



Agricultural Marketing Service

7 CFR Part 800

[Doc. No. AMS-FGIS-19-0062]

RIN 0581-AD90

Exceptions to Geographic Boundaries

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule; request for comments.

SUMMARY: This notice of proposed rulemaking invites public input on proposed revisions to Federal Grain Inspection regulations. The Agricultural Marketing Service is required to revise the regulations as a result of 2018 Farm Bill amendments to the U.S. Grain Standards Act. Revised regulations would allow designated official agencies to perform grain inspections outside their geographic areas under certain additional conditions. Proposed revisions are based on industry input and are intended to provide additional flexibility to the industry.

DATES: Comments must be received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments must be submitted through the Federal e-rulemaking portal at <http://www.regulations.gov> and should reference the document number and the date and page number of this issue of the **Federal Register**. All comments submitted in response to this document will be included in the record and will be made available to the public. Please be advised that the identity of individuals or entities submitting comments will be made public on the internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Sophie Parker, Deputy Director, Quality Assurance and Compliance Division, Federal Grain Inspection Service, AMS, USDA; email: FGISQACD@usda.gov.

SUPPLEMENTARY INFORMATION: Under the USGSA (7 U.S.C. 71 *et seq.*), each official agencies (OA) in the United States is assigned a specific geographic area where it performs all official grain inspection and weighing services for customers within that geographic area (7 U.S.C. 79(f)(2)(A)). This ensures effective and efficient delivery of official services to all customers within the assigned OA's geographic area and enhances the orderly marketing of grain. The U.S. Grain Standards Act (USGSA) also provides that customers may obtain services from other OAs under certain circumstances. The Secretary may allow OAs to cross geographic boundaries to provide services to requesting customers if: (1) the assigned OA is unable to provide necessary services on a timely basis; (2) the customer has not been receiving official inspection services from the assigned OA; (3) the customer requests probe inspection on barge-lot basis; or (4) the assigned OA agrees in writing with the adjacent OA to waive the current geographic restriction at the customer's request (7 U.S.C. 79(f)(2)(B)). These allowances are considered exceptions to the USGSA's standard requirements regarding the use of designated OAs to perform inspection services within specified geographic areas. Exceptions must be approved on a case-by-case basis by the Agricultural Marketing Service's Federal Grain Inspection Service (FGIS) that administers regulations under the USGSA.¹ Regulations in 7 CFR part 800 provide limitations for use of these exceptions.

Service Exceptions

A notable exception that has been implemented in the past is known as the nonuse of service exception. In that exception, a customer who had not obtained inspection services from the assigned OA for a specified length of time could obtain services from another OA. At times, regulations required customers to have not used their designated OA for at least 90 consecutive days; at other times the regulations specified a 180-day

¹ FGIS, formerly part of USDA's Grain Inspection, Packers and Stockyards Administration, was merged with USDA's Agricultural Marketing Service in 2018.

nonuse period before the customer could apply for service from another OA. However, lack of clarity about how FGIS determined whether to grant nonuse of service exceptions fostered confusion and conflicts among involved parties and created a perception of inconsistency regarding the handling of such requests. Congress eliminated the nonuse of service exception from the USGSA in 2015;² FGIS subsequently removed that exception from the regulations.³

Although the nonuse of service exception was eliminated from the USGSA in 2015, Congress reinstated authority to implement a nonuse of service exception through an amendment to the USGSA in the 2018 Farm Bill.⁴ FGIS must now consider regulatory options related to the reinstatement of the nonuse of service exception (see 7 U.S.C. 79(f)(2)(B)(ii)).

On April 1, 2020, FGIS published an advanced notice of proposed rulemaking (ANPR) (85 FR 18155) to solicit public comments on how FGIS should amend its criteria for reviewing, approving, and implementing exceptions to USGSA's requirements for geographic boundaries. FGIS received six comments on the ANPR. We have incorporated industry feedback from the ANPR, along with input received during industry meetings, to develop this proposed rule (PR). FGIS is requesting public comment on options for timely service and nonuse of service, as defined within this PR. Particularly, FGIS seeks input from industry participants and OAs who use and provide official services and are familiar with grain inspection services under the USGSA. We welcome the submission of data and other information to support commenters' views. As a result of public input received on the PR, FGIS will develop a final rule for publication in the **Federal Register**.

² The Agricultural Reauthorizations Act of 2015, enacted September 20, 2015 (Pub. L. 114-54 sec. 301(b)(3)(A)).

³ 81 FR 49855, July 29, 2016.

⁴ The Agricultural Improvement Act of 2018, enacted December 20, 2018 (Pub. L. 115-334 sec. 12610(a)(1)(D)).

Restoration of Previous Nonuse of Service Exceptions

Subsequent to 2015 amendments to the USGSA and the 2016 changes to the FGIS regulations, a number of nonuse of service exceptions were terminated. The 2018 Farm Bill directed USDA to allow for restoration of those exceptions where appropriate. Interested parties were given an opportunity to submit restoration requests to FGIS, as described in a Notice to Trade published on March 5, 2019.⁵

Termination of Nonuse of Service Exceptions

The amended USGSA provides that the nonuse of service exception may only be terminated if all parties to the exception jointly agree on the termination.⁶ This means that the customer, the assigned OA, the OA that has been providing service under the exception (gaining OA), and FGIS must agree to terminate the exception. This ensures that: (1) all parties are aware of the change and (2) the assigned OA will resume providing service to the customer.

The requirement for all parties to the exception to jointly agree on termination of the nonuse of service exception does not apply if the designation of an OA is terminated.⁷ If the designation of an OA is renewed or restored after being terminated, the exceptions that were previously approved, under 7 U.S.C. 79(f)(2)(B), may be renewed or restored by requesting a determination from FGIS.

Comment Review

The ANPR suggested three criteria for timely service exceptions and four criteria for nonuse of service exceptions, and requested input on 11 questions regarding factors that could impact decisions on exceptions. FGIS would like to thank those who participated in this process for providing valuable input. Not all commenters provided

⁵ Restoring Certain Exceptions to the U.S. Grain Standards Act, published March 5, 2019. <https://www.ams.usda.gov/content/restoring-certain-exceptions-us-grain-standards-act>

⁶ Pub. L. 115-334 sec. 12610(a)(1)(E).

⁷ Pub. L. 115-334 sec. 12610(a)(2).

feedback on criteria for every exemption or on every question in the ANPR. Most recognized the need for the official system to be customer focused and to provide timely and accurate services.

FGIS received mixed comments about timely service and nonuse of service exceptions. Some commenters stated that they thought the nonuse of service exception involved the inability of the OA to provide timely service. The USGSA specifies these are two separate exceptions; therefore, FGIS is using the feedback to the ANPR to improve and clarify the requirements under the appropriate exception.

The ANPR criteria for timely service exceptions included that: the requesting facility would be required to submit a written or verbal request for an exception to FGIS, along with documentation regarding the designated OA's inability to provide service within six hours from the requested service. Further, the OA would have to be unable to provide requested services within timeframes established in the OA's approved fee schedule. The ANPR criteria for nonuse of service exception requests included the requesting facility (customer or applicant) demonstrating they have not received official services for 90 days, documenting why they have not received service, and providing a written or verbal request for an exception. In addition, the ANPR suggested potential factors for consideration, some of which now fit within the expanded criteria for timely service requests.

In the feedback to the ANPR criteria for timely service exceptions, some commenters supported the criteria but provided differing opinions on how to apply the criterion regarding timeframes for services provided. One suggested that customers should not be allowed to routinely call their OA after business hours as a mechanism for obtaining service from another OA. Here, FGIS notes parameters required for requesting official services are defined in 800.116(b) and OA fee schedules. FGIS also received requests to clarify which services are included in a timely service exception. Industry

feedback indicates some OA's do not offer all official services some customers request. Others indicate that weather events could impact access to timely service. Timely service exceptions criterion in this PR would provide an avenue to accommodate these situations.

In the feedback to the ANPR criteria for nonuse of service exceptions, some commenters asked FGIS to add flexibility to the nonuse of service exception and to rename it "service exception". According to industry input, customers occasionally face limitations in the types of services offered by the assigned OA. This again indicated to FGIS that there is confusion about the criteria for timely service and the criteria for nonuse of service exceptions. In addition, the feedback on the number of days without official service (for nonuse of service exceptions) had a wide range, from 30 to 180 days. As stated in the ANPR, prior ranges allowed were between 90 to 180 days in length. A period of 90 days is within timeframes used for the nonuse of service exception in the past and is a compromise based on timeframes suggested in the comments.

In the general feedback to the ANPR, FGIS received comments expressing concern that some requests for exceptions relayed false or misleading information. These comments questioned how FGIS would validate requests for exceptions and whether the assigned OA would have an opportunity to respond to the request. Therefore, FGIS proposes adding a validation process for requests for exceptions. This would allow all parties to submit information and data regarding the request. FGIS would review information and assess requests to ensure the integrity of the official system is maintained. FGIS also received feedback expressing concern that nonuse of service exceptions negatively impact the integrity of the official system. FGIS has attempted to address all feedback within this PR.

Overview

Amendments proposed would modify parameters for the exceptions program for timely service and reinstate the exception program for nonuse of service in 7 CFR

800.117, to comply with amendments made to the USGSA in the 2018 Farm Bill. This PR incorporates feedback received from the public on the ANPR to create a clear, consistent, and fair framework for considering and granting these exceptions, which allow designated OAs to perform grain inspections outside their geographic areas under certain conditions. Timely service and nonuse of service are two of those conditions. This PR defines and differentiates between timely service and nonuse of service exceptions and their associated requirements.

Under § 800.117(b)(1), the industry would have a mechanism to request and receive timely service from an alternate OA. Applicants could also request timely service exceptions for delays caused by weather events and requests for services that are not offered by the assigned OA. For a timely service exception, FGIS would grant an exception when: (1) the designated OA is unable to provide services to an applicant within 6 hours or the OA is unable to provide results and certificate in accordance with 800.160(c); or (2) a request for services not offered by the assigned OA would result in an inability to receive timely service; or (3) a weather event or impact caused by a weather event results in an inability to receive timely service from the assigned OA; and (4) granting an exception is in the best interest of the integrity of the official system. It is important to note that not all of these instances indicate a delay caused by the assigned OA and that the reasons and justification for the exception request weigh more prominently for nonuse of service requests than timely service. This PR proposes a tiered progression for timely service exceptions. The first is a one-time timely service exception. In the case of untimely service, the ability to use another official agency may be granted for the next service request, as applicable. The second is a 90-day timely service exception. If, after the first request is granted, a second instance occurs within 180 days, the customer may apply for a 90-day exception. Once granted, the alternate OA would provide services to the customer for 90 days. The third is a long-term timely

service exception. If there is another occurrence, within 365 days of the return to the assigned OA, the applicant may request a long-term exception, extending until the termination date of the gaining agency's designation. If FGIS determines the assigned OA's inability to provide a specific service, limited due to weather events or service availability, has been resolved, FGIS may terminate the long-term exception. If FGIS terminates a long-term exception, all parties would be notified, and the applicant would resume service with the assigned OA within 60 days of notification. However, if the exception was associated with the assigned OA's inability to provide service in 6 hours or less, or timely issuance of the results and certificate, FGIS may not terminate the exception. During the duration of exceptions caused by a failure of the assigned OA to supply timely service, the assigned OA should work on improving their ability to provide the requested services.

For nonuse of service exception requests, this PR defines the period of nonuse as 90 days. The PR also specifies, *but does not limit*, categories FGIS would take into consideration when reviewing requests for nonuse of service exceptions. These include: (1) the location of the specified service point(s); (2) the ability of the alternate OA to take on additional customers; (3) the ability of the assigned OA to staff an onsite laboratory; (4) whether the requesting facility has ever previously utilized the official system (i.e., facilities that have never used the official system would not qualify for nonuse of service exception, nor would a facility that was under new ownership by a company with no history of use of the official system). For a nonuse of service exception, FGIS would grant an exception when: (1) an OA has not provided service to an applicant within their assigned geographic area within the established time period, (2) FGIS receives a request for a nonuse of service exception from an applicant, and (3) granting an exception is in the best interest of the integrity of the official system. In some cases, the cost of the equipment is more than the OA would be able to recoup, due to the infrequency of the

requests. FGIS would take these factors into consideration when reviewing requests for exceptions and would work with the OAs and customers to find a solution.

FGIS recognizes there may be instances where granting an exception may impact the assigned OA's viability and instances where there is concern about the integrity of the official system. In such instances, FGIS proposes adding a challenge process into this regulation. As an example, FGIS would consider factors such as percent of business or percent of customers lost due to 90-day and long-term exceptions. Requests for a challenge must clearly state and support the identified reason for the request. The assigned OA must include supporting documentation for FGIS to review as part of this process. FGIS seeks input from industry participants and OAs on the challenge process. We welcome and encourage the submission of data and other information to support commenters' views.

FGIS proposes to add the nonuse of service exception back into the regulations, under § 800.117(b)(2). The industry would be able to apply for official services from an alternate OA if they have not received official services within the previous 90 days. In addition, FGIS proposes to evaluate criteria defined in the section to promote clarity, consistency, and transparency. FGIS also proposes to expand and clarify options for exceptions under timely service. Applications for timely service exceptions would undergo a more streamlined approval process and require less rigorous justification by the applicant than those submitted for nonuse of service exceptions. For both types of exceptions, the PR establishes processes to address assigned OA concerns of potentially false or misleading exception requests and validation of requests by FGIS.

Executive Orders 12866 and 13563

Executive Orders 12866 – Regulatory Planning and Review, and 13563 – Improving Regulation and Regulatory Review, 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 effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits of reducing costs, harmonizing rules, and promoting flexibility.

In this initial evaluation of costs and benefits of the rule, FGIS has determined that the proposed rule does not meet the criteria of a significant regulatory action under Executive Order 12866 as supplemented by Executive Order 13563. Moreover, FGIS finds that the rule does not create any new material costs for industry.

Baseline

Under the USGSA, the USDA regulates the inspection of barley, canola, corn, flaxseed, mixed grain, oats, rye, sorghum, soybeans, sunflower seed, triticale, and wheat. This rule impacts the 42 OAs that provide USDA-regulated grain certification and the 5,218 commercial entities they serve. In FY2020, OAs performed 3,093,261 grain inspections of 240.3 million metric tons of grain⁸. FGIS expects fewer than one percent of the entities served by OAs to request and be granted exceptions under the rule.

Official inspection costs represent a very small percentage of the total value of grain shipment. In 2018, FGIS calculated weighted average costs for inspections for different carriers as follows: \$24.50 for a semi-truck capable of carrying 58,000 pounds, \$24.65 for a railcar capable of carrying 220,000 pounds, and \$234.42 for a barge capable of carrying 3,000,000 pounds of grain. For example, if the price of wheat was \$5 for a 60-pound bushel, the cost of the inspection would represent 0.53% of the revenue for a truck, 0.13% of the revenue for a railcar train, and 0.08% of the revenue for a barge.

Need for the Rule

⁸ Source: USDA Federal Grain Inspection Service (FGIS) Program Data at: https://fgisonline.ams.usda.gov/F_DEC/AnnualReport.aspx

Federally regulated grain inspection is designed to remedy two competing sources of market failure – asymmetric information and market power – while preserving the ability of small producers to access markets. This rule increases the flexibility of the existing inspection program without affecting the program’s quality standards or the ability of small sellers to access inspection services. Greater flexibility in allowing producers to obtain inspection services, however, will save costs and provide them greater ability to meet potential market opportunities.

Many agricultural products, including grain, vary in important quality characteristics due to both farm production decisions and idiosyncratic factors. In the absence of a quality verification process, sellers in transactions may have more knowledge of product quality than buyers, a condition called asymmetric information. Akerlof (1970) showed asymmetric information can cause economic inefficiencies in which producers forego investments that are less costly to implement than the benefit they provide consumers.⁹ Third-party inspection that verifies a product’s quality resolves this source of market failure.

Grain inspectors certify the protein content, kernel size, and other quality factors related to product’s market value to simplify transactions. Since the outcome of grain inspections directly affects the sale price, biases and inconsistencies in inspection methods might potentially redistribute the gains to trade from seller to buyer, or vice versa. Market power might exacerbate the tendency to bias and inconsistency if, for instance, large sellers or buyers can influence the outcome of quality inspections in their favor. In addition to fairness concerns, such opportunistic behavior creates economic inefficiencies by reducing returns on investment in quality improvement and creating costs for

⁹George Akerlof, “The Market for Lemons: Quality Uncertainty and the Market Mechanism” *Quarterly Journal of Economics*, 1970

downstream producers (i.e. bakers and food processors) expecting products of certain quality.

Grain inspection is an optional service. When information asymmetries are a concern, inspection facilitates simpler, more rapid, and less risky transaction of final product. By allowing producers to recoup the costs of quality improvement, grain inspection also encourages investment in quality improvement.

Under its regulatory authority, the USDA approves grain inspection standards and monitors their uniform application by OAs. To promote a competitive market for grain, in which all producers have access to inspection services, FGIS requires that OAs provide inspection services to all producers in an assigned area and regulates marketing fee schedules charged by OAs for these services. FGIS approves rates to cover various labor, laboratory, and travel costs and only approves differential rates across geographic areas if underlying costs differ across assigned regions. For this reason, FGIS does not expect this rule to impact the prices paid by inspection users or the fees received by OAs. Instead, FGIS expects this rule will allow the small fraction of inspection users who need “timely service” and “nonuse of service” exceptions greater flexibility in obtaining inspections services to meet immediate business requirements.

Benefits and Costs of the Rule

FGIS considers economic benefits of this rule as being three-fold. First, the rule provides clarity to producers regarding the terms under which exceptions are granted. Second, the rule increases options to producers who require inspection services to market their grain. FGIS expects that this option will be utilized by fewer than one percent producers who need inspections services quickly but face service constraints by OAs. Third, the rule may heighten attention to service issues among OAs that have received nonuse of service exception requests. The validation process FGIS will maintain as part

of the granting of exceptions will ensure requests serve a valid business purpose. OAs may offer additional services such as a broader range of testing as a result.

FGIS does not ascribe any direct compliance costs to either OAs or producers as a result of the potential increase for timely service and nonuse of service exceptions under this rule. FGIS does not expect that inspection fees it approves will change as a result of this rule. To the extent that this rule provides greater flexibility to how producers can obtain inspection services, it will provide improved services or reduce total costs to producers by, for instance, allowing those needing immediate inspections to get them from an OA other than the one to which they are assigned. Moreover, FGIS does not believe the rule will create significant indirect costs, aside from minor costs to market participants learning the rule and documenting exceptions.

To the extent that some OAs conduct fewer inspections because producers in their assigned area have requested more exceptions, other OAs will conduct more inspections. FGIS believes that any business losses to an OA will be small and that any losses will be offset by gains to other OAs. This rearrangement of business activity constitutes a transfer of benefits from one OA to another and has a neutral effect on total costs and benefits of the rule.

To summarize, FGIS believes that the total impact of the rule on the grain inspection industry is not economically significant and that the benefits of this rule exceed its costs, which are negligible.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) requires agencies to consider the impact of their rules on small entities and to evaluate alternatives that would accomplish objectives of the rule without unduly burdening small entities when rules impose a significant economic impact on a substantial number of small entities. This rule has an economic impact on farms selling grain that require inspections (classified under

North American Industry Classification System, or NAICS, codes 111110, 111120, 111130, 111140, 111150, 111191, 111160, 111191, and 111199), grain elevators and grain certifiers that conduct post-harvest crop activities (NAICS code 115114) and either require or perform inspections. The Small Business Administration (SBA) considers grain farms to be small if their sales are less than \$1 million and grain elevators and grain certifiers (OAs) to be small if their sales are less than \$30 million (13 CFR 121.201).

FGIS certifies that this rule does not have a significant economic impact on small businesses. This determination is made based on FGIS's expectation that any small entities requiring grain inspection, including grain farms and grain elevators, or entities performing grain inspection, including OAs, will see neither a change in prices paid or fees charged nor a loss in access to inspection services or change in territorial boundaries for which they can perform inspections. Further, FGIS believes its proposed challenge process addresses the concern that some small OAs may lose economic viability when exceptions are granted to customers under the exceptions to geographic boundary requirement.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988 – Civil Justice Reform. This rule is not intended to have retroactive effect. The USGSA provides in sec. 87g that no State or subdivision thereof may require or impose any requirements or restrictions concerning the inspection, weighing, or description of grain under the Act.

This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. No administrative proceedings would be required before parties could file suit in court challenging the provisions of this rule.

Executive Order 13175

This rule has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on: (1) Policies that have tribal implications, including regulations, legislative comments or proposed legislation; and (2) 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, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Agricultural Marketing Service (AMS) has assessed the impact of this proposed rule on Indian tribes and determined that this rule would not have tribal implications that require consultation under Executive Order 13175. AMS hosts a quarterly teleconference with tribal leaders where matters of mutual interest regarding the marketing of agricultural products are discussed. Information about proposed changes to regulations will be shared during an upcoming quarterly call, and tribal leaders will be informed about proposed revisions to the regulation and the opportunity to submit comments. AMS will work with the USDA Office of Tribal Relations to ensure meaningful consultation is provided as needed with regards to the proposed regulations.

AMS has provided 30 days for comments on this proposed rule. All comments received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] will be considered prior to finalizing this proposed rule. Comments in response to any or all of the above processes or proposed wording should be submitted to the address provided in the ADDRESSES section of this document to ensure consideration.

List of Subjects in 7 CFR Part 800

Administrative practice and procedure, Exports, Grains, Reporting and recordkeeping requirements.

For reasons set forth in the preamble, FGIS proposes to amend 7 CFR part 800 as follows:

PART 800 – GENERAL REGULATIONS

1. The authority citation for part 800 continues to read as follows:

Authority: 7 U.S.C. 71-87k.

2. Amend § 800.117 by:

a. Adding paragraph (b) introductory text;

b. Revising paragraph (b)(1);

c. Redesignating paragraphs (b)(2) and (3) as paragraphs (b)(3) and (4),

respectively; and

d. Adding new paragraph (b)(2).

The additions and revision read as follows:

§800.117 Who shall perform original services.

* * * * *

(b) *Exceptions for official agencies to provide service.* Under an exception, an official agency may provide service to a customer outside of their geographic area. The applicant must request that the Service grant an exception. As outlined below, the Service may grant an exceptions in instances when: the assigned official agency is unable to provide inspection services in a timely manner; a person requesting inspection services in that geographic area has not been receiving official inspection services from the official agency for that geographic area; a person requesting inspection services in that geographic area requests a probe inspection on a barge-lot basis; or, the assigned official agency for that geographic area agrees in writing with the adjacent official agency to waive the current geographic area restriction at the request of the applicant for service.

(1) *Timely service.* The Service grants an exception when service is not timely as described in this section. Service is not timely when an official agency cannot provide requested official services within 6 hours or cannot provide results and certificate in accordance with 800.160(c). Applicants may also request timely service exceptions for delays caused by weather events or request a timely service exception for services that the assigned official agency does not offer. The applicant must submit a request for a timely service exception to the Service. The applicant may make this request orally or in writing. The applicant must clearly state and support the identified reason for the requested exception. There are three consecutive tiers of timely service exceptions: one-time, 90-day, and long-term. Applicants must progress through each tier. Applicants must apply for and the Service must approve a one-time exception before the Service considers a 90-day exception. Likewise, applicants must apply for and the Service must approve a 90-day exception before the Service will consider a long-term exception. The Service will review requests and may contact the applicant, the assigned official agency, or potential gaining agency with questions during its review. The Service will provide its determination on the exception request to the customer in writing.

(i) *One-time.* In the case of untimely service, the ability to use another official agency may be granted for the next service request, as applicable.

(ii) *90-day.* If there is an occurrence of untimely service within 180 days of the date of the occurrence in paragraph (b)(1)(i) of this section, the applicant may request a 90-day exception. This 90-day window will begin the day the exception is granted.

(iii) *Long-term.* If after a return to service following an exception granted under paragraph (b)(1)(ii) of this section there is another occurrence of untimely service within 365 days, the applicant may request a long-term exception. When granting this exception, the Service may extend this exception up to the date of termination of the gaining agency's designation term.

(iv) *Supporting Documentation.* The applicant must submit a request for a timely service exception and associated supporting documentation to the Service. The Service will give all parties an opportunity to provide information. The Service will request additional information if any is needed.

(v) *Review and Validation.* Prior to granting a timely service exception, the Service will review and validate all information submitted with the application. If the request is urgent and made outside of the Service's normal business hours, an official agency from outside the geographic area may provide service. When providing an urgent service, the official agency must provide written notification to the Service within two business days after service. The Service will review and validate the circumstances of the urgent request and the Service will verify that the request was not false or misleading.

(vi) *False or Misleading Requests.* If an applicant submits a request that the Service determines to be false or misleading, the Service will not grant the exception. If an urgent request was granted on the basis of a false and misleading request, the Service may deny the applicant from future urgent timely service exceptions for a period of up to 180 days.

(vii) *Return to the Assigned Official Agency.* The applicant maintains the option of returning to the assigned official agency at any time with a 60-day notification period to all parties. The exception will be cancelled, and future exception requests will be considered at the beginning of successive-tiered system.

(viii) *Termination.* If the Service determines the original official agency's inability to provide a specific service, limited due to weather events or service availability, has been resolved, the Service may terminate the long-term exception. However, if the exception was associated with the official agency's inability to provide service in 6 hours or less, or timely issuance of the results and certificate, the Service may not terminate the exception. If the Service terminates a long-term exception, all parties

will be notified, and the applicant will resume service with the assigned official agency within 60 days of notification.

(2) *Nonuse of service exception.* If an applicant has not received service from the assigned official agency within the last 90 days, the applicant may request that the Service grant a nonuse of service exception.

(i) Requests must clearly state and support the following:

(A) The last date of service from assigned official agency;

(B) The reason service has not been received during this timeframe;

(C) The identified reason for the request.

(ii) *Relevant information.* Applicants may submit *any* relevant supporting information. This may include, but is not limited to:

(A) The location of the specified service point(s);

(B) The types of services requested by the applicant and offered by assigned official agency;

(C) The ability of the gaining official agency to take on additional customers;

(D) The ability of the assigned official agency to provide the requested service;

(E) Whether the requesting facility has ever used the official system.

(iii) *Supporting Documentation.* Included with the request for an exception, the applicant must submit supporting documentation to the Service. After receipt of the request, the Service will give all parties an opportunity to provide additional supporting documentation. The Service will request additional information if any is needed.

(iv) *Review and Validation.* Prior to granting an exception, the Service will review the application and all supporting documentation, and the Service will conduct any necessary analysis to estimate the exception's impact.

(A) *Notification.* The Service will notify the assigned official agency prior to granting an exception for nonuse of service.

(B) *Challenge*. The assigned official agency may challenge a proposed exception for any reason. To challenge a proposed exception, the assigned official agency must object in writing, and must submit supporting documents to the Service within 14 days after the date of notification. Documents must clearly identify the objection and support the identified reason for the challenge.

(C) *Determination*. The Service will consider impacts on the assigned official agency, the applicant, and the potential gaining agency when deciding whether to grant an exception. These impacts may include, but are not limited to, the viability of the assigned official agency given the loss of business. The Service will also consider the impact on the integrity of the official system and confirm an exception would not undermine the congressional policies in section 2 of the United States Grain Standards Act. The Service will provide its decision in writing to the assigned official agency, the applicant, and the potential gaining agency.

(v) *False or Misleading Requests*. If an applicant submits a request that the Service determines is false or misleading the Service may elect to limit them from submitting further requests for a period of up to 180 days.

(vi) *Renewal or Termination of Exception*. The nonuse of service exception is for the period of the gaining agency's designation. At the end of the designation, the Service will review the exception, and verify all criteria and information. If the exception still meets the nonuse criteria, the Service will renew the exception for the new designation period. In the event the gaining agency is no longer designated, the exception would automatically terminate and the customer would return to the assigned official agency. If all parties jointly agree to the termination of a nonuse of service exception, the Service will terminate the exception. In this case, the assigned official agency must resume service within 60 days of notification.

(vii) *Historic exceptions.* All *nonuse of service exceptions*, that were in place as of March 30, 2019, will be incorporated into geographic boundaries of the gaining agencies.

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Erin Morris, Associate Administrator,
Agricultural Marketing Service.

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