

Directive

9290.18 12-02-10

EXCEPTION PROGRAMS

1. PURPOSE

This directive establishes responsibilities and requirements for providing original service under Section 800.117(b), "Exceptions for official agencies to provide service" of the regulations under United States Grain Standards Act (USGSA).

2. BACKGROUND

Under USGSA, all official agencies in the United States are designated to serve a specific area. This restriction was put in place to ensure effective and efficient delivery of official services to all customers in a designated official agency's assigned territory. Nonetheless, some grain firms have reported delays in getting service due to the distance from the inspection laboratories serving them. Others have reported difficulty in getting service during harvest or other peak demand periods.

In April 1993, The General Accounting Office released a study entitled "Grain Inspection Industry Views on the Decline in Official Inspection and Inspection Costs," which raised questions on the exclusivity of boundaries. In response to that report, Congress amended Sections 7(f) and 7A of the USGSA on November 24, 1993 (Public Law 103-156) to authorize the Grain Inspection, Packers and Stockyards Administration (GIPSA) to conduct pilot programs to determine the benefits of allowing more than one official agency to provide official services within a single geographic area.

Utilizing this authority, GIPSA conducted two pilot programs "timely service and open season" to study the affect of permitting more than one designated agency to inspect or weigh grain in a single geographic area. Additionally, GIPSA initiated the "barge probe service" exception program pilot study on March 1, 1998. Based on information gathered from the pilot studies GIPSA concluded that, under certain circumstances, less restrictive geographic service area requirements on designated official agencies could promote utilization of the official system and enhance the orderly marketing of grain.

Subsequently, Congress amended Section 7(c) (B) (2) of the USGSA in 2000 to give the Department Agriculture discretion to allow more than one designated official agency to provide official inspection services within a single geographic area.

On April 18, 2003, GIPSA revised its regulations to allow more than one designated official agency to inspect or weigh grain within a single geographic area. Section 800.117(b) established three exception programs: timely service; nonuse of service (formerly called open season); and barge probing service. These programs allow, under certain conditions, eligible facilities to request official grain inspection or weighing services from an official agency other than the one assigned to serve their area.

3. POLICY

It is GIPSA's policy to ensure that the exceptions program should promote utilization to enhance the marketing of grain and improve customer service to benefit users of the official system while meeting the statutory objectives under the USGSA.

Responsibilities and request requirements for each program, i.e., timely service, nonuse of service, and barge probe service, vary and are outlined in the following sections.

4. RESPONSIBILITIES

a. FGIS Responsibilities.

(1) Compliance Division.

The Compliance Division is responsible for the oversight of the timely service, nonuse of service, and the barge probe service exception programs. This includes the approval of request; monitoring the volume information; and periodically reviewing the exception programs to ensure they continue to facilitate the marketing of grain and meet the requirements of the USGSA.

(2) Field Management Division (FMD).

The FMD Field Office Manager (FOM) is responsible for assisting the Compliance Division in determining if a request meets the requirements of the exception program, for providing oversight of their assigned official agency regardless of where the service is being provided, and forwarding Timely Service request to the Compliance Division.

b. Facility Management Responsibilities.

The management of the facility where official service is being provided is responsible for requesting Nonuse of Service of an OA other than the incumbent OA; for providing valid documentation of the Timely Service request; and for submitting written request for Nonuse of Service with the required information, including the justification for the request.

c. Official Agency (OA) Responsibilities.

(1) Incumbent OA. The incumbent OA is the official agency designated to provide official services in the area. The incumbent OA is responsible for providing customer service information (e.g., the date and the type of service last provided to the facility), and for reporting monthly volume information for any services provided to the facility after the exception has been approved.

- (2) Requested OA. The requested OA is responsible for ensuring that service is provided once an exception is approved and for reporting monthly volume information.

5. QUALIFICATIONS

- a. Timely Service. A facility that cannot get official services from the incumbent official agency within the specified 6-hours from the time of the request, can request official services from an alternate OA. Facilities should request services within the time frames established in the OA's approved fee schedule.
- b. Nonuse of Service. A facility that has not had official sample-lot inspection or weighing services for 90-consecutive days from the incumbent OA can request official services from another OA. GIPSA evaluates each request for non-use of service on a case-by-case basis and takes into consideration such factors as the location of the specified service point(s); services offered; potential impact of the loss of revenue by the incumbent agency; the number of approved exceptions in the incumbents designated area; and ability to staff an onsite laboratory. Facilities that have never utilized the official system do not automatically qualify for nonuse of service.
- c. Barge Probe Service. OA's can provide probe-sampling and inspection for barge-lots of grain in barges located outside the geographic areas assigned to them.

6. REQUIREMENTS

- a. Timely Service. Request for timely service may be made verbally; however, facilities requesting service must provide valid documentation that they have made every attempt to contact the incumbent OA for services before requesting service from an alternate OA. Valid documentation may include voice mail message, text message, or email which shows the date and time of the request.

If the alternate OA agrees to provide the service they should contact either the supervising field office or the Compliance Division prior to providing service, if during normal business hours. If it is outside normal business hours, the alternate OA should provide the requested service and notify either the supervising field office or the Compliance Division within 2 business days.

Normal business hours:

Compliance Division, Monday through Friday, 7:00 am to 4:30 pm ET.

Field Office, established hours pertaining to that field office.

After normal business hours:

Call either the field office or the Compliance Division (202-720-8262), and leave a message containing: Name of caller, OA name, facility requesting service, the time and date of service provided.

- b. Nonuse of Service. Initial request for nonuse of service may be made verbally from the facility requesting service, and must be followed up in writing to the Compliance Division.

Requests will not be approved until the written request is received by the Compliance Division with the required information.

Written request shall include the following information:

- (1) The date of the request.
- (2) The name of the owner or manager of the facility.
- (3) The facility name, address, and telephone number.
- (4) The type of service(s) requested, e.g., inspection, weighing, or other services.
- (5) The date when last provided official services and the name of the OA that provided the services.
- (6) The name of the requested OA.
- (7) The reason(s) for the requesting service from another OA instead of the incumbent OA.
- (8) Person(s) contacted regarding service request, e.g., the incumbent OA and/or the OA from whom service is being requested.

Mail written request to:

USDA, GIPSA, CP, Review Branch
STOP 3604, Room 1647-S
1400 Independence Avenue, S.W.
Washington, DC 20250

Or Email: Karen.w.guagliardo@usda.gov

Approved nonuse of service exceptions that have been inactive for 18-months are subject to cancellation by the Compliance Division.

- c. Barge Probe Service. The OA can provide probe-sampling and inspection for barge-lots of grain located outside the geographic areas assigned to them. Participating OA's must provide GIPSA with monthly information on services provided under the program. There are no requirements for prior approval for barge probing.

7. DISQUALIFICATION

Any OA that has received a "Letter of Jeopardy" within their 3-year designation period will not be allowed to participate in the non-use of service exception program for up to a three-year period from the date of the Letter of Jeopardy.

Depending on the severity of the reasons causing the Letter of Jeopardy, existing nonuse of service exceptions will be under scrutiny of possible cancellation.

8. AREAS NOT COVERED UNDER THE EXCEPTION PROGRAMS

Submitted samples are not included under the exception program nor are commodities under the U.S. Agricultural Marketing Act.

9. QUESTIONS

Direct any questions to the Compliance Division, at 202-720-8262.

See Attachment "Questions and Answers," for additional information.

/s/ Karen Guagliardo
for

Thomas O'Connor, Director
Compliance Division

Attachment

Frequently Asked Questions

This document is intended to answer questions that may not be covered in the Directive.

GENERAL QUESTIONS RELATED TO ALL EXCEPTION PROGRAMS

- 1. Which OA's can participate in the exception programs?**
All designated OA's can participate in the exception programs unless they have received a Letter of Jeopardy within their designation timeframe or have otherwise been barred from the program.
- 2. Can two OA's provide official services at the same time at a single facility?**
No. The possible misunderstandings, disputes, and billing problems that might result from two OA's working at the same time at the same facility would not be in the interest of the official inspection system.
- 3. Do OA's have to provide official services outside their assigned area under the exception programs? Will this affect their qualification for designation?**
No. An OA's decision not to provide official services outside their assigned area will not affect their qualification for designation.
- 4. If OA "A" chooses not to participate in the exception program by not going outside their assigned area, does this preclude another official agency "B" from going into "A's" designated area to provide official services?**
No. Official agency "A" may decide not to participate in the exception program, however, that does not preclude a facility in "A's" area from requesting approval for official agency "B" to provide official services in "A's" area.
- 5. Will an OA be advised when another official agency is providing service in their area? If so, by whom?**
Nonuse of service program: all parties, i.e., the requesting facility, the incumbent OA, the requested OA, and the FGIS field office(s) which oversees each of the OA's, will be advised of the approval or denial of the request by the Compliance Division. They will not be advised each time that OA is providing service in their area.
Timely service program: per request, the incumbent OA and the Compliance Division must be informed that the facility has requested another OA's services.

- 6. If a designated State has a law that prohibits other official agencies from providing official services within the State, is this State exempted from the exception programs?**
No, provisions of a Federal Statute preempt those of a State Statute.
- 7. Do exception programs only include white certificate service?**
Both timely service and nonuse of service programs include all official inspection/weighing services, except for submitted samples.
- 8. What fees will be allowed under the exception programs? Will volume discounts and contract rates be allowed?**
OA's will charge according to their approved fee schedule. Volume discounts or contract rates may be used if on the approved fee schedule. Fees will be assessed in a nondiscriminatory manner. That is, OA's cannot give special rates or conditions to one facility without making the same rates and conditions available to all other facilities they serve. To do so will result in a Letter of Jeopardy.
- 9. If an OA crosses over field office boundaries, which field office is responsible for supervision?**
The OA supervising field office does not change, however field offices may assist each other.
- 10. What role does the field offices have in approving OA's to participate in exception programs?**
Nonuse of service program: the field office works with the Compliance Division to evaluate each request, but only Compliance Division can approve the request.
Timely service program: either the field office or the Compliance Division may give permission on a request-by-request basis
Barge sampling program: no approval is needed.
- 11. Should OA's be given access to FGIS information concerning customers outside of their designated area, i.e., customer mailing lists, types and volume of service requested by customers, kinds of QC plans for sampling, customers not requesting service, customers that have been interested in exception programs, etc?**
Public information which may be released includes only the names of the facilities.
- 12. Do the exception programs end?**
No. GIPSA changed the regulations under the U. S. Grain Standards Act (USGSA) to incorporate the exception programs, effective May 19, 2003.

TIMELY SERVICE PROGRAM

1. **Will the incumbent OA have the opportunity to justify why services were not timely and will the Review Branch give sufficient time to respond?**

The intent of the timely service program is to assist with timely, quality service, not to serve as a complaint process. GIPSA expects OA's and grain facilities to discuss the time frame within which service is needed. If the incumbent OA cannot meet the timely service requirements with its current work force or by getting help from another OA, they should advise the facility and determine if the facility wants to accept results at a later time or contact another OA.

2. **If an incumbent OA does not meet the timely service requirements for a facility, can the facility use a different OA the next time they need official services?**

No. Request for timely service is per occurrence, not on-going. Request for official services must first be made to the incumbent OA designated to serve them.

However, GIPSA will not view favorably repeated incidents of an incumbent OA not providing service within the timely service guidelines and will investigate the reasons for repeated incidents.

3. **Do inspection results always have to be given within 6 hours?**

The intent of the 6 hours is to provide timely service meeting the customer's needs. If the 6 hour period ends at early morning hours (e.g. 2 a.m.) and the facility has no immediate need for the results, then providing results as soon as possible the next day but not later than noon will be considered reasonable. The focus of this exception program is to provide timely and quality customer service, not to establish rigid government rules that individuals could misuse.

4. **If a facility calls an incumbent OA and gets no answer, what should they do?**

If the facility has made a reasonable attempt (via phone message, text message, or email) to contact the incumbent OA and they have not received a reply within a reasonable amount of time, the facility may contact an alternate OA. Documentation showing who the facility tried to contact and the date and time of the request is required.

5. **What if an OA provides the requested service and the facility was not eligible to participate?**

If the facility was ineligible to participate, it will be barred from further participation. If the OA provides service to a facility that they knew was ineligible, it will be barred from further participation.

If the OA is unsure if the facility is eligible to participate, they should contact the incumbent OA prior to providing the requested service.

NONUSE OF SERVICE PROGRAM

- 1. Under the nonuse of service program, when does the 90-day period start?**
The 90 consecutive day period begins on the day after the facility last received official services. The 90 consecutive day period, does not automatically qualify a facility for the nonuse of service.
- 2. If a facility changes ownership, does it automatically qualify to participate under the nonuse of service program?**
No, unless that facility was already operating under the nonuse of service exception program. The ownership change of a facility is not a qualifying factor. The same requirements apply as if the ownership had not changed.
- 3. Can a company who is not the owner or operator of a facility but ships grain through that facility participate under the nonuse of service program? To clarify this question, the owner/operator of the facility has received official services within the last 3 months, but the shipper has not.**
No. It is based on the facility receiving official service within the last 90 consecutive days.
- 4. Is there a requirement that the facility must obtain services from the OA once it is approved to participate in the "Nonuse of Service" program?**
No. Once the facility is approved to participate in the exception program, the facility may obtain service from the requested OA or from the incumbent OA designated to serve the area.
- 5. Can facility alternate requests for official services between the incumbent OA in whose area they are located and another OA?**
A facility can alternate services between the incumbent OA and the requested OA. Compliance Division monitors the volume from both OA's to ensure that the exception program is being utilized appropriately.
- 6. Would a facility that receives official services on outbound movements but not inbound be eligible to participate in the nonuse of service option?**
No. The criterion is that no official services have been provided within the last 90 consecutive days at that facility. The type of movement or carrier does not matter.
- 7. When a facility in OA "A's" geographic area is approved to use OA "B," may that facility use a third OA "C"?**
No, if the facility requested OA "C" and is approved, OA "B" will no longer be approved.
- 8. Who is ultimately obligated to provide service? The incumbent OA in whose area the facility is located or the OA approved under the exception program that provides the predominant service to the facility?**

An OA that has agreed to provide service under an exception request then becomes obligated to provide services.

If the OA is repeatedly unable to provide services, the exception will be removed, and the incumbent OA is again obligated to provide service.

9. If an OA's designation is not renewed, who will provide service to their exception program customers previously serviced by that OA?

The Compliance Division will work with the facilities and the field office to determine the successor OA.