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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1207

[Doc. No. AMS–SC–22–0041]

Potato Research and Promotion Plan; Changes to Board Membership and Administrative Committee

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule implements recommendations from the National Potato Promotion Board (Board) to change its membership and organization by revising the formula used to determine the number of producer and importer seats on the Board, reducing the maximum number of importer seats on the Board, and indefinitely suspending the Administrative Committee. In addition to these Board-recommended changes, the U.S. Department of Agriculture (USDA) makes several non-substantive changes to clarify the start of the term of office for Board members and modernize the Board's procedures. The Board administers the Potato Research and Promotion Plan (Plan) with oversight by the Agricultural Marketing Service (AMS).

DATES: Effective February 7, 2024.

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SUPPLEMENTARY INFORMATION: This rule affecting the Plan (7 CFR part 1207) is authorized under the Potato Research and Promotion Act of 1971 (Act) (7 U.S.C. 2611–2627).

Executive Orders 12866 and 13563

USDA is issuing this rule in conformance with Executive Orders 12866, 13563, and 14094. Executive Orders 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 effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 reaffirms, supplements, and updates Executive Order 12866 and further directs agencies to solicit and consider input from a wide range of affected and interested parties through a variety of means. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

Executive Order 13175

This rule was reviewed under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, which requires agencies to consider whether their rulemaking actions would have Tribal implications. AMS has determined this rule is unlikely to 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.

Executive Order 12988

This rule was reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 311 of the Act (7 U.S.C. 2620), a person subject to the Plan may file a petition with USDA stating that the Plan, any provision of the Plan, or any obligation imposed in connection with the Plan, is not in accordance with law and requesting a modification of the Plan or to be exempted therefrom. Such person is afforded the opportunity for a hearing on the petition. Thereafter,

USDA will issue a ruling on the petition. The Act provides that the district courts of the U.S. for any district in which the petitioner resides or conducts business shall have jurisdiction to review a final ruling on the petition if the petitioner files a complaint for that purpose not later than 20 days after the date of the entry of USDA's final ruling.

Background

Under the Plan, which became effective on March 9, 1972, the Board administers a nationally coordinated program of research, development, advertising, and promotion designed to strengthen potatoes' competitive position and expand domestic and foreign markets for potatoes and potato products. This program is financed by assessments on handlers and importers of potatoes and potato products.

This rule modifies the membership of the Board by revising the formula to determine the number of producer and importer seats on the Board. This action increases the current threshold from one member seat per five million hundredweight pounds of potatoes produced or imported to one seat per 10 million hundredweight for both producer and importer seats. This action further revises importer membership by reducing the maximum number of importer seats from five to two. Additionally, the action indefinitely suspends the Administrative Committee. Finally, this rule clarifies the start date of the term of office for Board members and modernizes certain Board procedures relating to the submission of votes and ballots.

The Board unanimously recommended the changes to its membership and the indefinite suspension of the Administrative Committee at a public meeting on March 9, 2022. Board members present for the vote represented domestic producers, importers, and the public, and the recommendations incorporated industry feedback collected by the Board over a three-year period.

Changes to Membership Rules

Section 1207.320(b) and (c) of the Plan provides the formula used to determine the number of producer and importer seats on the Board. Under the current formula, one seat is created for every five million hundredweight of potatoes produced or imported.

Therefore, as more potatoes are produced and imported, the Board has more seats.

The Board has encountered significant challenges in filling Board member seats. First, since the Board's inception, the potato industry has experienced both increased production and consolidation. Since the 1970s when the Board was created, production of potatoes in the U.S. as well as imports from Canada and other countries have increased substantially. At the same time, the number of commercial potato farmers and importers has decreased significantly. Accordingly, the number of seats on the Board has increased but there are fewer eligible producers and importers to fill them. Second, Board members are volunteers, nominated by peers to represent their State or importer sector. To be a member, domestic producers and importers use time otherwise spent with their businesses to travel to meetings and participate in committees and decision making. Board members are also expected to communicate the activities of the Board to their constituencies and recruit future Board members. While service as Board members is important, it is time-consuming.

As a result of these challenges, the Board in recent years has typically had approximately 125 total seats, of which only about 100 have been filled. Therefore, the Board has experienced roughly 25 vacancies each year. This rule increases the threshold from one member seat per five million hundredweight pounds of potatoes produced or imported to one seat per 10 million hundredweight for both producer and importer seats. With these changes, the Board expects the number of member seats to reduce to 80.

Section 308(b) of the Act (7 U.S.C. 2617(b)) and §§ 1207.320(c) and 1207.322(d) of the Plan currently allow for a maximum of five importer seats on the Board. Since importers started paying assessments in 1991, the Board has always included the maximum of five importer member seats. Like their domestic producer counterparts, however, potato importers have experienced industry consolidation. According to Customs and Border Protection data, in 2022 there were only 10 importers with annual receipts above the Small Business Administration's (SBA) threshold of \$34 million. The Board has not filled all five positions in the last 10 years because of the small number of continuously active importers. Given members serve three-year terms and cannot serve more than two consecutive terms, along with the

small number of importers, it is reasonable to decrease the maximum number of importers from five to two. Additionally, the Board conducted extensive outreach to affected stakeholders regarding this issue and received their support, as evidenced by the unanimous vote for this change.

The initial request for these changes came from domestic producers and importers. Since 2020, the Board has met with various State organizations across the country to discuss the changes. USDA and members of industry also participated in numerous public meetings conducted by the Board to discuss the chronic vacancies experienced by the Board as a result of its current size and structure. The solution developed by the Board reflects the input from these stakeholders.

Suspending the Administrative Committee

Section 1207.507 of the Plan establishes an Administrative Committee composed of 38 producer members, one importer member, and the public member, as provided for in the Board's bylaws. The Administrative Committee is selected annually. The Administrative Committee acts for the Board in implementing marketing research, development, advertising, and/or promotion activities as directed by the Board and is charged with developing and submitting to USDA for approval specific programs or projects. The Administrative Committee also acts for the Board in authorizing contracts or agreements for the development and carrying out of such programs or projects and the payment of the costs thereof with funds collected pursuant to the Plan. Finally, the Administrative Committee acts for the Board in contracting with cooperating agencies for the collection of assessments pursuant to the Plan.

Due to the changes to the Board's membership made by this final rule, which reduces membership seats to approximately 80, the Administrative Committee is no longer needed. Previously, the Board used the Administrative Committee like a smaller Board that met twice a year, while the full Board only met once. It was easier and cheaper for the Administrative Committee to convene and conduct business because of its reduced size. While the Board, with the changes, will still be larger than the Administrative Committee, the reduced membership under the changes allows the full Board to meet in lieu of the Administrative Committee. Meeting more frequently addresses a major industry concern that only members of committees, which

make up the Administrative Committee, have sufficient interaction with staff to fully understand the programs and activities the Board implements. Although meeting more frequently may require a greater time commitment from Board members, the Board believes the benefits of this change outweigh any additional burden on members. Furthermore, as explained in the next section, this final rule also amends the regulations to permit voting and balloting via electronic methods, which is expected to increase the efficiency of the Board's operations and make it easier for members to participate. By reducing the Board size to a more reasonable number of members, the Board hopes to include all members on committees to promote Board member interaction and involvement. Therefore, this rule indefinitely suspends the Administrative Committee.

USDA Changes

Section 1207.321(a) states that the term of office of Board members starts on July 1, or such other date as may be specified in the regulations. In 1973, USDA added § 1207.504, which provided that the term of office would instead start on April 1. In 1984, § 1207.504 was amended to require the term of office to start on March 1. Since then, each member's term has started on March 1. This final rule changes the start date in § 1207.321(a) from July 1 to March 1 to match § 1207.504 and be consistent with the current practice of the Board.

In § 1207.325(c), the Plan provides that Board members may vote on non-controversial matters and matters of an emergency nature when there is not enough time to call an assembled meeting by mail, telegraph, or telephone. This final rule changes this language to remove the reference to telegraph as a means for voting and to allow for voting by mail, electronic mail, facsimile, or any other means of communication. In § 1207.503(a), (b), and (c), the Plan provides that producers and importers may nominate Board members at meetings or by mail ballots. This final rule changes this language to allow ballots to be submitted by mail, electronic mail, facsimile, or any other means of communication. These changes modernize the sections and increase accessibility to the voting and balloting processes by providing additional options.

Regulatory Flexibility Analysis

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), AMS considered the

economic impact of this action on small entities. Accordingly, AMS prepared this final regulatory flexibility analysis. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be unduly or disproportionately burdened. The RFA requires, where feasible, an estimate of the number of small businesses affected by the rule. This regulatory flexibility analysis estimates a proportion of small businesses where it is not feasible to estimate a number.

The Small Business Administration (SBA) has established size standards that determine whether a business entity is a small business. The size standards are based on the entity's economic activity, or industry, and generally use the North American Industry Classification System (NAICS). The size standards are expressed in annual receipts in millions of dollars or in number of employees, and indicate the maximum allowed for an entity to be considered a small business.

The SBA defines small potato producers as those having annual receipts equal to or less than \$4.25 million (Potato Farming, NAICS code 11211). Small agricultural service firms (handlers and importers) are defined as those having annual receipts equal to or less than \$34 million (Postharvest Crop Activities, NAICS code 115114) (13 CFR 121.201). These were the numbers in effect when this regulatory flexibility analysis was prepared in October 2023.

According to the Board, in 2021 there were approximately 1,500 producers and 955 handlers of potatoes. Since data was not available on the number of producers that are small businesses according to the SBA standard, this analysis computes an estimate of the number of small farms using census data from the USDA's National Agricultural Statistics Service (NASS). Producers that pay Board assessments have a minimum of five acres of potatoes. The 2017 Agricultural Census (the most recent census data available) reported 2,420 farms with five or more harvested acres of potatoes, which is reasonably close to the Board estimate of 1,500 producers that paid assessments in 2021.

NASS reported a 2022 U.S. potato crop value of \$5,069,511,000 and 895,600 harvested acres (the most recent annual data available). The estimated average value per harvested acre is \$5,660 (obtained by dividing the crop value of \$5,069,511,000 by the number of acres, 895,600). Thus, on average, a farm would have to harvest 751 or fewer acres of potatoes to meet the SBA's definition of a small business (obtained

by dividing the SBA threshold of \$4.25 million by the estimated 2022 average value per acre, \$5,660).

According to the 2017 Agricultural Census, out of the 2,420 potato farms with five or more harvested acres, 2,030 farms (84 percent) harvested 749 or fewer acres, very close to the 751 or fewer acres in the previous computation. Based on these computations, and assuming a normal distribution, a large majority of potato farms paying assessments to the Board are small businesses according to SBA criteria.

As noted above, the SBA threshold size for a small agricultural service business is \$34 million in annual sales. The Board estimate of the number of potato handlers in 2021 was 955. Dividing the \$5.07 billion NASS crop revenue estimate by 955 yields an annual estimate of potato sales per handler of approximately \$5.3 million (farm level value), which is well below \$34 million, the SBA threshold size for a small agricultural service business.

Potato handlers perform various procedures to get potatoes to market, including grading, sorting, packaging, and shipment. What handlers are paid can be estimated by obtaining an annual average shipping point price for potatoes from AMS Market News. AMS shipping point prices capture the prices received by shippers (handlers) after buying potatoes from growers, and then grading, sorting, packaging, and shipping. The 2022 average AMS shipping point price received for potatoes (\$0.20 per pound) is 55 percent higher than the 2022 average annual NASS price of \$0.129 per pound received by growers. Adding 55 percent to the \$5.3 million potato sales per handler at the farm level yields an estimate of \$8.2 million average annual sales at the handler level, which is also well below the SBA small business threshold size of \$34 million or less in annual sales. Assuming a normal distribution, a majority of potato handlers are small agricultural service businesses, according to SBA criteria.

Based on a review of 2022 potato import data from U.S. Customs and Border Protection, there were approximately 140 importers. Of those 140 importers, 130 (93 percent) had potato imports valued at \$34 million or less, the SBA size threshold for small agricultural service firms. Therefore, 130 potato importers are small businesses in terms of potato import value, using SBA business size criteria.

This rule amends §§ 1207.320, 1207.321, 1207.322, 1207.325, and 1207.503, and suspends § 1207.507. The changes modify the membership of the

Board by revising the formula to determine the number of seats on the Board and reducing the maximum number of importer seats on the Board. The changes also indefinitely suspend the Administrative Committee, clarify the start date of the term of office of Board members, and modernize the Board's voting and balloting procedures.

This rule does not impose any new costs on producers, handlers, or importers. This rule also does not impose any additional reporting, recordkeeping, or information collection requirements on affected entities. The changes are administrative in nature and allow the Board to more effectively carry out the requirements of the Plan while reducing costs and increasing participation. With these changes, fewer individuals are required to attend meetings, reducing the time burden and costs associated with traveling and attending meetings. Further, modernizing the Board's procedures to authorize additional methods for casting votes and ballots is expected to help increase participation.

The Board considered several options when evaluating the best course of action. Adopting a set number of seats per region with several at-large seats was considered. The industry preferred to continue using an annual volume calculation instead of setting a finite number of seats. The Board also considered taking no action and continuing to experience significant membership vacancies. The Board decided against this option because vacancies have become pervasive. Therefore, these alternatives were rejected.

Regarding outreach efforts, all the Board's meetings, including the March 9, 2022, meeting during which the Board recommendations relevant to this action were discussed, are open to the public and interested persons are invited to participate and express their views. No concerns were raised in these meetings about the changes proposed in this document.

As with all Federal promotion programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

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

A proposed rule concerning this action was published in the **Federal Register** on September 5, 2023 (88 FR 60599). Copies of the proposed rule were sent via email to all potato producers, importers, and handlers. A copy of the proposed rule was also made available through the internet by AMS via <https://www.regulations.gov>. A 30-day comment period ending October 5, 2023, was provided for interested persons to respond to the proposal.

Comment Analysis

During the proposed rule's 30-day comment period, AMS received 13 comments and one ex parte communication, which may be viewed on the internet at <https://www.regulations.gov>. Twelve comments and the ex parte communication were in support of the changes, and one opposed the changes. Nine comments and the ex parte communication were from the potato industry and three were from the public.

Of the comments supporting the changes, several noted the changes would increase participation at the meetings. More specifically, one comment believed having each person serving the function of what is now the Administrative Committee will allow members to better understand the Board's strategy and vision. Another comment pointed to increased accountability and access to make programmatic decisions that represent all potato growers. Some comments mentioned that the changes would increase the efficiency of the Board, fostering more robust debate and making the decision-making more transparent. Other comments acknowledged the difficulty in recruiting members seats and remarked having fewer of them would make them easier to fill.

One of the commenters who ultimately supported the amendments expressed two concerns. The commenter questioned whether a smaller Board could adequately represent the interests of the public. In addition, the commenter suggested that the reduced size of the Board could lead to less dissent, fewer creative solutions to challenges, and fewer members with technical expertise.

This final rule does not reduce the public's representation nor access to the Board. First, this final rule does not change the number of public members on the Board. Pursuant to the regulations, the Board includes one public member in addition to its producer and importer members. Significantly too, all Board meetings are open to the public and interested

persons are invited to participate and express their views. Additionally, the reduction in Board member seats is not expected to negatively impact the quality of the Board's work. Instead, it is expected that the reduced size of the Board will foster greater participation and engagement among members.

One comment did not support the changes as proposed. First, the commenter expressed concern that the amendments would create an imbalance between producers and importers on the Board by increasing the number of importer seats and decreasing the number of producer seats. The commenter suggested that the number of importer seats should be proportional to their contribution to assessment revenue and that the number of producer seats should not be reduced. Second, the commenter stated that the amendments would reduce diversity and inclusion and cause some states to be overrepresented or underrepresented on the Board. The commenter suggested that producer seats should be allocated to States based on equitable criteria and that the Board should encourage more participation from underrepresented farmers, including women and minorities. Third, the commenter opposed the indefinite suspension of the Administrative Committee. Fourth, unrelated to the changes implemented in this final rule, the commentator raised water consumption and pollution issues associated with potato production.

Regarding changing the number of importer and producer seats, the rule amends the formula that is applied to both producer and importer membership and reduces, not increases, the maximum number of importers that can serve on the Board. Specifically, the rule reduces the maximum number of importer seats from five to two. Since the Board's inception, the global potato industry has experienced both increased production and consolidation. Accordingly, the number of member seats has increased but there are fewer eligible producers and importers to fill them. In response to these industry shifts, the Board considered the current number of members, the challenges in recruitment, and how a reduction might change representation on the Board. Recognizing assessments contributed by both importers and producers, the Board proposed to increase the current threshold from one member seat per five million hundredweight pounds of potatoes produced or imported to one seat per 10 million hundredweight for both producer and importer seats.

As for using equitable criteria to allocate producer seats, § 1207.320(b) of the Plan provides the formula to

determine the membership of the Board. This formula applies to all States equally and allocates member seats to States based on the volume of potatoes they produce. The amended formula in this rule also applies to all States equally, decreasing the number of members from each State proportionately. Regarding encouraging more participation from underrepresented farmers, the Board goes to great lengths to recruit underrepresented producers and importers to serve. During the nomination process, the Board conducts extensive outreach, including traveling to speak at local industry meetings and relevant agriculture-related associations. Additionally, AMS policy is that diversity of the boards, councils and committees it oversees should reflect the diversity of their industries in terms of the experience of members, methods of production and distribution, marketing strategies and other distinguishing factors, including but not limited to individuals from historically underserved communities, that will bring different perspectives and ideas to the table.

Regarding the Administrative Committee, it is comprised of 40 members and can act for the Board in implementing programs, projects, and authorizing contracts. When considering changes to the Plan, the Board initially modeled the projected membership to resemble the Administrative Committee because of its success in getting members involved and providing interaction with program staff. The Board further discussed the Administrative Committee's role with the reduced membership and considered keeping or amending it. However, considering industry's feedback, the Board believed the Administrative Committee was no longer needed. With this change, the opportunities for members to discuss and debate important issues related to the budget, contracts, audits, and reports of the Board will not be reduced. On the contrary, it is expected that the reduced size of the Board will increase participation and debate among Board members.

Concerning potato production's water consumption and pollution issues, § 1207.335(b) of the Plan provides that the Board can establish and carry on research and development projects and studies to the end that the marketing and utilization of potatoes may be encouraged, expanded, improved, or made more efficient. The Board uses this authority to support the industry's leading sustainability initiatives and funds several research projects. More

specifically, they fund research developing new potato varieties that will perform in hot and humid environments.

During the comment period, AMS received an ex parte communication responding to a posted comment. The commenter remarked the rule decreases the number of importer seats, not increases them. The commenter went on to mention the Board's diversity and inclusion efforts, stating the reduction of membership will not degrade diversity and inclusion efforts. Lastly, the commenter elaborated how the Board is increasing diversity by including all members on operating committees and commented that the Administrative Committee is no longer needed.

After consideration of all relevant material presented, including the information and recommendations submitted by the Board, comments submitted, and other available information, AMS determined this rule tends to effectuate the declared policy of the Act. Accordingly, no changes will be made to the rule as proposed based on the comments received.

List of Subjects in 7 CFR Part 1207

Advertising, Agricultural research, Potatoes, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Agricultural Marketing Service amends 7 CFR part 1207 as follows:

PART 1207—POTATO RESEARCH AND PROMOTION PLAN

■ 1. The authority citation for 7 CFR part 1207 continues to read as follows:

Authority: 7 U.S.C. 2611–2627; 7 U.S.C. 7401.

■ 2. Amend § 1207.320 by revising paragraphs (b) and (c) to read as follows:

§ 1207.320 Establishment and membership.

(b) Producer membership upon the Board shall be determined on the basis of the potato production reported in the latest Crop Production Annual Summary Report issued by the National Agricultural Statistics Service of the U.S. Department of Agriculture. If a State's potato production data is not provided by the National Agricultural Statistics Service, the Board may use an alternative data source that reliably reflects potato production in the United States. Unless the Secretary, upon recommendation of the Board, determines an alternate basis, for each 10 million hundredweight of such

production, or major fraction thereof, produced within each State, such State shall be entitled to one member. However, each State shall initially be entitled to at least one member.

(c) The number of importer member positions on the Board shall be based on the hundredweights of potatoes, potato products equivalent to fresh potatoes, and seed potatoes imported into the United States but shall not exceed two importer members. Unless the Secretary, upon recommendation of the Board, determines an alternate basis, there shall be one importer member position for each 10 million hundredweight, or major fraction thereof, of potatoes, potato product equivalents, and seed potatoes imported into the United States.

* * * * *

■ 3. Amend § 1207.321 by revising paragraph (a) to read as follows:

§ 1207.321 Term of office.

(a) The term of office of Board members shall be 3 years, beginning March 1, or such other beginning date as may be approved pursuant to regulations.

* * * * *

■ 4. Amend § 1207.322 by revising paragraph (d) to read as follows:

§ 1207.322 Nominations and appointment.

* * * * *

(d) The importer members shall be nominated by importers of potatoes, potato products and/or seed potatoes. The number of importer members on the Board shall be announced by the Secretary and shall not exceed two members. The Board may call upon organizations of potato, potato products and/or seed potato importers to assist in nominating importers for membership on the Board. If such organizations fail to submit nominees or are determined by the Board to not adequately represent importers, then the Board may conduct meetings of importers to nominate eligible importers for Board member positions. In determining if importer organizations adequately represent importers, the Board shall consider:

- (1) How many importers belong to the association;
- (2) What percentage of the total number of importers is represented by the association;
- (3) Is the association representative of the potato, potato product, and seed potato import industry;
- (4) Does the association speak for potato, potato product, and seed potato importers; and
- (5) Other relevant information as may be warranted.

* * * * *

■ 5. Amend § 1207.325 by revising paragraph (c) to read as follows:

§ 1207.325 Procedure.

* * * * *

(c) For routine and noncontroversial matters which do not require deliberation and the exchange of views, and for matters of an emergency nature when there is not enough time to call an assembled meeting, the Board may act upon a majority of concurring votes of its members cast by mail, telephone, electronic mail, facsimile, or any other means of communication. Any vote cast by telephone shall be confirmed promptly in writing.

■ 6. Amend § 1207.503 by revising paragraphs (a), (b), and (c) to read as follows:

§ 1207.503 Nominations.

(a) Pursuant to § 1207.322 of the plan, the Board shall assist producers in producing sections or States each year to nominate producer members for the Board. Such nominations may be conducted at meetings or with ballots submitted by mail, electronic mail, facsimile, or any other means of communication. One individual shall be nominated for each position to become vacant. A list of nominees shall be submitted to the Secretary for consideration by November 1 of each year.

(b) Pursuant to § 1207.322 of the plan, the Board shall assist importers each year to nominate importer members for the Board. Such nominations may be conducted at meetings or with ballots submitted by mail, electronic mail, facsimile, or any other means of communication.

(c) Nomination meetings or balloting by mail, electronic mail, facsimile, or any other means of communication shall be well publicized with notice given to producers, importers, and the Secretary at least 10 days prior to each meeting or distribution of ballots.

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§ 1207.507 [Stayed]

■ 7. Stay § 1207.507 indefinitely.

Erin Morris,
Associate Administrator, Agricultural Marketing Service.

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