

# An Electronic Identification Mandate for the Cattle Industry

Roger McEowen ([roger.mceowen@washburn.edu](mailto:roger.mceowen@washburn.edu)) – Washburn University School of Law  
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## Overview

The United States entered the World Trade Organization (WTO) at its formation on January 1, 1995. The express purpose of the WTO is to increase imports and exports around the world. At the time of the WTO's formation, recommendations were made for nations to adopt animal identification (animal I.D.) procedures to track disease in animals as a means to facilitate trade. In the U.S., efforts concerning animal I.D. began in 1999, but accelerated in 2002

As a result of a Canadian cow infected with bovine spongiform encephalopathy (BSE) the USDA, in 2003, the USDA's Animal and Plant Health Inspection Service (APHIS) proposed the National Animal Identification System (NAIS) which contained mandatory registration of premises and exclusive use of electronic identification devices (EID eartags) on all classes of cattle, from birth to slaughter, by cattle farmers and ranchers (producers). The NAIS led to voluntary premises identification. 80 percent of hog farms voluntarily participated as did 95 percent of poultry operations. However, the NAIS proved to be unpopular with cattle producers. Only 18 percent of cattle operations voluntarily participated in the NAIS. As a result, the Congress stopped the funding of the program and a 2010 USDA Factsheet acknowledged that the "vast majority of participants were highly critical of the program [NAIS]." The USDA then promised it would take a new approach that "offers more flexibility, lower cost options, and is less burdensome."

The new approach to animal identification in the cattle industry – it's the topic of today's post.

## Animal I.D. – What is it?

Animal I.D. refers to keeping records on individual farm animals or groups of farm animals so that they can be easily tracked from their birth through the marketing chain. Historically, animal I.D. was used to indicate ownership and prevent theft, but the reasons for identifying and tracking animals have evolved to include rapid response to animal health and/or food safety concerns. As such, traceability is limited specifically to movements from the animal's point of birth to its slaughter and processing location.

## 2010 Development

On February 5, 2010, the USDA announced that it was abandoning the NAIS and proposing a new plan known as Animal Disease Traceability (ADT) that was to be designed to be a state-administered program allowing states (and Indian Tribes) to choose their own degree of animal identification and traceability of livestock populations within their borders. But a state program would be subject to a



USDA requirement that all animals moving in *interstate* commerce have a form of ID that allows traceability back to their originating state or tribal nation.

**Note:** The USDA Secretary of Agriculture has the authority to regulate *interstate* movement of farm-raised livestock. See 7 U.S.C. §8305.

### 2013 Final Rule

This new approach was published in a 2013 final rule requiring adult cattle shipped interstate (across state lines) to be affixed with an official animal I.D. device. The device must contain an official identification number on a metal ear clip, plastic numeric eartag, EID eartag, or group lot identification. Backtags could be used under certain circumstances and registered brands and tattoos could also be used when agreed to by the shipping and receiving states. Cattle shipped interstate must also be accompanied by an interstate certificate of veterinary inspection or other documentation.

**Note:** The USDA's Animal and Plant Health Inspection Service (APHIS) expressly stated that the 2013 rule "is designed to allow producers to use tags that do not require any electronic or special equipment to read the official eartags." 78 Fed. Reg. 2,058.

**Note:** The requirement for the use of group lot identification number (GIN) is that cattle and bison managed as one group throughout the preharvest production chain are not required to be individually identified. Instead, the GIN is recorded on documents accompanying the animals as they move interstate. See 89 Fed. Reg. 39,548. As such, the new rule favors vertically integrated cattle and bison production systems as they can avoid the cost of individual animal identification..

The stated purpose of the 2013 rulemaking was to improve USDA's ability to trace livestock in the event that disease is found, which the agency states will "minimize[e] not only the spread of disease but also the trade impacts an outbreak may have." 78 Fed. Reg., at 2,063.

While the USDA promised flexibility to cattle producers (which prioritized flexibility early on) with the 2013 rule, the USDA made it clear that it would not end APHIS' quest to expand its animal I.D. mandate. In fact, although the agency did not disclose it would be eliminating the option for producers to choose either low-cost non-EID eartags or high-cost EID eartags, the agency did disclose its future intention to substantially expand the classes of cattle required to bear official identification eartags. The agency stated that it viewed the inclusion of feeder cattle as an "essential component" of an "effective traceability system in the long term." 78 Fed. Reg. 2,047. Indeed, the agency contemplated it would conduct a "separate future rulemaking" to include feeder cattle. *Id.*

**Note:** In April of 2019, the USDA produced a Fact Sheet followed by the issuance of a Notice specifying that radio frequency identification (RFID) was going to be the only option going forward. The Notice was challenged in court on the grounds that the USDA lacked the legal authority to mandate RFID use and issued the plan without allowing time for public comment in violation of the Administrative Procedure Act and without publishing it in the *Federal Register*. *Ranchers Cattlemen Action Legal Fund United Stocgrowers of America v. United States Department of Agriculture, filed Oct. 3, 2019 (D. Wyo)*. The lawsuit also accused the agency of violating the Federal Advisory Committee Act (FACA), which requires federal agencies to follow certain protocols around establishing and utilizing advisory



committees. Within three weeks of the lawsuit being filed, the USDA shelved the plan and asked the court to dismiss the case, which the court did.

### 2024 New Final Rule

On May 9, 2024, the USDA published a new final rule eliminating the flexibility, lower cost options, and less burdensome requirements promised in the 2013 final rule. Under the new final rule, effective November 5, 2024, adult cattle and bison shipped interstate *must* bear an EID eartag (though cattle and bison bearing an official animal identification device pursuant to the 2013 final rule may retain that device throughout its lifetime). This new rule effectively eliminates the flexibility given producers under the 2013 final rule to use lower-cost eartags that don't require premises registration.

The purported purpose of the mandatory use of EID eartags is to improve APHIS' "ability to trace the cattle and bison that are currently required to have official identification and that meet this requirement with eartags [meaning the new rule would have no impact on cattle shipped interstate when using brands or tattoos when agreed to by both the shipping and receiving states]." 89 Fed. Reg., 39,542. This traceability is (according to APHIS) for disease traceability purposes.

The new rule also places additional emphasis on trade noting that one of its goals is that by making the overall "process of tracing infected and exposed animals more efficient," EID eartags "would be critical to reopening export markets." 89 Fed. Reg. 39,544.

**Scope and classes of cattle.** The new rule will not increase the number of cattle subject to the EID eartag mandate beyond the number of cattle already covered under the 2013 rule. The new rule states that 11 million cattle will be impacted by the EID mandate, an estimate APHIS based on the number of official identification eartags that have been used in previous years, and which represents only 11-12% of the U.S. cattle and bison inventory. See 89 Fed. Reg. 39,558.

The new rule does not change the type or class of animals subject to the EID eartag mandate from those covered under the 2013 rule. The classes of cattle subject to the new mandate continue to include "all sexually intact cattle and bison 18 months of age or over; all female dairy cattle of any age and all male dairy cattle born after March 11, 2013; cattle and bison of any age used for rodeo or recreational events; and cattle and bison of any age used for shows or exhibitions." 89 Fed. Reg. 39,545. Cattle and bison are exempted from official identification requirements under both the 2013 final rule and the new rule if they are going directly to slaughter. See *id.*

**Cost to producers.** APHIS claimed that the cost of purchasing EID eartags was the only additional cost associated with the new mandate and estimated the cost for producers would be approximately \$26.1 million dollars, representing an average cost of \$30.39 per cattle or bison operation each year. See 89 Fed. Reg. 39,561. This estimated cost for the new rule falls within the cost range the agency estimated in the 2013 rule. See 78 Fed. Reg. 2,058.

However, when responding to comments received for the 2013 rule that at least one study estimated that the cost of a NAIS-type system would range as high as \$1.9 billion, APHIS expressly stated that it did not dispute the cost factors used in the study based on its belief that the management practices associated with those cost factors were not needed to comply with the 2013 rule. See *id.*



**Shortcomings Acknowledged by APHIS.** APHIS asserts its testing of the 2013 rule's efficacy finds that "States on average can trace animals [at least to the State where an animal was either shipped from or the State where the animal was officially identified] in less than 1 hour[.]" *89 Fed. Reg. 39541*.

Despite this touted success, APHIS has acknowledged at least four shortcomings associated with the 2013 rule, but only one of which is addressed in the new rule:

- APHIS acknowledges that 70 percent of cattle would need to be traceable for it to be fully prepared for a possible incursion of a foreign animal disease. *See 89 Fed. Reg. 38542*. As stated above, the new rule does not require any more cattle to be officially identified than are required under current regulations.
- APHIS acknowledges in the 2013 rule that the digitization of interstate certificates of veterinary inspections (ICVIs), which must accompany cattle and bison shipped interstate, "is important to increase administrative efficiencies and to support timely traceability." *78 Fed. Reg. 2,055*. Yet, the agency did not require the digitization of such records in the 2013 rule and does not require it in the new rule.
- APHIS acknowledges that eartags on the animal and accompanying ICVIs and other paper documentation work in tandem, and both are essential to the process of animal disease traceability. The agency claims that if both these interdependent tools are in electronic form, there is a "significant advantage over non-EID tags and paper record systems."

**Note:** The mandate only applies to producers, not the veterinary community. This would appear to jeopardize the ability of APHIS to achieve a significant advantage in tracing back diseased cattle. The justification given for not requiring the digitization of ICVIs is that they "may sometimes be impracticable for the regulated community," without specifying the reason such a mandate would be impracticable.

- APHIS acknowledges that while it is requiring producers to purchase and affix EID tags to their cattle and bison, it is not requiring anyone in the industry to purchase or even use the electronic equipment needed to read and record the EID tags (e.g., electronic readers and data management systems). *See 89 Fed. Reg., 39,557*. In other words, while APHIS is imposing its EID mandate on producers' cattle and bison, whether the data in those EID tags are ever transferred electronically to a digital data management system remains purely discretionary. This calls into question the agency's stated purpose for the EID mandate itself – to reduce or eliminate errors associated with transcribing numbers on visual tags to a database and to more "rapidly and accurately read and record tag numbers and retrieve traceability information." *89 Fed. Reg., 39,543*.

**Note:** The significance of this is that the agency, as stated above, is contemplating including feeder cattle in a future rule. When combined with the new rule's EID eartag mandate, it would essentially



resurrect a NAIS-type system. This could reasonably be anticipated to result in a substantial cost increase to producers, including equipment and labor costs because feeder cattle are not currently required to bear any official animal identification under the 2013 rule. Given that approximately 25 million steers and heifers are slaughtered each year, including feeder cattle (i.e., lighter weight steers and heifers intended for eventual slaughter), a future rulemaking would likely increase the number of cattle subject to the EID mandate from 11 million to 36 million.

### Actions to Overturn

Senator Mike Rounds, (R-SD) has introduced S. 4282, A bill to prohibit the Secretary of Agriculture from implementing any rule or regulation requiring the mandatory use of electronic identification eartags on cattle and bison, to reverse the new rule.

On May 9, 2024 Congresswoman Harriet Hageman (R-WY) issued a public statement stating, "In the coming weeks, I will introduce a joint resolution of disapproval pursuant to the Congressional Review Act (CRA) to overturn this harmful rule."

**Note:** The CRA is located at 5 U.S.C. §§801-808.

In addition, Senators Rounds and Tester (D-MT), are also pushing the U.S. Senate to pass a resolution of disapproval which could lead to the invalidation of the 2024 final rule under the CRA.

### Legal Issues/Challenges

An animal I.D. program raises the possibility of potential legal liability if disease can be traced back to a particular farm or producer. If a farmer is deemed to be a "merchant," goods that are not merchantable cannot be placed in commerce. A diseased animal is not merchantable. The courts are split on whether a farmer is a merchant. Importantly, some states (such as Kansas) have statutorily exempted livestock producers from liability under for breach of the warranty of merchantability as well as the warranty of fitness for a particular purpose. The exemptions exist primarily in the major livestock producing states. The states with exemptions vary widely in their statutory approach to the exemption.

It is also possible that a strict liability claim could be brought against a livestock seller for selling an unreasonably dangerous defective product. However, a primary question is whether livestock are "products" for this purpose.

Perhaps greater potential liability would lie in a negligence claim. Under a negligence theory, the plaintiff would have to show that the producer owed the plaintiff a duty that was breached and the breach of the duty caused the plaintiff's injury. Any increased transparency of an animal I.D. system could make it easier for a plaintiff to prevail on a negligence (as well as a warranty or strict liability) claim.

An additional concern involves the privacy of information that would be collected under a mandatory animal I.D. program and whether that information could be generally available to the public pursuant to a Freedom of Information Act (FOIA) request. 7 U.S.C. §552. The FOIA entitles the public to obtain records that federal agencies hold. While the FOIA applies to "agency records" maintained by



“agencies” within the executive branch of the federal government, an exemption prevents the disclosure of confidential information that could harm an individual. 7 U.S.C. §552(b). Also exempt is public access to various types of business-related information as well as commercial or financial information or any other confidential information, the release of which could harm the provider. The extent of that exemption would likely be tested in court.

## Conclusion

The new rule appears to be a corrective step in APHIS’ incremental march toward the fulfillment of its implied objective to ultimately increase the number of cattle and bison subject to its EID mandate. The only measurable effect of the new rule is to eliminate the flexibility, lower costs, and less burdensome requirements promised in the 2013 rule. Neither the number of cattle or classes of cattle subject to official identification requirements will change.

The new rule does not address the shortcomings identified with the 2013 rule and appears only to ensure cattle and bison shipped interstate will bear an electronic device, but without an accompanying mandate that those devices be read or recorded electronically, thus calling into question the potential efficacy of the new mandate.

What is really needed for effective disease traceability is the digitization of the accompanying ICVI which is associated with the tag number on the cow. The 2024 rule doesn’t require this.

Further, because the new rule incentivizes vertical integration with its lower-cost and less burdensome GIN method, the rule will likely facilitate the ongoing consolidation and concentration of the U.S. cattle industry.

Another problem with the rule is that it has a disparate impact on producers based on their geographic location. If a producer lives in a state with packing plants, the producer’s animals need not cross state lines and would not be subject to the animal I.D. rule. However, producers in a state without a packing plant would be subject to the rule. This could lead to a constitutional challenge based on disparate impact.

Yet another question is where the chips used in RFID come from. Currently, approximately eight companies are certified as manufacturers of EID tags. It is not known where these companies are getting the chips. The possibility exists that the chips are coming from China. If that is the case, the use of the chips provides the possibility that China would gain the ability to discern the location of livestock herds in the U.S. and present the U.S. with a national security issue.

The United States used to bar imports from countries with BSE or foot and mouth disease. It seems that a much more effective (and acceptable) approach would be to put that ban back in place instead of imposing a mandatory animal I.D. program.

So, what’s the big deal with animal I.D.? Why does the USDA care so much about this? Why do the meatpackers not oppose animal I.D.? The USDA is promoting the rule as having a minimal impact on producers. That’s likely by design with additional mandates to come in the future.



Finally, given the USDA's recent push for "Climate Smart Agriculture" and its attempts to entice producers via tax credits to adopt certain "climate friendly" practices, it's certainly plausible to conclude that USDA's end goal is to monitor greenhouse gas emissions from farms and ranches across the U.S. by requiring associated information to be on the EID tag. If that's correct, mandatory animal I.D. may actually be the beginning of the end of freedom for the American cattle rancher.

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K-State Agricultural Economics | 342 Waters Hall, Manhattan, KS 66506-4011 | 785.532.1504  
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