

Farm and Ranch Freedom Alliance
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Via e-mail: foodestablishments@dshs.texas.gov

September 29, 2020

Re: Informal comments on Draft Rules, Title 25, Chapter 228, Retail Food, Project #20R023

Dear DSHS Consumer Protection Division:

The Farm and Ranch Freedom Alliance is a nonprofit advocacy organization that supports independent family farmers and protects a healthy and productive food supply for American consumers. FARFA promotes common sense policies for local, diversified agricultural systems.

FARFA submits the following informal comments on the draft new rules for retail food establishments.

I. The agency should abolish the requirement that retail food establishments only receive graded chicken eggs.

FARFA appreciates that the agency has changed the requirement that all eggs received by a retail food establishment be graded, so as to limit it to chicken eggs only (as has been the enforcement policy for several years). But grading should not be required for *any* eggs.

Grading is a marketing issue and provides no benefits from a health or food safety perspective. Egg grading is a voluntary program¹ that is strictly a marketing tool, administered by the USDA Agricultural Marketing Service (AMS).² According to the AMS, “Grading provides for a standardized means of describing the marketability of a particular food product.”

In 2016, USDA-AMS revised the definition of the terms used for grading:
to **remove any food safety implications** ... 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.³

¹ “Questions and Answers – USDA Shell Egg Grading Service.” USDA Agricultural Marketing Service, www.ams.usda.gov/publications/qa-shell-eggs.

² Quality Grading & Inspections. USDA Agricultural Marketing Service, www.ams.usda.gov/services/grading.

³ <https://www.govinfo.gov/content/pkg/FR-2016-09-16/html/2016-22246.htm>

Grading **doesn't** mean that the eggs are high quality. Indeed, **the TFER allows retail food establishments to accept Grade B eggs, which have abnormal shells, stained shells, runny whites, and blood spots. It makes no sense to allow retail food establishments to buy Grade B eggs, and prevent them from buying clean, sound ungraded eggs.**

Texas farmers can legally sell ungraded eggs directly to consumers, and one can find ungraded eggs being sold at farmers' markets all over the state – with no reported problems. Under the Texas Agriculture Code, farmers can legally sell ungraded eggs from their own flocks to anyone, as long as they do not claim a grade. *See* Texas Agriculture Code §132.002. In addition, under the Agriculture Code, restaurants can serve ungraded eggs to their customers, and grocers can sell ungraded eggs. *See* Texas Agriculture Code §§132.021(b)(2) & (b)(5).

Thus, under the Texas Agriculture Code, restaurants and retailers can legally buy ungraded eggs from farmers. Yet the TFER bars those retail food establishments from “receiving” ungraded eggs.

There is no health-based reason to restrict the sale of ungraded eggs. The fact that it is in the FDA Model Food Code is not evidence to the contrary. And amending the Texas regulations to allow retail food establishments to receive clean, sound ungraded eggs would still be in substantial compliance with the Model Food Code.

The grading requirement is a significant barrier for many small farmers, because eggs have a very small profit margin, and the additional expense and hassle cannot be justified by many farmers. This regulation thus limits the ability of both farm-to-table restaurants and small independent grocers from sourcing the local eggs that are in demand by their customers.

Justin Keely, a federal/state supervisor for the USDA's poultry programs for Texas and Oklahoma, explains that USDA poultry quality procedures were developed around the time of World War II, at a time when American agriculture was moving away from small family farms to a large-scale agribusiness model.⁴ As consumers now increasingly seek out foods from small family farms, DSHS should not be placing regulatory barriers unrelated to food safety in their way.

FARFA urges the agency to amend §228.62(b) to require that retail food establishments receive eggs that are clean, sound, and clearly labeled as to whether they are graded or ungraded.

II. The agency should address the low-risk nature of fermented vegetables

Section 228.76 allows local entities to require variances and HACCPs for any food they think warrants it. Unfortunately, several local health departments are using this authority to require HACCPs for fermented vegetables. This makes no sense, given how low risk fermented vegetables are.

⁴ Wood, Virginia B. “Crackdown.” If Local Eggs Are Outlawed, Will Only Outlaws Have Eggs? - Food - The Austin Chronicle, www.austinchronicle.com/food/2009-11-27/921339/.

USDA microbiologist Fred Breidt says “that fermented vegetables can be safer than raw vegetables, thanks to the ability of lactic acid, which forms during fermentation, to hunt down and kill any harmful bacteria that might be present. ‘It’s almost bulletproof,’ he said ... ‘It’s hard to mess it up. Things can go wrong, but it’s rare.’”⁵

A review of the CDC’s reports from 1998 to 2017 shows that there were 1,136 outbreaks due to botulism – and only one of those was linked to any kind of fermented vegetable. And in that case (in Amarillo 2013), the person making it **mixed** the fermented vegetables with boiled vegetables that had been left in the fridge for a week – making those non-fermented vegetables the most likely source of the illness.

Simply requiring that the fermented vegetables have a final pH of 4.6 or lower addresses the risk of botulism. Moreover, a published study showed that fermented pickles at that pH or lower produced a 5-log reduction in *E. coli* O157:H7.⁶

We urge the agency to amend 228.76 to explicitly exclude fermented vegetables that are a pH of 4.6 or lower from its scope. If local authorities believe that fermented foods are truly a significant risk, they can still adopt a local ordinance to address the issue. By amending the regulations, DSHS would simply clarify the state agency’s position.

III. Actions FARFA requests be taken after final adoption of the TFER

After discussions with the staff, we understand the reasoning behind incorporating the FDA’s Model Food Code by reference. But we are still concerned that this approach requires regulated businesses to cross-reference multiple documents in order to determine which regulations apply to them.

Many retail food establishments are small sole proprietorships or mom & pop operations. Many are run by people who do not have smartphones or who are not comfortable navigating multiple government websites and understanding their interactions. Rural businesses often lack reliable high-speed internet, making it more difficult to navigate multiple websites and download multiple documents. We thus urge DSHS to create a guidance document that sets out the full and final regulations in a single, easy-to-read and easy-to-access document.

In addition, the regulations in Chapter 229 have caused multiple problems since the creation of that chapter in 2014. While Chapter 229 regulates farmers’ markets and farmers’ market vendors, many of those vendors are retail food establishments regulated under Chapter 228. We recognize that the timeline for proposing and adopting regulations may make it infeasible to address this issue at this time, but we urge the agency to undertake another rulemaking soon to

⁵ <https://www.foodsafetynews.com/2014/03/fermenting-veggies-at-home-follow-food-safety-abcs/>. See also <https://www.todaysdietitian.com/newarchives/0418p24.shtml> (“Fermented foods, whether produced in the home or industrially, have a good safety record, and lactic acid bacteria strains in particular have a long history of safety.”)

⁶ Breidt F, Caldwell JM. 2011. Survival of *Escherichia coli* O157:H7 in cucumber fermentation brines. *J Food Sci* 76(3):M198-M203

place the provisions of Chapter 229 into Subchapter H of Chapter 228, consistent with the fact that farmers' market vendors are typically a special type of retail food establishment.

Thank you for this opportunity to comment on the draft rules.

Sincerely,

A handwritten signature in black ink, reading "Judith McGeary". The signature is written in a cursive style with a long, sweeping tail on the "y".

Judith McGeary
Executive Director