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## The Evolution of Animal Identification in Beef Cattle

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# The Evolution of Animal Identification in Beef Cattle

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## I. INTRODUCTION

The United States' beef cattle industry's recent past has been plagued by a lack of a national animal identification system. The lack of a national animal identification system has made it difficult, if not impossible, to track a diseased animal back to its farm of origin or determine what other cattle have been in contact with the diseased animal. In fact, during the investigation of the December 2003 Bovine Spongiform Encephalopathy (Mad Cow Disease) outbreak, the lack of a national animal identification system meant that the United States was only able to locate twenty-eight of the eighty cows that entered the United States with the diseased cow.<sup>1</sup> The United States Department of Agriculture (USDA) attempted to fix this problem in 2004 with a voluntary national animal identification system (NAIS).<sup>2</sup> When the NAIS proved to be unsuccessful, the USDA proposed a mandatory animal identification system in August 2011 referred to as the Animal Disease Traceability (ADT) program.<sup>3</sup> This article will analyze the new mandatory animal identification system in the context of the system that failed in the past.

The beef cattle industry in the United States is widespread, with a presence in every state, and includes a large number of individual farming operations.<sup>4</sup> As of January 1, 2011, there were 30.9 million beef cows in the United States being raised on 742,000 farming operations.<sup>5</sup> The majority of beef cattle operations in the United States would be classified as smaller operations.<sup>6</sup> In fact, nearly one third of

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1. OFFICE OF COMM'NS, U.S. DEP'T OF AGRIC., RELEASE NO. 0074.04, FINAL BSE UPDATE (2004).

2. *See infra* Part IV.

3. *See infra* Part V.

4. *See generally* WILLIAM D. MCBRIDE & KENNETH MATHEWS, JR., U.S. DEP'T OF AGRIC., ECONOMIC INFORMATION BULLETIN NO. 73, THE DIVERSE STRUCTURE AND ORGANIZATION OF U.S. BEEF COW-CALF FARMS (2011).

5. NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., APPENDIX 2—OVERVIEW OF U.S. LIVESTOCK, POULTRY, AND AQUACULTURE PRODUCTION IN 2010 AND STATISTICS ON MAJOR COMMODITIES, 6–7 [hereinafter NASS 2010 Statistics]. For the purpose of the agriculture census, a farm is defined as “any establishment from which \$1,000 or more of agricultural products were sold or would be normally sold during the year.” *Id.* at 1.

6. MCBRIDE & MATHEWS, *supra* note 4, at 1. Small beef cow operations are defined as operations with one to forty-nine head of beef cows. NASS 2010 Statistics, *supra* note 5, at 7.

beef cattle operations have fewer than ten cows, with over half of all beef cattle operations having fewer than twenty cows, and almost 80% of beef cattle operations have less than fifty cows.<sup>7</sup> Conversely, large operations<sup>8</sup> account for just over 9% of all beef cow operations in the United States, yet these large operations produce over 54% of all beef cows in the United States.<sup>9</sup>

The vast majority of cattle operations have less than fifty cows.<sup>10</sup> The small size of these operations and the increased cost in finishing calves for slaughter results in nearly 80% of calves being sold within sixty days of weaning.<sup>11</sup> Most of these calves are shipped to large commercial feedlots where they are finished for slaughter.<sup>12</sup> These statistics illustrate that in order for a nationwide animal identification system to be effective in the United States, it must be flexible enough for implementation by a wide array of beef cattle operations.

The lack of a uniform, nationwide animal tracking program in the United States makes it difficult to estimate the number of cattle that are moved interstate in any given year. States do, however, track inshipments or the number of cattle that are shipped into the state during the year.<sup>13</sup> It is important to note, however, that the inshipment tracking does not include cattle that are shipped into the state for immediate slaughter.<sup>14</sup> In 2009, total inshipments recorded nearly twenty million head of cattle.<sup>15</sup> Moreover, the USDA estimates that approximately ten million head of cattle are moved interstate directly to slaughter each year.<sup>16</sup> Therefore, about 40% of cattle and calves sold in the United States each year are assumed to move interstate.<sup>17</sup>

Until recently, the United States has taken a fairly *laissez faire* approach to animal identification in beef cattle. This article focuses on the history and evolution of animal identification systems in United States beef cattle. Part II of this article addresses recent events that precipitated the push for a national animal identification system. Next, Part III reviews the animal traceability component of the Brucellosis regulations, Part IV examines the National Animal

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7. MCBRIDE & MATHEWS, *supra* note 4, at 1.

8. Large beef cow operations are defined as operations with one hundred or more head of beef cows. NASS 2010 Statistics, *supra* note 5, at 7.

9. NASS 2010 Statistics, *supra* note 4, at 7.

10. MCBRIDE & MATHEWS, *supra* note 4, at 1.

11. MCBRIDE & MATHEWS, *supra* note 4, at 5–6.

12. MCBRIDE & MATHEWS, *supra* note 4, at 6.

13. ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., REGULATORY IMPACT ANALYSIS & INITIAL REGULATORY FLEXIBILITY ANALYSIS: TRACEABILITY FOR LIVESTOCK MOVING INTERSTATE, 15–16 (Jan. 2011) [hereinafter USDA, REGULATORY IMPACT ANALYSIS].

14. *Id.*

15. *Id.* at 16.

16. *Id.* at 25.

17. *Id.*

Identification System, and Part V explains the recently proposed mandatory ADT regulations.

## II. WHAT BROUGHT ABOUT THE NEED FOR ANIMAL IDENTIFICATION?

### A. Bovine Spongiform Encephalopathy—“Mad Cow Disease”

On December 23, 2003, then USDA Secretary Ann Veneman reported the United States' first case of suspected Bovine Spongiform Encephalopathy (BSE), or mad cow disease.<sup>18</sup> During this news conference, Secretary Veneman noted that the single Holstein cow was from a farm in Mabton, Washington and that the BSE was detected as part of the agency's aggressive surveillance program.<sup>19</sup> After making the announcement, Secretary Veneman repeatedly assured the American people that the American beef supply remained safe and no alterations to eating beef habits needed to be made.<sup>20</sup>

The USDA was interested in getting to the bottom of the BSE outbreak for a number of reasons. First, BSE is a progressive, fatal, and chronic degenerative neurological disease in cattle.<sup>21</sup> There are only certain tissues within BSE infected cattle that are actually infective; these tissues include the brain, spinal cord, and retina of the eye.<sup>22</sup> The major concern with BSE infected cattle in the United States meat supply stems from the fact that “[t]he BSE agent is extremely resistant to heat and to normal sterilization processes.”<sup>23</sup> In fact, current scientific research indicates that neither thoroughly cooking the meat nor irradiation will kill the BSE agent.<sup>24</sup>

Second, in 1996 scientists in the United Kingdom found ten cases of variant Creutzfeldt-Jakob Disease (vCJD), which is a chronic and fatal neurological-degenerative disease found in humans.<sup>25</sup> Over

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18. OFFICE OF COMMC'NS, U.S. DEP'T OF AGRIC., RELEASE No. 0433.03, TRANSCRIPT OF NEWS CONFERENCE WITH AGRICULTURE SECRETARY ANN M. VENEMAN ON BSE (Dec. 23, 2003).

19. *Id.*

20. *Id.*

21. ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., BOVINE SPONGIFORM ENCEPHALOPATHY: AN OVERVIEW, PROGRAM AID No. 1705, at 2 (2006).

22. *Id.* at 5.

23. *Id.* at 2.

24. Food Safety & Inspection Serv., U.S. Dep't of Agric., *Fact Sheets: Bovine Spongiform Encephalopathy—“Mad Cow Disease,”* (Mar. 2005), [http://www.fsis.usda.gov/Fact\\_Sheets/Bovine\\_Spongiform\\_Encephalopathy\\_Mad\\_Cow\\_Disease/index.asp#13](http://www.fsis.usda.gov/Fact_Sheets/Bovine_Spongiform_Encephalopathy_Mad_Cow_Disease/index.asp#13).

25. ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., BOVINE SPONGIFORM ENCEPHALOPATHY: AN OVERVIEW, PROGRAM AID No. 1705, 5 (2006).

time, scientific evidence has convincingly linked BSE and vCJD.<sup>26</sup> In fact, laboratory studies have shown the “biological and molecular features of the pathologic agent transmitted from BSE-infected cattle and human cases of vCJD to be identical.”<sup>27</sup> The source of transmission appears to be the human consumption of beef products that were contaminated by nervous system tissue from BSE positive cattle.<sup>28</sup>

Individuals with vCJD may be asymptomatic for years,<sup>29</sup> but once symptoms are present, the individual usually survives fourteen months.<sup>30</sup> Early symptoms include “behavioral changes, loss of the ability to coordinate muscular movements, and peripheral sensory disturbances such as loss of sensation.”<sup>31</sup> As vCJD progresses, the patients are likely to experience forgetfulness, other memory impairments, apathy, weight loss, and mild dementia, which eventually becomes progressive dementia.<sup>32</sup> Just prior to death, some vCJD patients will even develop blindness.<sup>33</sup> Currently, vCJD can only be diagnosed postmortem; an autopsy will reveal an appearance of “spongy” holes in the brain.<sup>34</sup>

Media reports in the days, weeks, and months following the USDA announcement addressed the enormous impact this discovery could have on the export market of America’s beef.<sup>35</sup> The larger issue of debate, however, dealt with the United States’ lack of a national animal identification system, which would aid in the location of other

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26. Nat’l Inst. of Neurological Disorders & Stroke, *Testimony on Transmissible Spongiform Encephalopathies, April 4, 2001* (Apr. 4, 2001), [http://www.ninds.nih.gov/news\\_and\\_events/congressional\\_testimony/nih\\_testimony.htm](http://www.ninds.nih.gov/news_and_events/congressional_testimony/nih_testimony.htm).

27. *Id.*

28. *Id.*

29. The time period between exposure and symptoms being present can be anywhere from five to twenty years. Susan J. Landers, *Mad Cow Disease Could Trigger Patient Concerns*, AMERICAN MEDICAL NEWS (Apr. 23/30, 2001), <http://www.ama-assn.org/amednews/2001/04/23/hlsa0423.htm>.

30. Litjen Tan, et al., *Risk of Transmission of Bovine Spongiform Encephalopathy to Humans in the United States: Report of the Council on Scientific Affairs*, 28 J. AM. MED. ASS’N 2330, 2332 (1999); National Institute of Neurological Disorders and Stroke, *supra* note 26.

31. National Institute of Neurological Disorders and Stroke, *supra* note 26.

32. Tan et al., *supra* note 30.

33. Tan et al., *supra* note 30.

34. Tan et al., *supra* note 30; National Institute of Neurological Disorders and Stroke, *supra* note 26.

35. See generally Scott Kilman et al., *Case of Mad Cow Found in the U.S. for First Time: Discovery Expected to Jolt American Cattle Industry; Food Supply Called Safe*, WALL ST. J., Dec. 24, 2003, at A1; Sherri Day, *Ranchers and Companies Support New Restrictions*, N.Y. TIMES, Dec. 31, 2003, at A15; Elizabeth Becker, *Mexico Lifts Ban on Many U.S. Beef Products*, N.Y. TIMES, Mar. 5, 2004, at C5; Alexei Barrionuevo, *Congress Is Staying Clear of Dispute Over Mad Cow*, N.Y. TIMES, May 10, 2005, at C9.

animals that may have been exposed to BSE.<sup>36</sup> The media further reported and warned that it could take weeks, or even months, to discover where the Holstein cow was born, and without a national animal identification system, investigators may never know.<sup>37</sup>

Prior to the December 2003 BSE discovery, the USDA was attempting to establish a national animal identification system, which could help enhance the speed and accuracy of the USDA's response to animal disease outbreaks.<sup>38</sup> In light of the discovery of BSE in the United States, then Secretary of Agriculture Ann Veneman requested that the development of the architecture to implement a national animal identification system be expedited.<sup>39</sup> Secretary Veneman declared the national animal identification system development a top priority of the USDA.<sup>40</sup> In light of the closure of the BSE investigation, it appears that this call for an expedited national animal identification system may have come too late.<sup>41</sup>

On February 9, 2004, the last update regarding the BSE investigation was released by the USDA, announcing that the field investigation was complete.<sup>42</sup> This report noted that the BSE-positive cow from Canada had been imported into the United States in September 2001, along with eighty other cattle from the same dairy.<sup>43</sup> Over the course of the investigation to locate these other eighty cattle, 255 animals were slaughtered and BSE tested, all of which were negative.<sup>44</sup> Moreover, after all of these animals were slaughtered, only twenty-eight of the eighty cattle that entered the United States with the BSE positive cow were identified.<sup>45</sup>

Just prior to the closing of the BSE investigation, Secretary Veneman's Foreign Animal and Poultry Disease Advisory Committee's Subcommittee on the United States' Response to the Detection of a Case of BSE<sup>46</sup> (Subcommittee) released a report titled, *Report on Mea-*

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36. See generally Kilman et al., *supra*, note 35, at A1; Richard A. Oppel, Jr. & Donald G. McNeil, Jr., *Tracing History of Infected Cow May Take Time*, N.Y. Times, Dec. 27, 2003, at A1.

37. Oppel & McNeil, *supra* note 36.

38. OFFICE OF COMM'NS, U.S. DEP'T OF AGRIC., RELEASE NO. 0449.03, VENEMAN ANNOUNCES ADDITIONAL PROTECTION MEASURES TO GUARD AGAINST BSE (2003).

39. *Id.*

40. *Id.*

41. OFFICE OF COMM'NS, U.S. DEP'T OF AGRIC., RELEASE NO. 0074.04, FINAL BSE UPDATE (2004).

42. *Id.* at 1.

43. *Id.*

44. *Id.*

45. *Id.*

46. The subcommittee members were Prof. U. Kihm (Switzerland), Prof. W. Hueston (USA), Dr. D. Matthews (UK), Prof. S. C. MacDiarmid (New Zealand), and Dr. D. Heim (Switzerland). THE SEC'Y'S FOREIGN ANIMAL & POULTRY DISEASE ADVISORY COMM.'S SUBCOMM. ON THE U.S.'S RESPONSE TO THE DETECTION OF A CASE OF BO-

*asures Relating to Bovine Spongiform Encephalopathy (BSE) in the United States*, which looked at the United States' efforts and investigation after the BSE infected cow was identified.<sup>47</sup> In this report, the Subcommittee noted the importance of the United States implementing an animal identification and traceability system.<sup>48</sup> The Subcommittee stated that such a system would provide a cost-effective and rapid manner of tracing animals in times of a contagious disease outbreak.<sup>49</sup>

In March 2005, the Center for Science in the Public Interest<sup>50</sup> released a report on BSE in the United States and Canada.<sup>51</sup> In this report, the Center for Science in the Public Interest blamed the USDA's breakdown in their 2003 BSE investigation on the lack of a national animal identification system.<sup>52</sup> In fact, the report noted that the lack of a national animal identification system made trace-back during the investigation difficult and sometimes impossible.<sup>53</sup> The report also noted that Canada maintained a mandatory animal identification system, which allowed Canada to quickly identify the birth place of the infected animal, along with all other cattle born on that farm in the twelve months before and after the birth of the infected animal.<sup>54</sup> This extensive animal identification system allowed Canada to quickly locate and test any surviving cattle from the same farm.<sup>55</sup>

Consequently, in light of the "failed" USDA investigation after the 2003 BSE scare, it appeared that many individuals were behind the implementation of a national animal identification system, which could make future disease outbreak investigations more successful.

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VINE SPONGIFORM ENCEPHALOPATHY, REPORT ON MEASURES RELATING TO BOVINE SPONGIFORM ENCEPHALOPATHY (BSE) IN THE UNITED STATES (2004).

47. OFFICE OF COMM'NS, U.S. DEP'T OF AGRIC., RELEASE NO. 0074.04, FINAL BSE UPDATE (2004).

48. THE SEC'y'S FOREIGN ANIMAL & POULTRY DISEASE ADVISORY COMM.'S SUBCOMM. ON THE U.S.'S RESPONSE TO THE DETECTION OF A CASE OF BOVINE SPONGIFORM ENCEPHALOPATHY, REPORT ON MEASURES RELATING TO BOVINE SPONGIFORM ENCEPHALOPATHY (BSE) IN THE UNITED STATES (2004).

49. *Id.*

50. "The Center for Science in the Public Interest (CSPI) is a consumer advocacy organization whose twin missions are to conduct innovative research and advocacy programs in health and nutrition, and to provide consumers with current, useful information about their health and well-being." *Mission Statement*, CTR. FOR SCI. IN THE PUB. INTEREST, <http://www.cspinet.org/about/mission.html> (last visited Mar. 4, 2012).

51. CTR. FOR SCI. IN THE PUB. INTEREST, NAME THAT COW: U.S. BSE PRECAUTIONS AND TRADE WITH CANADA (2005).

52. *Id.* at 6.

53. *Id.*

54. *Id.*

55. *Id.*

### III. BRUCELLOSIS VACCINATION PROGRAM

In 2003, the United States did have a system for tracing some cattle.<sup>56</sup> The problem with this system is that the tracing mechanism is tied to brucellosis vaccination and was not created as an animal tracking system.<sup>57</sup>

Brucellosis is a contagious disease that affects beef cattle and other ruminant animals.<sup>58</sup> Brucellosis can cause cattle to abort pregnancies or to have weak and unhealthy calves.<sup>59</sup> Moreover, brucellosis can lead to lowering of fertility with poor conception rates or sterilization due to retained afterbirths with resulting uterine infections.<sup>60</sup> Additionally, brucellosis can be transmitted to an animal through direct contact with an infected animal or from contact with discharges from an infected animal.<sup>61</sup> In light of all of the negative impacts of brucellosis, it should come as no surprise that the United States implemented a program in 1934 to begin to control, and eventually eradicate, brucellosis in the United States.<sup>62</sup>

A brief review of the brucellosis vaccination program, along with current statistics, elucidates why the brucellosis vaccination program did not work as an animal identification or tracking system in 2003 and does not work currently.

#### A. Details of the Brucellosis Vaccination Program

Under the brucellosis vaccination program, there are four different state classifications.<sup>63</sup> In descending order of prevalence, the classifications are as follows: Class Free, Class A, Class B, and Class C.<sup>64</sup> A state's classification determines whether cattle from that state must be vaccinated for brucellosis prior to being transported interstate.<sup>65</sup>

To qualify as a Class Free State, all cattle herds in the state must have been brucellosis free for twelve consecutive months, and the cattle herd infection rate within any twelve consecutive month period

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56. 9 C.F.R. § 78 (2012).

57. *Id.*

58. Animal & Plant Health Inspection Serv., U.S. Dep't of Agric., *Facts About Brucellosis*, [http://www.aphis.usda.gov/animal\\_health/animal\\_diseases/brucellosis/downloads/bruc-facts.pdf](http://www.aphis.usda.gov/animal_health/animal_diseases/brucellosis/downloads/bruc-facts.pdf) (last visited Mar. 4, 2012).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. 9 C.F.R. § 78.1 (2012).

64. *Id.*

65. *Id.* § 78.10. Special rules exist about the movement of cattle that are brucellosis reactors, (*id.* § 78.7), cattle that have been exposed to brucellosis, (*id.* § 78.8), and cattle from unaffected herds, (*id.* § 78.9), but none of these special rules require brucellosis vaccination.

must be 0.0%.<sup>66</sup> If the state has been Class Free for five consecutive years, and it does not have brucellosis in its wildlife, then all of the recognized slaughtering establishments<sup>67</sup> must agree to participate in the market cattle identification (MCI) program testing.<sup>68</sup> If a state has not been Class Free for five consecutive years or there is brucellosis in its wildlife, then all recognized slaughtering establishments in the state must participate in the MCI program, and blood samples must be collected from at least 95% of all cows and bulls over two years of age.<sup>69</sup> Moreover, all Class Free States must be able to trace-back 90% of all brucellosis reactors<sup>70</sup> to the farm of origin.<sup>71</sup> Also, Class Free States must be able to close 95% of the brucellosis reactor cases that were traced to the farm of origin.<sup>72</sup>

To qualify as a Class A State, the cattle herd infection rate for the state, during any twelve consecutive months, cannot exceed 0.25%.<sup>73</sup> All recognized slaughtering establishments in a Class A State must participate in the MCI program, and blood samples must be collected from at least 95% of all cows and bulls over two years of age.<sup>74</sup> A Class A State must be able to trace-back at least 90% of all brucellosis reactors to the farm of origin and successfully close at least 95% of those cases.<sup>75</sup>

Class B State and Class C State requirements are the same, except the cattle herd infection rate.<sup>76</sup> For both classifications, all recognized slaughtering establishments in the state must participate in the MCI program and blood samples must be collected from at least 95% of all cows and bulls over two years of age.<sup>77</sup> Both classifications must also trace-back at least 80% of all brucellosis reactors to the farm of origin and close at least 90% of the brucellosis reactor cases that were traced back to the farm of origin.<sup>78</sup> To qualify as a Class B State, the cattle herd infection rate, during any twelve consecutive months, cannot ex-

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66. *Id.* § 78.1.

67. Recognized slaughtering establishments are defined as “any slaughtering establishment operating under the provisions of the Federal Meat Inspection Act or a State meat inspection act.” *Id.* (internal citations omitted).

68. *Id.*

69. *Id.*

70. A brucellosis reactor is “[a]n animal subjected to an official test resulting in a brucellosis reactor classification or subjected to a bacteriological examination for field strain *Brucella abortus* and found positive.” *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

ceed 1.5%.<sup>79</sup> To qualify as a Class C State, the states cattle herd infection rate, during any twelve consecutive months, exceeds 1.5%.<sup>80</sup>

All steers and spayed heifers are able to move interstate without any restrictions from the brucellosis regulations.<sup>81</sup> All dairy cows and heifers, four months of age or older, that are moved into or out of a Class B State must be officially vaccinated prior to interstate movement.<sup>82</sup> Whereas, all cows or heifers, four months of age or older, that are moved into or out of a Class C State must be officially vaccinated prior to interstate movement.<sup>83</sup> Consequently, all cattle moving into or out of a Class Free State or a Class A State are not required to be officially vaccinated prior to interstate movement.<sup>84</sup>

Once cattle are officially vaccinated with the brucellosis vaccination, the cattle are then tagged with an official vaccination eartag.<sup>85</sup> The official vaccination eartag is approved by the Animal and Plant Health Inspection Service of USDA and provides each animal with a nationally unique identification number.<sup>86</sup> When officially vaccinated cattle are moved interstate, they must be accompanied by an official document which lists each individual animal's official eartag number, along with the origination and destination locations, which allows for traceability of the animals.<sup>87</sup> Consequently, even though the brucellosis vaccination system was established to eradicate brucellosis in the United States, it also provided a means for tracking some interstate movement of officially vaccinated cattle.

## B. Why It Is No Longer Effective

As of June 30, 2000, forty-four states, plus Puerto Rico and the United States Virgin Islands were all brucellosis-free, the remaining six states were classified as Class A states.<sup>88</sup> In 2011, all fifty states, plus Puerto Rico and the United States Virgin Islands were classified as brucellosis-free states.<sup>89</sup> Consequently, by 2000, and still today, no cattle in the United States are required to be officially vaccinated or

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79. *Id.*

80. *Id.*

81. *Id.* § 78.6.

82. *Id.* § 78.10 (a).

83. *Id.* § 78.10 (b) & (c).

84. *Id.* § 78.10.

85. *Id.* § 78.1.

86. *Id.*

87. *Id.*

88. U.S. Dep't of Agric., Animal & Plant Health Inspection Serv., *Facts About Brucellosis*, [http://www.aphis.usda.gov/animal\\_health/animal\\_diseases/brucellosis/downloads/bruc-facts.pdf](http://www.aphis.usda.gov/animal_health/animal_diseases/brucellosis/downloads/bruc-facts.pdf) (last visited August 15, 2012).

89. 9 CFR § 78.43.

officially eartagged prior to interstate movement, under the brucellosis regulations.<sup>90</sup>

Simply because farmers and ranchers are not required to officially vaccinate or eartag, does not mean they are not voluntarily undertaking these provisions and still reporting cattle movement to the United States government. In fact, in 2010, over three million cattle were officially identified under the brucellosis regulations.<sup>91</sup> This is a marked decline, however, from the ten million calves that were officially identified in 1988, when only twenty-seven Class Free States were present.<sup>92</sup> Consequently, this marked decline in the levels of officially identified cattle has left the USDA seeking another method to officially identify and track cattle in the United States.

#### IV. NATIONAL ANIMAL IDENTIFICATION SYSTEM (NAIS)

On December 30, 2003, just days after the announcement that a cow in the United States was infected with BSE, then Agriculture Secretary Veneman announced that the implementation of a nationwide animal identification system had become a top priority at USDA.<sup>93</sup> Four months later, Secretary Veneman announced that the framework for the implementation of a National Animal Identification System (NAIS) had been designed.<sup>94</sup> It was touted that the NAIS would enhance USDA's efforts in responding to animal disease outbreaks.<sup>95</sup>

In creating the NAIS, the USDA's main goal was to create a system that when fully implemented would allow for the traceability of animals to be completed within forty-eight hours of detecting a disease, which would help contain an outbreak.<sup>96</sup> The traceability component would include both a "trace-back" and "trace-forward" component.<sup>97</sup> Trace-back refers to the process in which "the prior movements of the livestock found to be infected or exposed"<sup>98</sup> are traced to determine if any other livestock have been in contact with the diseased animal or shared a contaminated feed supply.<sup>99</sup> Trace-forward would allow the

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90. *See supra* section III.A.

91. Traceability for Livestock Moving Interstate, 76 Fed. Reg. 50,082 (proposed Aug. 11, 2011) (to be codified at 9 C.F.R. pt. 71, 77-78, 90).

92. *Id.*

93. Press Release, U.S. Dep't of Agric., Veneman Announces Additional Protection Measures to Guard Against BSE (Dec. 30, 2003).

94. Press Release, U.S. Dep't of Agric., Veneman Announces Framework and Funding for National Animal Identification System (Apr. 27, 2004).

95. *Id.*

96. Federal Measures to Mitigate BSE Risks: Considerations for Further Action, 69 Fed. Reg. 42288, 42298 (proposed July 14, 2004) (to be codified at 9 C.F.R. pt. 50-85).

97. *Id.*

98. Traceability for Livestock Moving Interstate, 76 Fed. Reg. 50,082, 50,093 (proposed Aug. 11, 2011) (to be codified at 9 C.F.R. pt. 71, 77-78, 90).

99. Federal Measures to Mitigate BSE Risks, 69 Fed. Reg. at 42298.

USDA to trace the forward movements of livestock that may have come into contact with the infected animal.<sup>100</sup>

With this groundwork laid, the USDA went to work on establishing and implementing the NAIS.

### A. Details of the NAIS

The most important aspect of the NAIS is that it is a *voluntary* system. During the early stages of designing the NAIS, the USDA explored the idea of initially implementing a voluntary system, and gradually making the system mandatory.<sup>101</sup> However, this never happened.<sup>102</sup>

On November 8, 2004, the USDA announced an interim rule that would allow the USDA to take a major step forward in developing and implementing the NAIS program.<sup>103</sup> The interim rule was finalized on July 18, 2007.<sup>104</sup> The interim rule initially recognized additional numbering systems, as an alternative to the already existing officially recognized numbering systems, for the identification of animals in interstate commerce and in disease control and eradication programs.<sup>105</sup> This was done by adopting an animal identification number (AIN), which would allow for the nationally unique identification of animals, with the first three digits of the AIN being the country code.<sup>106</sup> Moreover, the definition of “official eartag” was changed to allow the use of the AIN, as an alternative to the already existing officially recognized number systems.<sup>107</sup>

Next, the interim rule allowed for “premises identification.”<sup>108</sup> The idea was that any location where livestock was managed or held would get a single, unique number, which would identify the location through the use of a seven-character alphanumeric code.<sup>109</sup> It was believed that the adoption of premises identification would allow for

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100. Traceability for Livestock Moving Interstate, 76 Fed. Reg. at 50,093.

101. Federal Measures to Mitigate BSE Risks, 69 Fed. Reg. at 42298. A 2005 article in the Stanford Law and Policy Review supported a mandatory animal identification system for fear that a voluntary system would be less successful. Jason R. Odeshoo, Note, *No Brainer? The USDA's Regulatory Response To The Discovery of "Mad Cow" Disease In The United States*, 16 STAN. L. & POL'Y REV. 277, 314 (2005).

102. Federal Measures to Mitigate BSE Risks, 69 Fed. Reg. at 42298.

103. Livestock Identification; Use of Alternative Numbering Systems, 69 Fed. Reg. 64644 (Nov. 8, 2004) (to be codified at 9 C.F.R. pt. 71, 77-80, 85, 93).

104. Livestock Identification; Use of Alternative Numbering Systems, 72 Fed. Reg. 39301 (July 18, 2007) (to be codified at 9 C.F.R. pt. 71, 77-80).

105. Livestock Identification; Use of Alternative Numbering Systems, 69 Fed. Reg. at 64645.

106. *Id.*

107. *Id.*

108. *Id.* at 64646.

109. *Id.*

the traceability of livestock from the farm of origin to other locations throughout its life, thus helping to make the forty-eight hour trace-back a reality.<sup>110</sup>

Finally, the interim rule addressed the removal or loss of official identification devices.<sup>111</sup> The interim rule prohibited the removal of official identification devices, except at the time of slaughter.<sup>112</sup> Moreover, the rule provided that “if an official identification device is lost and it is necessary to retag an animal with a new official number, every effort should be made to correlate the new official number with the previous official number of the animal” to ensure that trace-back would not be impaired.<sup>113</sup>

Since the NAIS is a voluntary system, the USDA issued a “User Guide,” instead of a regulation, to inform livestock producers how to participate in the NAIS, if they chose, along with the benefits of participation.<sup>114</sup> The User Guide provides an overview of the three major components of the NAIS: premises registration, animal identification and animal tracing.<sup>115</sup> Throughout the User Guide, the USDA makes it very clear that livestock producers can decide whether to participate in the NAIS and to what extent they participate.<sup>116</sup>

The first step to participating in the NAIS is for a livestock producer to register his or her premises.<sup>117</sup> A “premises” is “a unique and describable geographic location where activity affecting the health and/or traceability of animals may occur.”<sup>118</sup> Some examples of locations which may be registered as premises include: “farms, ranches, other production units, markets, . . . slaughter facilities . . . rendering facilities, ports of entry, veterinary clinics/laboratories, exhibitions, and any other location where livestock are raised, held, or boarded.”<sup>119</sup>

In order to register premises, livestock producers need to fill out a short form, which includes information about the producer and the premises,<sup>120</sup> and submit it to the proper state or tribal authority.<sup>121</sup>

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110. *Id.*

111. *Id.* at 64647.

112. *Id.*

113. *Id.*

114. U.S. Dep’t of Agric., National Animal Identification System (NAIS): A User Guide And Additional Information Resources (Draft Version Nov. 2006).

115. *Id.*

116. *See id.*

117. *Id.* at 17.

118. *Id.* at 19.

119. *Id.*

120. Specifically, a state or tribe must gather and keep at least all of the following information on a premises: “premises identification number (PIN); name of entity; owner or appropriate contact person; street address, city, state, and zip or postal code (or latitude/longitude coordinates) of the premises; contact phone number; operation type; date activated, date retired, and the reason retired (to

After submitting the form, the state or tribal authority will provide the producer with a unique “premises identification number” (PIN) for that location.<sup>122</sup> The PIN is permanently assigned to a location, and is associated with the mailing address, or geographic coordinates, of the premises.<sup>123</sup> In order to assure livestock producers that any information they submit in order to register their premises is safe, the USDA notes that federal law protects private and confidential business information from disclosure.<sup>124</sup>

In order to encourage livestock producers to provide private information and to register their premises, the USDA highlights the benefits of premises registration.<sup>125</sup> First, if the USDA knows where animals are located and how to reach livestock producers, then this will aid in a rapid, accurate, and cost-effective disease response.<sup>126</sup> Moreover, the USDA promises that if a livestock producer registers his or her premises, then animal health officials will notify the producer if there is a disease event that may place the producer’s livestock at risk.<sup>127</sup> Lastly, the USDA explains that premises registration is free, quick and simple, and does not obligate the producer to participate in any other component of the NAIS.<sup>128</sup>

The second component of the NAIS is animal identification.<sup>129</sup> When an animal moves through the production chain as an individual animal, like beef cattle does, then the USDA recommends that each animal be individually identified with an animal identification number (AIN).<sup>130</sup> The AIN is a unique fifteen digit number, with the first

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determine whether animals still exist at the location); and alternative phone numbers.” *Id.* at 23.

121. *Id.* at 17.

122. *Id.*

123. *Id.* at 22.

124. *Id.* at 25. This assurance likely arose from producers concerns that the general public may be able to access the information provided under the NAIS through the Freedom of Information Act. Matthew E. Rohrbaugh, Note, *It’s Eleven O’clock, Do You Know Where Your Chicken Is? The Controversy Surrounding The National Animal Identification System And Its Application To Small And Organic Farmers*, VT. L. REV. 407, 420-21 (2007); Amy K. Guerra, Comment, *Agricultural Accountability: The National Animal Identification Plan, Confidentiality And The Freedom Of Information Act*, 15 SAN JOAQUIN AGRIC. L. REV. 213, 222 (2005-2006); Margaret Rosso Grossman, *Animal Identification And Traceability Under The US National Animal Identification System*, 2 J. FOOD L. & POL’Y 231, 302-08 (2006). The Freedom of Information Act attempted to create transparency by giving the public the right to access certain federal agency records. 5 U.S.C. § 552 (2006).

125. U.S. Dep’t of Agric., *supra* note 114, at 17.

126. *Id.*

127. *Id.*

128. *Id.* at 17-18.

129. *Id.* at 28.

130. *Id.* at 29. The NAIS does have provisions for group identification numbers, but this is reserved for animals that move through the production chain as a group of

three digits consisting of the country code<sup>131</sup> and the last twelve digits being the animal's unique identification number.<sup>132</sup> By developing the AIN, the USDA hopes that the AIN will eventually become the standard national number system for the individual identification of animals and replace all of the various methods of individual animal identification which are currently approved under other disease eradication or vaccination programs.<sup>133</sup>

In addressing animal identification, the USDA notes that there are some animals that do not need any identification numbers.<sup>134</sup> This includes animals which never leave the farm, or are transported directly from the farm to a custom slaughter facility for personal consumption.<sup>135</sup> Moreover, animals that are born, die and are buried on the same premises do not need to be identified under the NAIS.<sup>136</sup> It is important to note, however, that even if an animal is born and dies on the same premises, but is brought to a rendering plant thereafter, the animal needs to be identified, so there is a means of determining the location from which the animal was taken.<sup>137</sup>

The NAIS does not require any specific identification technologies for official identification of animals.<sup>138</sup> The cattle working group<sup>139</sup> of the NAIS, however, has recommended radio frequency identification devices<sup>140</sup> (RFID), as the preferred form of identification of cattle.<sup>141</sup> The costs associated with the identification device will depend on the type of device the livestock producer decides to use.<sup>142</sup> The USDA notes that individual plastic eartags will cost about one dollar each, whereas RFID eartags will cost between two and three dollars

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animals, like poultry and pork, and therefore group identification numbers are not recommended for beef cattle. *Id.* at 30.

131. The country code for the United States is 840. *Id.* at 29.

132. *Id.*

133. *Id.* at 34.

134. *Id.* at 31.

135. *Id.*

136. *Id.*

137. *Id.* The USDA suggests that producers visit with the rendering facility to determine what identification devices may be used. *Id.*

138. *Id.* at 32.

139. In an attempt to incorporate stakeholder suggestions and concerns relating to the NAIS, the USDA created species-specific working groups comprised of government officials and industry experts. The cattle working group is the species-specific group for cattle. U.S. Dep't of Agric., Implementing the Animal Health Safeguarding Review: Summer 2005 Status Report, 10 (Oct. 2005).

140. RFID is an identification device that transmits information from a microchip in the eartag, about the animal, through radio waves to an RFID reader. The RFID tag can transmit information about the animal including location, identification number, and sale dates. *What is RFID?*, AIM GLOBAL, [http://www.aimglobal.org/technologies/rfid/what\\_is\\_rfid.asp](http://www.aimglobal.org/technologies/rfid/what_is_rfid.asp) (last visited August 16, 2012).

141. U.S. Dep't of Agric., *supra* note 114, at 33.

142. *Id.* at 35.

each.<sup>143</sup> Therefore, individual livestock producers have the flexibility of choosing which device to use and how much to spend on the individual identification of their animals. It is important to note, however, that if a livestock producer wants to individually identify their animals using an AIN tag or device, they must purchase these tags or devices from an authorized AIN device manufacturer.<sup>144</sup>

Producers have the option of applying the official identification devices to their animals themselves.<sup>145</sup> If for some reason, the producer does not have the facilities to do it themselves, then they can hire an individual to tag their animals for them.<sup>146</sup> Moreover, some auction markets will provide tagging services.<sup>147</sup> If animals are tagged at an auction market, they should be tagged prior to commingling with animals from other premises.<sup>148</sup> While the decision of when, or even if, to place the identification on the animal is up to the livestock producer, the USDA suggests that such identification be placed prior to the animal participating in any “reportable movement.”<sup>149</sup>

The last component of the NAIS is animal tracing.<sup>150</sup> It is important to note that there will not be a federal animal tracing database; rather databases will be developed by individual states and the private sector, with government officials only having access to the information in the databases if a disease outbreak occurs.<sup>151</sup> Since databases will be operated by states and the private sector, it will be up to the individual livestock producer to decide which animal tracking database to use.<sup>152</sup> In order to participate in an animal tracking database, the livestock producer will have to provide the database operator with at least the following information: PIN, AIN, date of the movement, and what the movement was (move-in or move-out).<sup>153</sup> The actual costs associated with animal tracking databases have not been determined because the costs will likely vary with range of services offered and the operational details of the database, but it is clear

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143. *Id.*

144. *Id.* at 37. AIN device manufacturers are authorized by the USDA. *Id.* at 36.

145. *Id.* at 38.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 29. A “reportable movement” is any movement where there is the potential for spreading a disease. *Id.* at 46.

150. *Id.* at 41.

151. *Id.* The switch was made to a private database in response to producers concerns that information obtained in the database may be used by government officials for purposes other than disease eradication measures. Bruce I. Knight, Under Sec’y for Mktg. & Regulatory Programs, U.S. Dep’t of Agric., Animal ID: Where We Stand (Feb. 1, 2007), available at <http://www.aphis.usda.gov/newsroom/speeches/content/2007/02/NatlCattlemen2-1-07.shtml>.

152. U.S. DEP’T. AGRIC., *supra* note 114.

153. *Id.* at 43.

that it will cost livestock producers to record animal movements in an animal tracking database.<sup>154</sup>

When looking at animal tracing, the question arises as to what animal movements need to be recorded? The USDA has noted that it is impractical to request that all animal movements be recorded.<sup>155</sup> Therefore, the USDA suggests that only movements where there is the potential for spreading a disease should be recorded.<sup>156</sup> These so called “reportable movements” include the private sale of an animal, selling animals through public markets or auctions, and participation of animals at regional or national exhibitions and/or sporting events.<sup>157</sup> Some examples of movements that would not need to be recorded include the movement of an animal from its birth premises directly to a custom butcher or moving animals within the operation or premises, such as moving cattle from one pasture to another.<sup>158</sup>

The USDA implied that once the NAIS was fully implemented and operational it would help producers and animal health officials quickly and effectively respond to animal disease events in the United States.<sup>159</sup> Despite the USDA’s optimism, the NAIS was not popular among beef cattle producers and therefore it was an unsuccessful program.

## B. Why the NAIS Did Not Work for Beef Cattle

One reason the NAIS was not successful was because of the costs incurred by individual beef cattle producers in implementing the program.<sup>160</sup> A USDA study of the NAIS showed that if full traceability were achieved, the cattle industry costs would account for over 90% of the total annual costs of the NAIS.<sup>161</sup> In fact, it was estimated that the aggregate cost to cattle producers of implementing the NAIS, would be \$175.9 million annually.<sup>162</sup> It was estimated that costs per cow could range from \$2.48 for operations with five thousand or more cows that are currently tagging cattle, to \$6.16 for operations with forty-nine or fewer cows that are not currently tagging.<sup>163</sup> This is extremely high when compared to the average per animal costs for other livestock sectors.<sup>164</sup> For example, the average per animal cost for

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154. *Id.* at 44.

155. *Id.* at 46.

156. *Id.*

157. *Id.* at 47.

158. *Id.* at 48.

159. *See generally, id.*

160. MCBRIDE & MATHEWS, *supra* note 4, at 30.

161. MCBRIDE & MATHEWS, *supra* note 4.

162. MCBRIDE & MATHEWS, *supra* note 4.

163. MCBRIDE & MATHEWS, *supra* note 4.

164. JOEL L. GREENE, CONG. RESEARCH SERV., R40832, ANIMAL IDENTIFICATION AND TRACEABILITY: OVERVIEW AND ISSUES 22 (2010).

other sectors has been estimated at \$0.059 for swine, \$1.39 for sheep, \$0.0007 for broilers, \$0.002 for turkey, and \$0.0195 for layers.<sup>165</sup> These estimates show that implementing the NAIS could be a substantial cost for a beef cattle operation.

Another reason that the NAIS failed was because of the low participation rate by cattle producers. It has been estimated that anywhere from 16 to 24% of all cattle operations voluntarily registered their premises under the NAIS.<sup>166</sup> This is extremely low in comparison to premises registration for other major animal species.<sup>167</sup> In fact 95% of poultry and sheep operations, 80% of swine operations, 60% of goat operations and 50% of horse operations registered their premises under the NAIS.<sup>168</sup> Premises registration is the first step to participating in any aspect of the NAIS.<sup>169</sup> The USDA estimated that they would need 70% participation per species in order to achieve the goal of the forty-eight hour trace-back, a level of participation that was clearly not met in the cattle industry.<sup>170</sup>

A final reason that cattle producers did not embrace the NAIS was because of fears related to potential liability that would come with participation.<sup>171</sup> Some producers believe that participation in the NAIS may make them liable for contamination or other problems with the livestock that occur well after the livestock has left their control.<sup>172</sup> In contrast, others have argued that producers can protect themselves from this potential liability by documenting all of their management practices. From a producer standpoint, however, such documentation merely adds more burden and costs on the producer.<sup>173</sup> It is generally believed that on many smaller cattle farms, the income source from beef cows is actually a secondary household income source.<sup>174</sup> Therefore, there is little incentive for these beef cattle farms to risk any perceived liability and participate in the program.<sup>175</sup>

It is interesting to note, however, that in 2007 nearly 80% of beef cow-calf producers in the United States used some method of individually identifying cattle on their farms.<sup>176</sup> The most common method of

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165. *Id.*

166. MCBRIDE & MATHEWS, *supra* note 4, at 31.

167. GREENE, *supra* note 164, at 18.

168. *Id.*

169. *See supra* section IV.A.

170. GREENE, *supra* note 164, at 19.

171. MCBRIDE & MATHEWS, *supra* note 4, at 36.

172. GREENE, *supra* note 164, at 24.

173. GREENE, *supra* note 164.

174. MCBRIDE & MATHEWS, *supra* note 4, at 36.

175. MCBRIDE & MATHEWS, *supra* note 4.

176. MCBRIDE & MATHEWS, *supra* note 4, at 33–34.

animal identification used was a visual eartag.<sup>177</sup> It is important to note that only 35% of the cattle, that were individually identified, had an official USDA identification eartag.<sup>178</sup> The remainder of the individually identified cattle were tagged with eartags that assisted the owner in maintaining private records.<sup>179</sup>

## V. ANIMAL DISEASE TRACEABILITY (ADT)

On February 5, 2010, USDA Secretary Tom Vilsack announced that the USDA would take a new approach with animal disease traceability.<sup>180</sup> This announcement came in light of the fact that the NAIS was not nearly as effective as the USDA had originally planned,<sup>181</sup> but the need to trace individual animals in the case of a disease outbreak was still very prevalent.<sup>182</sup> Consequently, on August 11, 2011, the Animal and Plant Health Inspection Service (APHIS) of the USDA issued a comprehensive proposed rule on the traceability for livestock moving interstate, and named the new program Animal Disease Traceability (ADT).<sup>183</sup>

### A. Details of the ADT Program

The newly proposed regulations outline a series of *mandatory* requirements which must be met prior to moving covered livestock<sup>184</sup> interstate.<sup>185</sup> There are, however, two unique situations in which covered livestock can be moved interstate without meeting the requirements outlined in the proposed regulations.<sup>186</sup> The first is if the “movement occurs entirely within Tribal land that straddles a State line and the Tribe has a separate traceability system from the States in which its lands are located.”<sup>187</sup> The second exemption is where the movement of livestock interstate is “to a custom slaughter facility in

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177. McBRIDE & MATHEWS, *supra* note 4, at 34.

178. USDA, REGULATORY IMPACT ANALYSIS, *supra* note 13, at 17.

179. USDA, REGULATORY IMPACT ANALYSIS, *supra* note 13.

180. Press Release, U.S. Dep’t. Agric, USDA Announces New Framework for Animal Disease Traceability (Feb. 5, 2010), *available at* <http://www.aphis.usda.gov/newsroom>.

181. Traceability for Livestock Moving Interstate, 76 Fed. Reg. 50,082, 50,083 (proposed Aug. 11, 2011).

182. *Id.*

183. *Id.* at 50,082.

184. Covered livestock is defined as “[c]attle and bison, horses and other equine species, poultry, sheep and goats, swine and captive cervids.” *Id.* at 50,106. While the proposed regulations focus on more than just beef cattle, this article will only focus on the aspects of the proposed regulations as they apply to beef cattle.

185. *Id.* at 50,107.

186. *Id.*

187. *Id.*

accordance with Federal and State regulations for preparation of meat for personal consumption.”<sup>188</sup>

### 1. *Recordkeeping Requirements*

There are two separate and distinct recordkeeping requirements within the proposed regulations.<sup>189</sup> The first recordkeeping requirement applies to the governmental or private entities that distribute official identification devices.<sup>190</sup> Section 90.3(a) requires that the distributing entity must “maintain for five years a record of the names and addresses of anyone to whom the [official identification] devices were distributed.”<sup>191</sup>

The second recordkeeping requirement applies to approved livestock facilities<sup>192</sup> that move covered livestock interstate.<sup>193</sup> Specifically, Section 90.3(b) requires approved livestock facilities to keep any interstate certificate of veterinary inspection (ICVI) or alternate documentation, which is required for interstate movement of covered livestock, for five years.<sup>194</sup> Approved livestock facilities are required to begin collecting this information on the effective date of the final rule.<sup>195</sup>

### 2. *Official Identification*

#### a. *Official Identification Devices and Methods*

In the proposed regulations, the Administrator approved various official identification devices and methods<sup>196</sup> based on the species, but the regulations also state that the Administrator can approve other

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188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. An approved livestock facility is a “stockyard, livestock market, buying station, concentration point, or any other premises under State or Federal veterinary inspection where livestock are assembled and that has been approved under § 71.20 of this chapter.” *Id.* at 50,106. Federal regulations require an approved livestock facility to execute an agreement with the Administrator stating that they will cooperate with state and federal agencies, abide by relevant regulations, maintain proper records, properly clean and disinfect the facility, keep the facilities and equipment in a state of good repair, clearly mark quarantined pens, and follow the standards for handling each species of animal. 9 C.F.R § 71.20 (2012).

193. Traceability for Livestock Moving Interstate, 76 Fed. Reg. at 50,107.

194. *Id.*

195. *Id.*

196. An official identification device or method is “[a] means approved by the Administrator of applying an official identification number to an animal of a specific species or associating an official identification number with an animal or group of animals of a specific species or otherwise officially identifying an animal or group of animals.” *Id.*

devices if the other devices will provide adequate traceability.<sup>197</sup> Beef cattle which are to be moved interstate can be officially identified in one of two ways.<sup>198</sup> The first method is by an official eartag.<sup>199</sup> An official eartag is an identification tag that must be approved by APHIS and bear an official identification number<sup>200</sup> for individual animals.<sup>201</sup> Moreover, one year after the final rule becomes effective all official eartags must bear the U.S. shield, must be tamper resistant, and must have a high retention rate in the animal.<sup>202</sup>

The second approved method of official identification of beef cattle is a group/lot identification (GIN).<sup>203</sup> A GIN can be used when there is a unit of animals, all of which are the same species and that are “managed together as one group throughout the preharvest production chain.”<sup>204</sup> The benefit of using a GIN is that it is recorded on all documents that accompany the animals as they move interstate, but the GIN does not have to be attached to each individual animal.<sup>205</sup>

### *b. Official Identification Requirements*

The general rule is that all beef cattle which are moved interstate must be officially identified prior to the interstate movement unless a clearly delineated exemption applies.<sup>206</sup> The first exemption applies to beef cattle which are moved as part of a commuter herd<sup>207</sup> and are accompanied by a commuter herd agreement.<sup>208</sup> The next exemption applies to beef cattle which are moved directly from a location in one

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197. *Id.*

198. *Id.*

199. *Id.*

200. An official identification number is “[a] nationally unique number that is permanently associated with an animal or group of animals and that adheres to one of the following systems: (1) National Uniform Eartagging System (NUES). (2) Animal identification number (AIN). (3) Location-based number system. (4) Flock-based number system. (5) Any other numbering system approved by the Administrator for the official identification of animals.” *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 50,106.

205. *Id.*

206. *Id.* at 50,108.

207. A commuter herd is “a herd of cattle . . . moved interstate during the course of normal livestock management operations and without change of ownership directly between two premises, as provided in a commuter herd agreement.” *Id.* at 50,106.

208. *Id.* at 50,108. A commuter herd agreement is “[a] written agreement between the owner(s) of a herd of cattle . . . and the animal health officials for the States or Tribes of origin and destination specifying the conditions required for the interstate movement from one premises to another in the course of normal livestock management operations and specifying the time period, up to 1 year, that the agreement is effective.” *Id.* at 50,106.

state through another state to a second location in the state of origin.<sup>209</sup> The third exemption applies when beef cattle are moved directly to an approved tagging site<sup>210</sup> in another state or tribe and are officially identified prior to commingling with other cattle from the premises.<sup>211</sup> The final exemption provides that states and tribes can agree to move beef cattle between their territories by another form of identification.<sup>212</sup> The proposed regulations offer some examples of other forms of identification which may be adopted by states or tribes, they include the following: brands, tattoos, or breed registry certificates.<sup>213</sup>

Realizing the burden that official identification could have on the beef cattle industry, APHIS is proposing phasing in the official identification requirement.<sup>214</sup> Once the regulations become effective, some high-risk categories of cattle will have to be official identified immediately.<sup>215</sup> These classes of cattle include the following: all sexual intact cattle over eighteen months of age, all dairy cattle, cattle used for rodeos or recreational events, and cattle used for shows or exhibitions.<sup>216</sup> For all other categories of cattle, APHIS will make a determination, at some indefinite time in the future, that the compliance with the above classes of cattle is at 70%, and then APHIS will publish an announcement stating that all other classes of cattle must be officially identified within one year of the announcement.<sup>217</sup>

Until official identification is required for all categories of cattle, beef cattle can be moved interstate without official identification if they are moved directly to a recognized slaughtering establishment or directly to a livestock facility approved to handle “slaughter only” animals and then directly to a recognized slaughtering establishment.<sup>218</sup> Additionally, the cattle must be moved with an USDA-approved backtag<sup>219</sup> or an USDA-approved backtag must be applied to the cattle at the recognized slaughtering establishment or the approved livestock facility that handles “slaughter only” animals.<sup>220</sup>

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209. *Id.* at 50,108.

210. An approved tagging site is “[a] premises, authorized by APHIS, State, or Tribal animal health officials, where livestock may be officially identified on behalf of their owner or the person in possession, care, or control of the animals when they are brought to the premises.” *Id.* at 50,106.

211. *Id.* at 50,108.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 50,108.

218. *Id.*

219. A USDA-approved backtag is “a backtag issued by APHIS that provides a temporary unique identification for each animal.” *Id.* at 50,107.

220. *Id.* at 50,108.

c. *Use of More than One Official Identification Device or Method*

Once the proposed rule becomes effective, the general rule is that no more than one official identification device or method can be applied to any one animal, unless the application of an additional device is allowed in the regulations.<sup>221</sup> A second official identification device can be approved by a state or tribal animal health official or an area veterinarian in charge of such approval, when the need to maintain the identity of a specific animal is intensified.<sup>222</sup> Some examples of when such an approval would be granted would be for “export shipments, quarantined herds, field trials, experiments, or disease surveys.”<sup>223</sup> It is important to note, however, that approval of a second identification device will not be granted merely for the convenience of identifying animals.<sup>224</sup> Moreover, the person applying the second identification device must record and retain certain information for five years.<sup>225</sup> The following information must be recorded: the date the second device was added, the reasons for the additional device, and the official identification numbers of the original and additional devices.<sup>226</sup>

There are two other situations in which a second official identification device may be applied.<sup>227</sup> The first is when an eartag bearing an AIN<sup>228</sup> beginning with the 840 prefix is applied to an animal that is already officially identified with an eartag with a National Uniform Eartagging System (NUES) Number.<sup>229</sup> Moreover, the NUES number would have to be recorded and reported in accordance with the AIN device distribution policies.<sup>230</sup> Finally, a brucellosis vaccination

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221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 50,109.

228. *Id.* at 50,106 (explaining that an Animal Identification Number is “a numbering system for the official identification of individual animals in the United States that provides a nationally unique identification number for each animal. The AIN consists of 15 digits, with the first 3 being the country code [840 for the United States] . . . only the AIN beginning with the 840 prefix will be recognized as official for use on AIN tags applied to animals [1 year after the proposed regulations become effective]”).

229. *Id.* at 50,109. *See also id.* at 50,107 (explaining that a National Uniform Eartagging System [NUES] is “a numbering system for the official identification of individual animals in the United States that provides a nationally unique identification number for each animal”).

230. *Id.* at 50,109.

ear tag, which contains a NUES number, may be applied to an animal that is already officially identified.<sup>231</sup>

*d. Removal or Loss of Official Identification Devices*

The intended purpose of an official identification device is “to provide permanent identification of livestock and to ensure the ability to find the source of animal disease outbreaks.”<sup>232</sup> In light of this purpose, the removal of official identification devices is prohibited except at time of slaughter, at any location upon the animal’s death, or as otherwise approved by state or tribal animal health officials or an area veterinarian in charge.<sup>233</sup>

At the time an animal is slaughtered, all official identification devices must be removed and correlated with the carcass through the final inspection as approved by the Food Safety Inspection Service (FSIS).<sup>234</sup> If diagnostic samples are taken, the identification device must be packaged with the samples and correlated to the respective carcass through final inspection, as approved by FSIS.<sup>235</sup> All official identification devices which are collected at slaughter must be made available to both APHIS and FSIS.<sup>236</sup> If a covered livestock carcass is moved interstate for rendering, then all affixed official identification devices must be removed at the rendering facility.<sup>237</sup> Moreover, all devices that are removed at a rendering facility must be made available to APHIS.<sup>238</sup>

If an official identification device is replaced because the animal lost the original device, the person applying the new official identification device needs to record certain information and retain the information for five years.<sup>239</sup> The information which must be recorded and retained includes: the date the new official identification device was added, the official identification number on the new device, and the official identification number of the old device, if known.<sup>240</sup>

*e. Replacement of Official Identification Devices for Reasons Other than Loss*

The proposed regulations lay out a series of situations, under which a state or tribal animal health official or veterinarian can au-

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231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

thorize the replacement of an official identification device.<sup>241</sup> The first such situation is when the device is so deteriorated that it is likely that the device will be lost or the number can no longer be read.<sup>242</sup> Also, an official identification device can be approved for replacement if the site where the device is attached is infected.<sup>243</sup> Additional situations include the malfunctioning of the electronic component of a radio frequency identification device (RFID) or the incompatibility or inoperability of the electronic component of an RFID.<sup>244</sup>

Once replacement of an original official identification device has been approved, the person replacing the device has to record certain information and keep these records for five years.<sup>245</sup> The information which must be recorded and retained includes the date the device was removed, the location where the device was removed, the official identification number on removed device, the type of device removed, the reason for removal, the official identification number on the replacement device, and the type of replacement device applied.<sup>246</sup>

#### *f. Sale or Transfer of Official Identification Devices*

Once an official identification device is issued, it cannot be sold or transferred from the premises to which the device was originally issued, unless prior approval is received from the administrator or a state or tribal animal health official.<sup>247</sup>

### *3. Documentation Requirements*

The person<sup>248</sup> who is responsible for the covered livestock that is leaving the person's premises and traveling interstate "must ensure that the livestock are accompanied by an interstate certificate of veterinary inspection (ICVI) or other document required" for the interstate movement of the livestock.<sup>249</sup> An interstate certificate of veterinary inspection (ICVI) is an official document which is issued by the federal, state, or tribal representative or an accredited veterinarian in the shipping state.<sup>250</sup> Many states currently require some or

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241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 50,107 (explaining that a person may be "any individual, corporation, company, association, firm, partnership, society, or joint stock company, or other legal entity").

249. *Id.* at 50,109.

250. *Id.* at 50,106.

all categories of beef cattle coming into their state to be accompanied by a certificate of veterinary inspection (CVI).<sup>251</sup>

*a. Information Which Must Be Contained in an ICVI*

The proposed regulations very carefully and meticulously lay out the information which must be contained in an ICVI.<sup>252</sup> An ICVI must state the species and number of animals, the purpose for which the animals are being moved, the origin and destination addresses, and the names and addresses of the consignor and consignee.<sup>253</sup> Moreover, the ICVI must list the official identification number of each animal unless there is a species-specific exemption or if the shipping and receiving states agree upon an alternative form of identification.<sup>254</sup> Moreover, if the beef cattle are shipped under a group identification number<sup>255</sup> (GIN), then only the GIN needs to be listed on the ICVI.<sup>256</sup> If an exemption applies which does not require the listing of each individual animal's identification number on the ICVI then the ICVI must clearly note the exemption and must state that all animals being moved under the ICVI are officially identified.<sup>257</sup> Moreover, the proposed regulations clearly note that "an ICVI may not be issued for any animal that is not officially identified if official identification is required."<sup>258</sup>

Instead of listing each animal's identification number on the ICVI, another document can be attached to the ICVI, provided that the additional document is approved by the state or APHIS and it requires individual identification of animals.<sup>259</sup> Moreover, a copy of this alternative document must be stapled to the original, and any copy of the ICVI.<sup>260</sup> The alternative document must identify each animal being moved under the ICVI and any areas not being utilized must be

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251. ALA. ADMIN. CODE r. 80-3-6.14 (2011); CODE ARK. R. § 125 (2006); CAL. CODE REGS. tit. 3, § 756.1 (2012); COLO. CODE REGS. § 1201-19 (2010); FLA. ADMIN. CODE ANN. r. 5C-3.004 (2010); IDAHO ADMIN. CODE r. 02.04.21.200 (2012); IOWA ADMIN. CODE r. 21-65.3 (2012); KAN. ADMIN. REGS. § 9-7-4 (2010); 302 KY. ADMIN. REGS. 20:040 (2012); MINN. R. 1700.0600 (2011); MO. CODE REGS. ANN. tit 2, § 30-2.010 (2011); 23 NEB. ADMIN. CODE § 2-004 (2011); OKLA. ADMIN. CODE § 35.15-40-90 (2012); TENN. COMP. R. & REGS. 008-02-01-.02 (2012); TEX. ADMIN. CODE § 51.2 (2007).

252. 76 Fed. Reg. at 50,106.

253. *Id.*

254. *Id.*

255. *Id.* (explaining that a group identification number is "the identification number used to uniquely identify a 'unit of animals' of the same species that is managed together as one group throughout the preharvest production chain").

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

clearly marked out in ink.<sup>261</sup> Moreover, the name of the document, along with either the serial number from the document or the name of the person who prepared the document and the date it was prepared must be written in ink in the identification column on the ICVI.<sup>262</sup>

The governmental representative or accredited veterinarian that issues the ICVI or other documents required for the interstate movement of livestock “must forward a copy of the ICVI or other document to the State or Tribal animal health official in the State or Tribe of origin within five working days.”<sup>263</sup> Then, the state or tribal health official must forward the ICVI or other documents to the state or tribe of destination within five working days.<sup>264</sup> The five-day forwarding period is designed to facilitate a trace-back and/or trace-forward investigation if an animal moved interstate was found to be infected.<sup>265</sup> It is important to note that these time frames only apply if the ICVI or other documents are in paper form.<sup>266</sup> In the event that the ICVI or other document was completed and issued electronically, then the issuer of the ICVI or other document would electronically transmit the ICVI or other documents simultaneously to both the state of origin and the state of destination.<sup>267</sup>

#### *b. Interstate Movement of Beef Cattle*

Generally, beef cattle moving interstate must be accompanied by an ICVI unless the movement falls within a clearly delineated exception as outlined in the proposed regulations.<sup>268</sup> The first exception applies when beef cattle are “moved directly<sup>269</sup> to a recognized slaughtering establishment<sup>270</sup> or directly to an approved livestock facility<sup>271</sup>

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261. *Id.*

262. *Id.* at 50,109.

263. *Id.*

264. *Id.*

265. *Id.* at 50,092.

266. *Id.*

267. *Id.*

268. *Id.* at 50,109.

269. *Id.* at 50,106 (explaining that directly means “without unloading en route if moved in a means of conveyance and without being commingled with other animals, or without stopping, except for stops of less than 24 hours that are needed for food, water, or rest in route if the animals are moved in any other manner”).

270. *Id.* at 50,107 (explaining that a recognized slaughtering establishment is “any slaughtering facility operating under the Federal Meat Inspection Act (21 U.S.C. 601 *et. seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et. seq.*) or State meat or poultry inspection acts”).

271. *Id.* at 50,107 (explaining that approved livestock facility is “a stockyard, livestock market, buying station, concentration point, or any other premises under State or Federal veterinary inspection where livestock are assembled and that has been approved under § 71.20 of this chapter”). *See also* 9 C.F.R. § 71.20 (2012) (requiring an approved livestock facility to execute an agreement with the Administrator, stating that they will cooperate with state and federal agencies, abide by

approved to handle ‘for slaughter only’ animals and then directly to a recognized slaughtering establishment and they are accompanied by an owner-shipper statement.”<sup>272</sup> The second exception applies when beef cattle are “moved directly to an approved livestock facility with an owner-shipper statement and do not move interstate from the [approved livestock] facility unless they are accompanied by an ICVI.”<sup>273</sup>

The next exception applies when the beef cattle “are moved from the farm of origin for veterinary medical examination or treatment and returned to the farm of origin without change in ownership.”<sup>274</sup> The fourth exception applies when the beef cattle “are moved directly from one State, through another State and back to the original State.”<sup>275</sup> Also, when beef cattle are moved interstate as a commuter herd<sup>276</sup> with a copy of the commuter herd agreement,<sup>277</sup> the beef cattle do not need to be accompanied by an ICVI.<sup>278</sup> Finally, beef cattle under eighteen months of age can be moved interstate with documentation other than an ICVI, as agreed upon by the animal health officials in the shipping and receiving states or tribes.<sup>279</sup>

*c. Individual Identification of Beef Cattle on the ICVI*

The general rule in moving beef cattle interstate is that each official identification number of the beef cattle must be recorded on the

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relevant regulations, maintain proper records, properly clean and disinfect the facility, keep the facilities and equipment in a state of good repair, clearly mark quarantined pens, and follow the standards for handling each species of animal).

272. Traceability for Livestock Moving Interstate, 76 Fed. Reg. 50,082, 50,109 (proposed Aug. 11, 2011). *See also id.* at 50,107 (explaining that an owner-shipper statement is “a statement signed by the owner or shipper of the livestock being moved stating the location from which the animals are moved interstate; the destination of the animals; the number of animals covered by the statement; the species of animal covered; the name and address of the owner at the time of the movement; the name and address of the shipper; and the identification of each animal, as required by the regulations, unless the regulations specifically provide that the identification does not have to be recorded” ).

273. 76 Fed. Reg. at 50,109.

274. *Id.*

275. *Id.*

276. *Id.* at 50,106 (explaining that commuter herd is “a herd of cattle . . . moved interstate during the course of normal livestock management operations and without change of ownership directly between two premises, as provided in a commuter herd agreement”).

277. *Id.* (explaining that a commuter herd agreement is “a written agreement between the owner(s) of a herd of cattle . . . and the animal health officials for the States or Tribes of origin and destination specifying the conditions required for the interstate movement from one premises to another in the course of normal livestock management operations and specifying the time period, up to 1 year, that the agreement is effective”).

278. *Id.* at 50,109.

279. *Id.*

ICVI or alternative documents unless one of two exceptions applies.<sup>280</sup> The first exception is when the beef cattle “are moved from an approved livestock facility<sup>281</sup> directly to a recognized slaughtering establishment.”<sup>282</sup> The second exception applies to cattle that “are sexually intact . . . [and] under [eighteen] months of age or steers or spayed heifers.”<sup>283</sup>

#### 4. Preemption

Section 90.8 explicitly states that the proposed regulations will preempt any state, tribal or local law that are in conflict with the regulations.<sup>284</sup> The proposed regulations, however, note that states and tribes are allowed to have more stringent requirements for interstate movement of livestock even to the extent of requiring livestock, which are exempt under the proposed regulations, to be officially identified to be eligible for interstate movement into their territory.<sup>285</sup>

While states and tribes have some latitude in creating their own requirements for receiving livestock that has been moved interstate, they are not allowed to require one certain official identification device, if the proposed regulations allow for alternative identification devices.<sup>286</sup> Moreover, states and tribes are not allowed to develop traceability requirements that would require the shipping state or tribe to “develop a particular kind of traceability system or change its existing system in order to meet the requirements” of the destination state or tribe.<sup>287</sup>

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280. *Id.*

281. *Id.* at 50,106 (explaining that an approved livestock facility is “a stockyard, livestock market, buying station, concentration point, or any other premises under State or Federal veterinary inspection where livestock are assembled and that has been approved under § 71.20 of this chapter”). *See also* 9 C.F.R § 71.20 (requiring an approved livestock facility to execute an agreement with the Administrator, stating that they will cooperate with state and federal agencies, abide by relevant regulations, maintain proper records, properly clean and disinfect the facility, keep the facilities and equipment in a state of good repair, clearly mark quarantined pens, and follow the standards for handling each species of animal).

282. *Id.* at 50,109. *See also id.* at 50,107 (explaining that a recognized slaughtering establishment is “any slaughtering facility operating under the Federal Meat Inspection Act (21 U.S.C. 601 *et. seq.*), the Poultry Products Inspection Act (21 U.S.C. 451 *et. seq.*) or State meat or poultry inspection acts”).

283. *Id.* at 50,109 (explaining that the second exception does not apply to dairy cattle, nor does it apply to cattle used for rodeo exhibition or recreational purposes).

284. *Id.* at 50,110.

285. *Id.*

286. *Id.*

287. *Id.*

## B. Praise & Criticism of the ADT Program

Like all government programs, there are individuals and industry groups that support and those that oppose the new proposed ADT program. In fact, over fourteen hundred comments were made on the proposed rule, many from concerned consumers and farmers and others from industry.<sup>288</sup>

Comments in favor of the proposed ADT program note that the increased traceability will help to rapidly and effectively manage and respond to disease outbreaks.<sup>289</sup> Moreover, proponents argue that this proposed program will help increase export markets.<sup>290</sup> Still other proponents highlighted the fact that this proposed program is needed to ensure food safety and accountability.<sup>291</sup>

While the supporting comments seem to be fairly focused, the comments opposing the proposed ADT program are more diverse. One of the major complaints of the proposed program was that brands and tattoos would no longer be deemed an official animal identification device and the opponents argued that brands and tattoos are a permanent form of identification that cannot be removed and therefore should be recognized as an official animal identification device.<sup>292</sup> Another major concern was that these proposed requirements would

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288. See Docket for APHIS-2009-0091, available at <http://www.regulations.gov/#!docketDetail;rpp=25;po=0;s=APHIS-2009-0091> (noting that there are over 1,600 comments and documents in the docket).

289. See Letter from Mark Dopp, American Meat Institute to APHIS (Dec. 7, 2011) (on file with APHIS), available at <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-1211>; Letter from Bill Donald, National Cattlemen's Beef Association to APHIS (Dec. 9, 2011) (on file with APHIS), available at <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-1420>; Letter from Canada Food Inspection Agency to APHIS (Nov. 8, 2011) (on file with APHIS), available at <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-0537>.

290. See Letter from American Meat Institute to APHIS (Dec. 7, 2011) (on file with APHIS), available at <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-1211>; Letter from Kendra Gillette to APHIS (Nov. 1, 2011) (on file with APHIS), available at <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-0482>.

291. See Letter from David Sasuga to APHIS (Dec. 11, 2011) (on file with APHIS), available at <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-0275>; Letter from Amanda Richey to APHIS (Dec. 17, 2011) (on file with APHIS), available at <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-0450>.

292. See Letter from Jenelle Rieger to APHIS (Dec. 9, 2011) (on file with APHIS), available at <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-1326>; Letter from Blaine Kenobbie to APHIS (Dec. 9, 2011) (on file with APHIS), available at <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-1315>; Letter from Nancy Peterson to APHIS (Nov. 15, 2011) (on file with APHIS), available at <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-0521>; Letter from Tipperary-Kerry Farms to APHIS (Nov. 15, 2011) (on file with APHIS), available at <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-0525>; Letter from Judy Rush to APHIS (Aug. 11, 2011) (on file with

place such a large financial burden on small producers, that they would be forced out of the livestock business altogether.<sup>293</sup> Also, many consumers expressed their concern that the proposed program would increase farmer's costs which would ultimately be passed onto consumers in the form of higher food costs.<sup>294</sup> A last major complaint of the proposed ADT program is that APHIS should be focusing on individual disease eradication programs rather than an after the fact tracking system.<sup>295</sup> One producer even expressed his concern that the proposed ADT program fails to adequately protect producers from down-line liability, which is beyond their control.<sup>296</sup> Another individual was concerned that the proposed program was an unnecessary invasion of privacy.<sup>297</sup>

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APHIS), *available at* <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-0004>.

293. *See* Letter from Linda Espino to APHIS (Nov. 21, 2011) (on file with APHIS), *available at* <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-0825>; Letter from Rose Difley to APHIS (Sept. 12, 2011) (on file with APHIS), *available at* <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-0115>; Letter from Susan Crozier to APHIS (Dec. 8, 2011) (on file with APHIS), *available at* <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-1300>; Letter from Mark Yarbrough to APHIS (Nov. 21, 2011) (on file with APHIS), *available at* <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-0797>; Letter from Julie Smithson to APHIS (Nov. 17, 2011) (on file with APHIS), *available at* <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-0549>.
294. *See* Letter from Megan Hackleman to APHIS (Oct. 6, 2011) (on file with APHIS), *available at* <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-0218>; Letter from Yvonne Lincoln to APHIS (Nov. 18, 2011) (on file with APHIS), *available at* <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-0587>; Letter from Mary Hooker to APHIS (Oct. 4, 2011) (on file with APHIS), *available at* <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-0205>; Letter from Hayes Batten to APHIS (Nov. 18, 2011) (on file with APHIS), *available at* <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-0711>; Letter from Liane Salgado to APHIS (Oct. 7, 2011) (on file with APHIS), *available at* <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-0240>.
295. Letter from Penney Morse to APHIS (Oct. 11, 2011) (on file with APHIS), *available at* <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-0309>; Letter from Cindi Otto to APHIS (Nov. 21, 2011) (on file with APHIS), *available at* <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-0850>; Letter from Alice Losasso to APHIS (Nov. 18, 2011) (on file with APHIS), *available at* <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-0763>; Letter from Monroe Jeffrey to APHIS (Oct. 11, 2011) (on file with APHIS), *available at* <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-0366>.
296. Letter from Brad Headtel, Longhorns Head to Tail Tours, to APHIS (Dec. 8, 2011) (on file with APHIS), *available at* <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-1280>.
297. Letter from Sandy Harlander to APHIS (Nov. 18, 2011) (on file with APHIS), *available at* <http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0091-0655>.

All of these comments show that there is some support for the proposed ADT program, but there are also lots of concerns that APHIS needs to address prior to implementing a final animal identification program.

### C. Animal Disease Traceability: A Failing Proposal

Animal identification is not a new concept; in fact cattle producers have been identifying cattle under the brucellosis vaccination program for decades. So, why are small cattle producers now upset at the thought of mandatory individual animal identification?

One reason cattle producers did not react as negatively to disease eradication and vaccination programs was because there was the potential that the programs would no longer be necessary. The program details provided that once the disease was eradicated, vaccinations and the associated proof of vaccination would no longer be required. The problem with the proposed ADT program is that there is no end in sight. Once ADT is implemented, there is no chance that the cattle producer will not have to individually identify his or her cattle in the future.

Another reason cattle producers are upset is cost. As mentioned previously with the NAIS, the costs to individual cattle producers could be quite high to individually identify every single cow, calf, and bull on their property. Moreover, the proposed ADT program creates more expenses for livestock producers in the form of mandatory recordkeeping of all tags placed on the producer's cattle, of any movement of the cattle, and any replacement tags. Moreover, these records must be retained for five years which creates extra paperwork and higher costs for cattle producers, when budgets are already stretched thin.

In an attempt to assure livestock producers that the cost under the ADT program would not exceed those under the NAIS, the USDA generously offered to "supply metal eartags and eartag applicators to States or Tribes free-of-charge for distribution to cattle operations, if resources allow."<sup>298</sup> In the day and age of the creation of a "super-committee" to reduce the United States deficit by \$1.5 trillion over ten years,<sup>299</sup> it is doubtful that resources will allow for the USDA to cover the cost of all metal eartags and eartag applicators. Thus the cost of individual eartags is likely to be borne by the producer.

By suggesting, and allowing, official identification to be achieved through metal eartags, the USDA is attempting to propose a low-cost

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298. USDA, *Regulatory Impact Analysis*, *supra* note 13, at 17 (emphasis added).

299. Jon Carson, *All About the So-Called "Super Committee,"* THE WHITE HOUSE BLOG (Aug. 4, 2011), <http://www.whitehouse.gov/blog/2011/08/04/all-about-so-called-super-committee>.

animal identification system. The problem with metal eartags is that they cannot be easily read at a distance. In fact metal eartags, once placed in a cow's ear, are typically 1.5 inches long and 5/16 inches wide, and would contain fifteen digits. Therefore, if the cattle moving interstate had to be recorded by its individual identification number, each animal would have to be run through a chute, so the official identification number could be accurately read and recorded on the proper document for interstate travel. Therefore, the system would be burdensome and expensive for beef producers who ship cattle as an individual animal through the production system.

Moreover, in this proposal, the USDA has failed to address any of the liability concerns that producers raised with the NAIS. While there may be little or no merit to the producers liability concerns from the USDA's perspective, the USDA still should have addressed this concern and informed producers what they could do to protect themselves from this perceived liability risk.

## VI. CONCLUSION

If the USDA is serious about implementing a successful, national uniform animal identification program, the USDA must listen to the concerns of producers and implement real changes to the program that address producers' concerns. Moreover, more efforts need to be made to inform producers about the benefits they will see by incurring these added costs of individually identifying their cattle. Many producers are not willing to accept a "feel good" benefit, they want to realize an actual economic benefit if they are to go to the trouble of implementing a program of this scale.