would be established, as there are currently no deadlines for the appeal of most Agency decisions or actions.

Current FSIS regulations also provide varied information about appeals requirements and procedures, such as who may file an appeal, where to file an appeal, what information may be submitted with the appeal, and whether the appellant must bear the cost of the appeal if it is determined to be frivolous. Therefore, FSIS is using this opportunity to clarify and simplify inspection appeals procedures generally.

### **Proposed Rule**

FSIS is proposing to add a new subsection to the Agency's Rules of Practice, at 9 CFR part 500, which will set forth the procedures. Specifically, the new subsection will include the following elements:

1. Requiring eligible persons to appeal decisions or actions related to inspection activities within 30 calendar days after receiving notification, either verbally or in writing (via electronic or hard copy communication), of the initial decision or action.

2. Clarifying and simplifying the following Agency requirements and procedures concerning such appeals:
- a. Any establishment subject to mandatory Federal inspection or facility receiving voluntary inspection services under the regulations that believes it has been adversely affected by an applicable decision or action may file an appeal;
  - b. Such appeal must be submitted to the immediate supervisor of the inspector or other Agency employee who made the contested decision or action;
  - c. The appellant may support the appeal by any argument or evidence as to why the appeal should be granted; and
  - d. Eliminating the requirement, currently prescribed in several subsections of the regulations, that the appellant must bear the cost of an appeal of an Agency decision or action if the appeal is determined to be frivolous.

FSIS is also proposing to revise several sections of the Federal regulations (9 CFR 327.10(d)(2), 327.24, 351.21, 354.134, 355.39, 381.35, 381.202(d), 381.204(f)(2), and 592.400) to state that appeals of relevant Agency decisions or actions must be made in accordance with the new Rules of Practice subsection, 9 CFR 500.9. In the 2020 final rule to amend the Agency's egg products inspection regulations, FSIS incorporated egg products plants into coverage of the Rules of Practice (85

FR 68642, October 29, 2020). As such, under this proposed rule, appeals of relevant Agency egg products inspection decisions or actions would also be made in accordance with the new subsection 500.9.

The scope of the proposed rule includes certain procedures for filing initial appeals of Agency decisions or actions related to inspection activities mandated under the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*), and the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031, *et seq.*). It also includes appeals of Agency inspection decisions or actions related to voluntary reimbursable inspection services allowed under the Agricultural Marketing Act (AMA) (7 U.S.C. 1622 and 1624; 9 CFR 354.134 and 355.39). For example, it includes appeals of Noncompliance Records, the cancellation of pre-stamping privileges for imported meat and poultry products, and sampling test results.

The scope of the proposed rule does not include appeals of FSIS decisions or actions unrelated to inspection. Further, it does not include actions related to refusing approval of labels. The Agency determined that the proposed new Rules of Practice subsection, 9 CFR 500.9, would not sufficiently address the varied, product-specific policy issues central to labeling determinations and reevaluation consultations between FSIS Labeling and Program Delivery Staff and labeling applicants.<sup>1</sup>

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<sup>1</sup> Labeling appeals are specifically addressed in the FSIS regulations at 9 CFR 317.12, 317.69, 317.380, 381.130, 381.412, 381.469, 381.519.

Finally, the scope of the proposed rule does not include appeals of Agency responses to requests made under the Freedom of Information Act (FOIA) (5 U.S.C. 552, *et seq.*; 9 CFR 390.7), as this Federal statute prescribes procedural requirements for such appeals.

#### *Unified Time Period Requirement for Appeals*

FSIS is proposing to require that initial appeals of Agency decisions or actions related to inspection activities be filed within 30 calendar days of the appellant's receipt of notification of the decision or action. This change will streamline and harmonize the appeals process by establishing a unified time period requirement for relevant Agency decisions or actions. The uniform time period requirement will further benefit certain appellants, as it will lengthen the amount of time the FSIS regulations currently prescribes for filing an appeal of specified types of decisions or actions. Specifically, the prescribed time period will lengthen for decisions or actions related to the cancellation of pre-stamping privileges for imported meat and poultry products (9 CFR 327.10(d)(2), 381.204(f)(2)), refused entry for imported poultry products (9 CFR 381.202(d)),<sup>2</sup> appeals of voluntary inspection of rabbits and products thereof (9 CFR 354.134), and poultry products inspection decisions or actions (9 CFR 381.35). Finally, establishing a time period requirement for appeals of

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<sup>2</sup> The proposed time period requirement for appeals of refused entry decisions or actions would not affect the existing uniform regulatory requirement that imported meat, poultry, or egg product that is refused entry must be disposed of within 45 days after notice is provided at the original port of entry to take such action (327.13(a)(5), 381.202(a)(4), 590.945(a)(4)).

inspection decisions or actions will increase the likelihood that relevant physical evidence, as well as directly involved personnel, will remain available during consideration of the initial appeal of the contested decision or action.

The time period for any subsequent appeal will be provided in the response to the initial appeal. The Agency's response to subsequent appeals will indicate when the Agency's decision will constitute final agency action.

FSIS is proposing that this 30-day time period requirement for initial appeals would be set forth in a new subsection of the FSIS Rules of Practice.

#### **Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety benefits, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This proposed rule has been designated a "non-significant" regulatory action under section 3(f) of E.O. 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget (OMB) under E.O. 12866.

#### **Economic Impact Analysis**

The proposed rule is expected to economically benefit industry by providing a harmonized, streamlined appeals process. Consolidating the inspection appeals procedures from multiple subsections of the CFR, simplifying the process, eliminating charges for frivolous appeals, and setting a uniform time period requirement would reduce the regulatory burden placed on industry.

Similarly, clarifying and simplifying Agency inspection appeals procedures is expected to benefit the Agency by reducing inefficiencies and facilitating better use of Agency personnel and resources. The proposed actions would also increase the likelihood that relevant physical evidence, as well as directly involved personnel, would be available during the appeals process.

The proposed uniform time period requirement is not expected to increase industry's labor or capital costs. Currently, the majority of appeals of FSIS decisions or actions related to inspection activities mandated under the FMIA, PPIA, and EPIA are filed within several months of the appellant's notification of the contested decision or action. For example, between April 2016 and March 2018, the Agency received 1,301 appeals from official establishments subject to Federal inspection to contest Noncompliance Records issued to address findings of regulatory violations. Of these appeals, sixty-two (62) percent were filed within 30 calendar days, thirty (30) percent were filed between 31 and 180 calendar days, and eight



(8) percent were filed after 180 calendar days. Further, the proposed time period requirement will lengthen the amount of time that an appeal may be filed for certain types of Agency decisions or actions. Therefore, the proposed uniform time period requirement would encourage the timely filing of appeals without imposing substantial cost burdens on current industry practices.

#### **Regulatory Flexibility Act**

The FSIS Administrator has made a preliminary determination that this proposed rule would not have a significant economic impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*). The proposed rule is not expected to increase costs to the industry. The proposed rule may provide some cost savings to industry related to the uniform filing of appeals of certain Agency decisions or actions, but any benefits with the proposed rule would not be significant. FSIS is also requesting comment from industry on the expected benefits of this proposed uniform appeals process.

#### **Paperwork Reduction Act**

There are no paperwork or recordkeeping requirements associated with this proposed rule under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

#### **E-Government Act**

FSIS and USDA are committed to achieving the purposes of the E-Government Act (44 U.S.C. 3601, *et seq.*) by, among other

things, promoting the use of the Internet and other information technologies and providing increased opportunities for citizen access to Government information and services, and for other purposes.

**Executive Order 12988, Civil Justice Reform**

This proposed rule has been reviewed under E.O. 12988, Civil Justice Reform. Under this rule: (1) All State and local laws and regulations that are inconsistent with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) no administrative proceedings will be required before parties may file suit in court challenging this rule.

**Executive Order 13175**

This rule has been reviewed in accordance with the requirements of E.O. 13175, "Consultation and Coordination with Indian Tribal Governments." E.O. 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

FSIS has assessed the impact of this rule on Indian tribes and determined that this rule does not, to our knowledge, have tribal implications that require tribal consultation under

E.O. 13175. If a tribe requests consultation, FSIS will work with the Office of Tribal Relations to ensure meaningful consultation is provided where changes, additions, and modifications identified herein are not expressly mandated by Congress.

**USDA Non-Discrimination Statement**

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (e.g., Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720-2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877-8339. Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD-3027, found online at <https://www.usda.gov/oascr/how-to-file-a-program-discrimination-complaint> and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632-9992. Submit your completed form or letter to USDA by: (1) mail: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue, SW, Washington, D.C. 20250-9410; (2) fax: (202) 690-7442; or (3) email: [program.intake@usda.gov](mailto:program.intake@usda.gov).

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### **Environmental Impact**

Each USDA agency is required to comply with 7 CFR part 1b of the Departmental regulations, which supplements the National Environmental Policy Act regulations published by the Council on Environmental Quality. Under these regulations, actions of certain USDA agencies and agency units are categorically excluded from the preparation of an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) unless the agency head determines that an action may have a significant environmental effect (7 CFR 1b.4 (b)). FSIS is among the agencies categorically excluded from the preparation of an EA or EIS (7 CFR 1b.4 (b)(6)).

FSIS has determined that this proposed rule, which would establish a uniform time period requirement for the filing of appeals of certain Agency inspection decisions or actions, and clarify and simplify appeals procedures generally, will not create any extraordinary circumstances that would result in this normally excluded action having a significant individual or cumulative effect on the human environment. Therefore, this action is appropriately subject to the categorical exclusion from the preparation of an environmental assessment or environmental impact statement provided under 7 CFR 1b.4(6) of the U.S. Department of Agriculture regulations.

#### **Congressional Review Act**

Pursuant to the Congressional Review Act (5 U.S.C. 801, *et seq.*), the Office of Information and Regulatory Affairs has determined that this notice is not a "major rule," as defined by 5 U.S.C. 804(2).

#### **Additional Public Notification**

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce this **Federal Register** publication on-line through the FSIS Web page located at: <https://www.fsis.usda.gov/federal-register>.

FSIS will also announce and provide a link through the FSIS *Constituent Update*, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our

constituents and stakeholders. The *Constituent Update* is available on the FSIS Web page. Through the Web page, FSIS is able to provide information to a much broader, more diverse audience. In addition, FSIS offers an e-mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: <https://www.fsis.usda.gov/subscribe>. Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves and have the option to password protect their accounts.

#### **List of Subjects**

##### **9 CFR Part 327**

Imported products.

##### **9 CFR Part 351**

Certification of technical animal fats for export.

##### **9 CFR Part 354**

Voluntary inspection of rabbits and edible products thereof.

##### **9 CFR Part 355**

Certified products for dogs, cats, and other carnivora; inspection, certification, and identification as to class, quality, quantity, and condition.

##### **9 CFR Part 381**

Poultry products inspection regulations.

##### **9 CFR Part 500**

Rules of practice.

**9 CFR Part 592**

Voluntary inspection of egg products.

For the reasons set forth in the preamble, FSIS is proposing to amend 9 CFR parts 327, 351, 354, 355, 381, 500, and 592 as follows:

**PART 327 - IMPORTED PRODUCTS**

1. The authority citation for part 327 continues to read as follows:

Authority: 21 U.S.C. 601-695; 7 CFR 2.18, 2.53.

2. Revise § 327.10 paragraph (d) (2) to read as follows:

**§ 327.10 Samples; inspection of consignments; refusal of entry; marking.**

\* \* \* \* \*

(d) \* \* \*

(2) An official import establishment's controlled pre-stamping privilege may be cancelled orally or in writing by the inspector or other Agency employee who is supervising its enforcement whenever the employee finds that the official import establishment has failed to comply with the provisions of this part or any conditions imposed pursuant thereto. If the cancellation is oral, the decision or action and the reasons therefor will be confirmed in writing, as promptly as circumstances allow. Any person whose controlled pre-stamping privilege has been cancelled may appeal the decision or action in accordance with 9 CFR 500.9. The appeal must state all of the

facts and reasons upon which the person relies to show that the controlled pre-stamping privilege was wrongfully cancelled.

\* \* \* \* \*

3. Revise § 327.24 to read as follows:

**§ 327.24 Appeals; how made.**

Any appeal of a decision or action of any program employee will be made to his/her immediate supervisor having responsibility over the subject matter of the appeal in accordance with 9 CFR 500.9.

**PART 351 - CERTIFICATION OF TECHINCAL ANIMAL FATS FOR EXPORT**

4. The authority citation for part 351 continues to read as follows:

Authority: 7 U.S.C. 1622, 1624; 7 CFR 2.17 (g) and (i), 2.55.

5. Revise § 351.21 to read as follows:

**§ 351.21 Certification of certain animal fat for export.**

Any person receiving inspection service may, if dissatisfied with any decision of an inspector relating to any inspection, file an appeal from such decision or action in accordance with 9 CFR 500.9.

**PART 354 - VOLUNTARY INSPECTION OF RABBITS AND EDIBLE PRODUCTS THEREOF**

6. The authority citation for part 354 continues to read as follows:

Authority: 7 U.S.C. 1622, 1624; 7 CFR 2.17 (g) and (i), 2.55.



7. Revise § 354.134 to read as follows:

**§ 354.134 Appeal inspections; how made.**

Any person receiving inspection service may, if dissatisfied with any decision of an inspector relating to any inspection, file an appeal from such decision or action in accordance with 9 CFR 500.9.

**PART 355 - CERTIFIED PRODUCTS FOR DOGS, CATS, AND OTHER CARNIVORA; INSPECTION, CERTIFICATION, AND IDENTIFICATION AS TO CLASS, QUALITY, QUANTITY, AND CONDITION**

8. The authority citation for part 355 continues to read as follows:

Authority: 7 U.S.C. 1622, 1624; 7 CFR 2.17 (g) and (i), 2.55.

9. Revise § 355.39 to read as follows:

**§ 355.39 Appeals from decisions made under this part.**

Any person receiving inspection service may, if dissatisfied with any decision or action of an inspector or other Agency employee relating to any inspection, file an appeal from such decision or action in accordance with 9 CFR 500.9.

**PART 381 - POULTRY PRODUCTS INSPECTION REGULATIONS**

10. The authority citation for part 381 continues to read as follows:

Authority: 7 U.S.C. 1633, 1901-1906; 21 U.S.C. 451-472; 7 CFR 2.18, 2.53.

11. Revise § 381.35 to read as follows:

**§ 381.35 Appeal inspections; how made.**

Any person receiving inspection service may, if dissatisfied with any decision or action of an inspector or other Agency employee relating to any inspection, file an appeal from such decision or action in accordance with 9 CFR 500.9.

12. Revise § 381.202 paragraph (d) to read as follows:

**§ 381.202 Poultry products offered for entry; reporting of findings to customs; handling of articles refused entry; appeals, how made; denaturing procedures.**

\* \* \* \* \*

(d) Any person receiving inspection service may, if dissatisfied with any decision or action of an inspector or other Agency employee relating to any inspection, file an appeal from such decision or action in accordance with 9 CFR 500.9. The poultry or poultry products involved in any appeal must be identified by U.S. retained tags and segregated in a manner approved by the inspector or other Agency employee pending completion of an appeal inspection.

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13. Revise § 381.204 paragraph (f)(2) to read as follows:

**§ 381.204 Marking of poultry products offered for entry; official import inspection marks and devices.**

\* \* \* \* \*

(f) \* \* \*

\* \* \*

(2) An official import establishment's controlled pre-stamping privilege may be cancelled orally or in writing by the

inspector or other Agency employee who is supervising its enforcement whenever the employee finds that the official import establishment has failed to comply with the provisions of this part or any conditions imposed pursuant thereto. If the cancellation is oral, the decision or action and the reasons therefor will be confirmed in writing, as promptly as circumstances allow. Any person whose controlled pre-stamping privilege has been cancelled may appeal the decision or action in accordance with 9 CFR 500.9. The appeal must state all of the facts and reasons upon which the person relies to show that the controlled pre-stamping privilege was wrongfully cancelled.

\* \* \* \* \*

#### **PART 500 - RULES OF PRACTICE**

14. The authority citation for part 500 continues to read as follows:

Authority: 21 U.S.C. 451-470, 601-695; 1031-1056; 7 U.S.C. 450, 1901-1906; (33 U.S.C. 1251 *et seq.*); 7 CFR 2.18, 2.53.

15. In § 500.1 revise paragraph (c) and add paragraph (d) to read as follows:

#### **§ 500.1 Definitions.**

\* \* \* \* \*

(c) A "suspension" is an interruption in the assignment of program employees to all or part of an establishment; and

(d) An establishment subject to Federal inspection or facility receiving voluntary inspection services under the

regulations is "adversely affected" when that person has a legally cognizable interest, and the decision or action has caused or is substantially likely to cause injury to that interest.

\* \* \* \* \*

16. Add § 500.9 to read as follows:

**§ 500.9 Procedures for the filing of initial appeals.**

(a) Any establishment subject to Federal inspection or facility under voluntary inspection and adversely affected by a decision or action of an inspector or other Agency employee related to an inspection activity mandated under the FMIA, PPIA, or EPIA or related to voluntary reimbursable inspection services allowed under the AMA may appeal the decision or action. Such initial appeal must be made within 30 calendar days after receipt of notification of the originating contested decision or action. It may be supported by any argument or evidence that the appellant may wish to offer as to why the contested decision or action should be reconsidered.

(b) Any appeal of a decision or action of an inspector or other Agency employee shall be made to his/her immediate supervisor having jurisdiction over the subject matter of the appeal.

**PART 592 - VOLUNTARY INSPECTION OF EGG PRODUCTS**

17. The authority citation for part 592 continues to read as follows:

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

18. Revise § 592.400 to read as follows:

**§ 592.400 How to file an appeal.**

Any person receiving inspection service may, if dissatisfied with any decision or action of an inspector or other Agency employee relating to any inspection, file an appeal from such decision or action in accordance with 9 CFR 500.9.

**§§ 592.410 through 592.440 [Removed]**

19. Remove §§ 592.410 through 592.440.

Done in Washington, DC:

Paul Kiecker,  
*Administrator.*

[FR Doc. 2021-14947 Filed: 7/14/2021 8:45 am; Publication Date: 7/15/2021]