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October 5, 2020

Submitted via regulations.gov

Re: Docket No. APHIS-2020-0022: use of Radio Frequency Identification Tags  
as Official Identification in Cattle and Bison

Dear Dr. Scott:

The Farm and Ranch Freedom Alliance (FARFA) is a nonprofit organization dedicated to promoting common-sense policies for local, diversified agriculture.

FARFA submitted a Freedom of Information Act request to USDA two months ago, seeking documents related to the agency's proposal to stop approving non-electronic forms of ID. We asked for the results of the test exercises that USDA has stated show inadequacies in the current program, the costs of the proposal, and the impact of Executive Order 13892 on the agency's decision-making. We have received no documents to date. **If the agency cannot provide information on the reasons for this proposal and its costs, then it should not proceed.**

**I. The agency has failed to show that there is a need to impose more expensive requirements on cattle owners and related businesses.**

Prior to imposing any new regulatory requirements and costs, an agency should conduct an analysis to identify (1) the goal, and (2) what is necessary to reach that goal. Despite numerous requests by FARFA and other organizations over the last 15 years, the USDA has failed to conduct that analysis, or, if it has been conducted, the agency has not shared it with the public.

First, what is the goal? The agency appears to be continuing to set "traceability" as a goal in and of itself. **Yet traceability is a tool, not a goal.** The goal is animal health and controlling disease. Whether or not there is sufficient traceability should be judged based on its effectiveness in meeting those goals; and the costs of enhancing traceability should be compared to the costs of alternative steps that would help meet the goals of animal health and controlling disease.

Over the last fifteen years, the agency has repeatedly referred to a goal of being able to trace an animal from birth to death within 24 hours. As justification, the agency has said that such traceability is needed to address highly contagious, fast-moving disease such as Foot & Mouth Disease. But that justification has two major flaws. First, such fast-moving diseases do not require birth to death traceability, but merely the ability to trace where an animal has been within the last few days. In contrast, diseases with long incubation periods, such as tuberculosis, do call for birth-to-death traceability – but there is little harm if the traceback takes longer than 24 hours for such slow-moving diseases.

Second, the agency has failed to show that traceability of domestic livestock is the “weak link” in the ability to address FMD and similar diseases. To the contrary, early diagnosis and good animal husbandry are far more important to disease control. Consider that the confinement pork industry already has premises ID and electronic ID, yet it had no apparent effect on the number of sick, dead, or euthanized pigs during the porcine epidemic diarrhea outbreak in 2013.

Second, even if one designates traceability (as opposed to animal disease control) as the goal, the next question is what is necessary to reach that goal? The agency has claimed that the state exercises show weaknesses in the current traceability system, but has not identified what those weaknesses actually are – nor how switching to electronic forms of ID will solve them. Were the slow or failed tracebacks due to the type of ID the cow had? A lack of ID, either because the owner never tagged the cow or the tag fell out (a problem that is greater with RFID tags than with the metal brite tags that USDA proposes to eliminate)? Problems with state agency personnel? Database or other technology flaws? Messy data from the failure of slaughterhouses to report “retired” ID numbers? There are numerous things that can slow tracebacks or make them impossible to complete, many of which do not vary with the type of ID tag. The USDA has provided no evidence that eliminating low-tech forms of ID will actually address the alleged problems.

## **II. The costs of the program will disproportionately harm small farmers and ranchers.**

While providing only questionable benefits if any, an electronic ID mandate carries significant costs.

The agency has failed to provide a cost-benefit analysis for its proposal, but the cost-benefit analyses conducted in the past on the National Animal Identification System (NAIS) proposal showed that a system of electronic ID and tracking would impose very high costs on small-scale farmers and ranchers.

The agency may respond that NAIS involved tracking as well as the ID itself. Yet the costs of the current mandatory electronic ID program go beyond the costs of the tag itself. Moving to an all-electronic ID system carries associated costs: electronic tag readers, computers, etc. Some proponents seek to ignore these associated costs, claiming that the tags will still be able to be read visually and hand-recorded. But since the proponents’ main argument in favor of electronic ID is that too many mistakes occur when people hand-transcribe the **eight (8) digit** numbers on metal brite tags, it is disingenuous and misleading to say that it will work for people to hand transcribe the **fourteen (14) digit** numbers that are used on RFID tags.

Moreover, we have a real-world example of the impacts of electronic ID alone. In 2007, the State of Michigan began to require electronic ID tags on cattle for in-state movements. FARFA submitted a FOIA request to the Michigan Department of Agriculture and Rural Development, seeking to determine the costs imposed by the

program on the state, farmers, sale barns, veterinarians, and related businesses. MDARD's response was that it would cost over \$1,724<sup>1</sup> to produce such documents because it would take high-level employees many hours to compile the information. In other words, Michigan imposed this requirement 13 years ago, and it still doesn't know what it actually cost to implement it.

Thus, the only way for the public to judge the costs of an electronic ID mandate is to look at the outcome. Based on the USDA Agricultural Census from 2007 (the same year Michigan implemented mandatory electronic ID for cattle) and 2012:

- Michigan saw a 3% decrease in the number of very small cattle operations (fewer than 10 head), even though nationally the number of such farms *increased* by 4%.
- Both Michigan and the entire country saw similar decreases in the number of small to mid-size farms.
- Michigan saw a 16% increase in the number of large cattle farms (500 to 999 cows), while nationally the number only increased 7%.
- Michigan saw a 35% increase in the number of very large cattle farms (over 1,000 head), even though the number of those operations *decreased* slightly nationally.
- Michigan saw a 50% increase in the number of cattle on those large farms, even though the number of cattle in large operations stayed basically steady nationally.

These numbers reflect a significant loss in small farms and a significant consolidation of the industry, far worse than the national trends. What is different about Michigan? Electronic cattle ID, which the USDA now proposes to impose on the entire country.

### **III. The agency has failed to comply with the Administrative Procedures Act.**

In 2013, the USDA published the Animal Disease Traceability (ADT) rule. This rule was the result of extensive work and negotiations between the agency and numerous stakeholders. As FARFA's Executive Director, I served on the Secretary's Advisory Committee on Animal Health during that time. The Committee had multiple, extensive discussions on the proposed rule, as did many others who provided input to USDA. The rule went through the formal process for rulemaking under the Administrative Procedures Act and, to date, has never been amended.

The ADT rule explicitly provides that cattle owners can use non-electronic forms of official identification when they are required to identify their animals under the program. Specifically, "official identification devices and methods" include an "official ear tag," properly registered brands accompanied by an official brand inspection certificate, tattoos and other identification methods acceptable to breed associations, "group/lot" identification numbers, backtags, *or* other forms of identification as agreed to by the shipping and receiving states. The 2013 rule was designed to "encourage" the use of low-cost technology, specifically metal eartags.<sup>2</sup> It allowed producers to use a variety of

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<sup>1</sup> MDARD revised the charge to \$1,624 when challenged, still reflecting its inability to provide a response to what should have been a simple request to identify the costs imposed by its electronic ID requirements.

<sup>2</sup> APHIS Factsheet, *Questions and Answers: Animal Disease Traceability Final Rule* (Dec. 2012) at 3.

“official identification numbers” and “official ear tags,” based upon the National Uniform Eartagging System (NUES), an Animal Identification Number (AIN), or a location-based number system.<sup>3</sup>

Indeed, the 2013 rule explicitly **forbids** states from mandating the use of RFID technology as part of the interstate requirements. The USDA’s fact sheet stated:

While [] producers may elect to use official eartags with radio frequency (RF), no state or tribe may require official RF tags for cattle moving into their jurisdiction. This ensures that all producers using the low cost official eartags may move their cattle to any other State or Tribal land using that method of official identification.<sup>4</sup>

**The ability to use low-cost, low-tech methods of identification was a key point during the discussions around the rulemaking. The ability to use either RFID or non-RFID tags was absolutely critical to many stakeholders, as was recognized by USDA at that time:**

One of the USDA’s priorities when it designated the framework for animal disease traceability was to ensure that producers were not adversely impacted by the cost of the program by focusing on low-cost technologies. USDA plans to provide the NUES tag (metal eartags) available at no cost to producers to the extent funds are available. The final rule also allows for a variety of official identification methods that have been approved by APHIS, so the producer can choose a format that works best for their operation.<sup>5</sup>

The agency’s proposal effectively amends this critical provision of the ADT rule, without going through the rule amendment process. The agency is improperly avoiding the requirement to do a cost-benefit analysis, and to identify the impacts on small businesses. While the agency is taking public comment, it appears poised to implement its new policy regardless of what comments are received – and without doing the appropriate analysis and response to comments required under the APA.

#### **IV. The agency has failed to comply with Executive Order 13892 and Executive Order 13771.**

USDA has improperly interpreted Executive Order 13892<sup>6</sup> to only require that it provide this non-APA notice and opportunity for comment before imposing the new requirement

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<sup>3</sup> APHIS Factsheet, *Questions and Answers: Animal Disease Traceability Final Rule* (Dec. 2012) at 2.

<sup>4</sup> APHIS Factsheet, *Questions and Answers: Animal Disease Traceability Final Rule* (Dec. 2012) at 3.

<sup>5</sup> APHIS Factsheet, *Questions and Answers: Animal Disease Traceability Final Rule* (Dec. 2012) at 5.

<sup>6</sup> Executive Order 13892, Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication, 84 Fed. Reg. 55239 (Oct. 9, 2019),

that cattle owners use electronic forms of ID. While this might satisfy Section 4 of the Executive Order about public notice, it does not satisfy the Executive Orders' explicit limitations on the use of guidance documents.

Executive Order 13892 explicitly forbids agencies from using guidance documents to “impose new standards of conduct on persons outside the executive branch except as expressly authorized by law or as expressly incorporated into a contract.” Sec. 3. A “guidance document” is defined in relevant part as an “agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation.” Sec. 2(c). Notably, guidance documents are defined to **not** include agency rules adopted under Administrative Procedures Act.

The agency's publication that it will no longer approve non-electronic forms has the same impact as a guidance document. It changes the behavior of regulated parties, and sets forth the agency's policy on the regulatory issue of what constitutes “official ID.” It is thus an improper use of agency authority under Executive Order 13892.

In addition, since the agency's new policy effectively amends a rule and increases costs for regulated entities, it should comply with Executive Order 13771. That 2017 Order requires that “any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.”<sup>7</sup> The agency has failed to identify the costs associated with this regulatory change, much less offset them as required.

## V. Conclusion

FARFA urges the agency to withdraw its proposal to limit official identification for cattle in the ADT program to RFID tags only. The agency should conduct and publish an analysis of the existing ADT program that addresses where the failures have occurred and the source of those failures. The agency should conduct and publish a full cost-benefit analysis of amending the ADT rule to require electronic tags, including comparing those costs and benefits to the impact on animal health of alternative approaches (such as investing in greater diagnostic capacity, training of frontline veterinarians, etc.).

Respectfully,

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<https://www.federalregister.gov/documents/2019/10/15/2019-22624/promoting-the-rule-of-law-through-transparency-and-fairness-in-civil-administrative-enforcement-and>

<sup>7</sup> Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, 82 Fed. Reg. 9339 (Feb. 2, 2017), <https://www.federalregister.gov/documents/2017/02/03/2017-02451/reducing-regulation-and-controlling-regulatory-costs>