April 14, 2015

Administrator Kevin Shea
USDA Animal and Plant Health Inspection Service
Docket No. APHIS-2014-0018
Regulatory Analysis and Development, PPD, APHIS
Station 3A-03.8, 4700
River Road Unit 118
Riverdale, MD 20737-1238

Dear Mr. Shea,

We are writing on behalf of Livestock Marketing Association (LMA) to provide comments on the proposed rule regarding Approved Livestock Marketing Facilities (Docket No. APHIS-2014-0018). The LMA is the leading national trade organization for more than 800 livestock marketing businesses located throughout the United States. We represent more than 75 percent of the regularly selling local livestock auction markets.

As you know, these livestock marketing businesses are the core entities that become Approved Livestock Marketing Facilities under 9 CFR §71.20, the main regulation this proposal would amend. The Approved Livestock Marketing Facilities regulation and agreement play a major role in the way Approved Livestock Marketing Facilities owners run their operations.

In addition, this proposed rule makes changes to the Animal Disease Traceability (ADT) regulation found in 9 CFR § 86. The ADT regulation also has a significant effect on livestock markets, as a primary place where cattle are bought and sold in interstate commerce. The portions of the ADT regulation USDA is proposing to amend have a particular importance to markets as they relate to when ADT exceptions apply for moving cattle to Approved Livestock Marketing Facilities.

LMA appreciates USDA's recognition that the existing Approved Livestock Marketing Facilities regulation is antiquated and the work put in to modernizing the requirements. We are also grateful for the engagement and communication USDA has had with stakeholders, and LMA in particular, in this process. While LMA is supportive of the process of updating this regulation and many of the proposed changes, there are also some of the proposed changes we believe would have negative consequences. Additionally, in some places we believe the regulation and agreement could be improved through adjustments.

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We have broken our comments on the proposed changes into three areas: (1) proposed changes to the ADT regulation, (2) proposed changes to the Approved Livestock Marketing Facilities regulation, and (3) proposed changes to the Approved Livestock Marketing Facilities agreement.

PROPOSED CHANGES TO ANIMAL DISEASE TRACIBILITY (ADT) REGULATION

Existing Documents can be used instead of Owner Shipper Statements –

LMA strongly supports USDA's clarification that State Veterinarians may allow cattle to move interstate to an Approved Livestock Marketing Facility without an Owner Shipper Statement or Interstate Certificate of Veterinary Inspection (ICVI), as long as the movement information is recorded when the cattle are unloaded. The ability to receive cattle from out of state with an Owners Shipper Statement instead of an ICVI is a major incentive for livestock markets to become Approved Livestock Marketing Facilities. In many cases, the required information for an Owner Shipper Statement is already captured on an existing document, such as a tag-in slip at a livestock market. Many states have allowed these existing documents to be used as Owner Shipper Statements. We appreciate USDA's support of this approach and believe codifying this option in the regulation is another positive step. This allows producers, livestock markets, and animal health officials to capture the key traceability information without the burden of creating unnecessary and duplicative documents.

ADT exceptions for cattle moving across state lines to Approved Livestock Marketing Facilities only apply to cattle moved from Farm of Origin

LMA opposes USDA's proposal that existing ADT rule flexibilities for cattle moving to an Approved Livestock Marketing Facility would be limited to only cattle coming to the facility from a Farm of Origin, defined as any farm where livestock are produced or maintained for at least four months prior to movement.

Under the ADT rule, cattle can move across state lines directly to an Approved Livestock Marketing Facility on an Owner Shipper Statement instead of an ICVI. Cattle covered under the ADT rule would then need an ICVI to move interstate from the facility (9 CFR 86.5(c)(2)). In addition, cattle covered by the ADT rule may move across state lines to no more than one Approved Livestock Marketing Facility and then directly to an approved slaughter establishment without being officially identified, so long as a USDA-approved backtag is applied (9 CFR 86.4(b)(1)(ii)). These are helpful flexibilities that allow for efficient movement of cattle while still capturing livestock movement information.

In this proposed rule, USDA would like to limit the exceptions listed above so that they only apply if the cattle are moving from the Farm of Origin, defined as any farm where livestock are produced or maintained for at least four months prior to movement.

This is unnecessary as the required information for traceability for these cattle is already being captured and a veterinarian will inspect on arrival livestock traveling from out of state to an Approved Livestock Marketing Facility on an ICVI exemption. For these cattle, veterinary inspection on arrival is both common practice and spelled out in the proposed Approved Livestock Marketing Facilities agreement in 7(b)(ii).

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The four-month Farm of Origin requirement would be extremely difficult to enforce and could even reduce traceability. Since livestock markets are selling cattle for consignors, the market operators do not necessarily have first-hand knowledge of animals' original locations prior to being transported to the livestock market. Information about where animals are being transported from is collected at check in. Market owners rely on the accuracy of information provided at check in and many worry that creating different requirements for livestock that cross state lines and have not been in the same place for more than four months could incentivize dishonesty about where livestock have been and for how long. Additionally, this requirement could cause some to sell cattle outside of a market where documentation and identification requirements are not enforced. Either of these options would have the effect of reducing traceability rather than enhancing it.

Additionally, USDA responses to inquiries indicate the four-month time frame is an arbitrary number not selected for any disease-specific purpose. Instead the number is utilized simply because it is a time frame used in some other regulations. This is an insufficient reason to use a lengthy time frame significantly limiting the definition of Farm of Origin, and therefore access to important ADT flexibilities. In other regulations, a much shorter time frame is used to determine when cattle are to be treated differently by the law on account of being traded rather than owned for a long period of time. For example, in 7 CFR § 1260.314 USDA determines that a non-producer exemption to the Beef Checkoff is available for cattle owned and resold within 10 days, a much shorter time frame than four months.

While USDA claims to be focusing on highly traded, comingled cattle with this component, the four-month time period will have a much broader reaching effect. For example, a livestock market could have a customer living 20 miles away that happens to be in a different state than the livestock market. If that customer buys a cow/calf pair at the market, takes them home, and then three months later wants to sell the cow, they would need to have a veterinarian visit their farm and write an ICVI before returning to the livestock market with the cow. This could be cost prohibitive and cause the producer to sell the cow through a different method. In addition, the extra step would be unnecessary because the traceability information of the cow would be captured at the market through an Owner Shipper Statement or tag-in slip and a market veterinarian would inspect the cow on arrival.

This same limitation could occur in other scenarios. For example, if a producer purchases thin cows, feeds them for three months, and then resells the cows for harvesting across state lines, then he or she would need both an ICVI and official identification. This is unnecessary as USDA-approved backtags and an owner shipper statement could maintain the identification and traceability of these cows headed to slaughter. In another example, a single set of cows that have not been commingled could need an ICVI to cross state lines and be sold if they have just spent three months together on a rented summer pasture that is not part of their Farm of Origin.

In these examples, both the livestock producers and livestock markets are small businesses that would incur costs from the implementation of this proposed rule. Producers would have an additional cost of a veterinarian farm visit to write an ICVI, and livestock markets would stand to lose business. The negative consequences would be especially harsh for livestock markets that happen to be located close to one or more bordering states.

LMA strongly discourages this requirement being implemented. However, if retained, significantly decreasing the amount of time required to qualify for farm of origin would help reduce the negative effect of the change.

PROPOSED CHANGES TO APPROVED LIVESTOCK MARKETING FACILITIES REGULATION

Terminology

LMA supports USDA's proposal to replace the terms "Approved Livestock Facilities," "Approved Stockyards," and "Specifically Approved Stockyards" with the new term "Approved Livestock Marketing Facilities." The new term is more descriptive, pinpointing that the types of livestock facilities USDA approves are the marketing facilities that LMA represents. A single term rather than three will also help promote clarity.

Veterinary Oversight

LMA supports USDA's proposal to allow Approved Livestock Marketing Facilities to have a veterinarian on call rather than physically present during the sale. While livestock markets are strong supporters of veterinarians and the key role they have in helping ensure the health of livestock, we also recognize that access to veterinarians is a very real concern in some areas. This is well recognized by USDA. In 2011, the agency received submissions for veterinary shortage areas from all 50 states designated 220 veterinary shortage areas across the United States.

In addition, changes to disease programs over the years, such as reducing federal funding for first-point testing of brucellosis susceptible cattle, have reduced the amount of work veterinarians have in some livestock markets. The key role of veterinarians at most livestock markets today is writing Interstate Certificates of Veterinary Inspection (ICVI), which are not needed for all livestock movements.

We also recognize that limited resources make it impractical in many states to have a state or federal animal health official present throughout the sale. This is currently an alternative for having a veterinarian present.

This proposal provides an option for markets that do not sell many livestock requiring veterinary inspection to have a veterinarian available on call rather than present during the sale. While most livestock markets will continue to have a veterinarian on site throughout the sale, the flexibility to instead have an established relationship with an on call veterinarian will be useful to some. Depending on the classes of animals sold and where they are traveling, only a few ICVIs may need to be issued at a livestock market on some sale days. LMA agrees with USDA that requiring an accredited veterinarian to be present at the facility all day on every sale day could result in an inefficient use of that veterinarian's services.

LMA sees the proposal requiring veterinary access as a positive approach to ensuring veterinarians still perform key functions, such as providing any inspection of livestock that is required by the regulations before the animal leaves the facility or writing ICVIs, while also not limiting the ability of livestock markets and veterinarians to maximize their productivity.

Recordkeeping Requirement for all Livestock Marketing Facilities (71.20(a))

LMA recognizes the important role recordkeeping has for animal disease traceability. Because of this, markets are willing to accept the responsibility of maintaining records of the receipt, distribution, and application of official identification devices and USDA-approved backtags for a five-year period. However, in order to maintain traceability, this requirement should also apply to others applying official identification or USDA-approved backtags. Perhaps the appropriate place for this requirement would be in 9 CFR § 86.3(a). This portion of the ADT regulation currently addresses recordkeeping on distribution of official identification devices, but not receipt or application of the devices. The current ADT regulation also does not address recordkeeping pertaining to USDA-approved backtags.

Withdrawal of Approved Status (71.20(b)(3))

Section 71.20(b)(3) states that the Administrator may withdraw approval of a livestock marketing facility if the facility has not been maintained in accordance with the agreement, if the individual who executed the agreement is no longer legally responsible for the day-to-day operations of the facility, or if the individual legally responsible for the day-to-day operations of the facility notifies the Administrator that the facility no longer handles livestock moved interstate under this chapter. What is not clear is whether the individual legally responsible for a facility may notify the Administrator that the facility no longer wants to be an approved facility. Because becoming an approved facility is a voluntary decision, it seems that facilities should also have the ability to voluntarily decide they no longer want to be an approved facility. We recognize that, if this decision were made, the facility would no longer be afforded the benefits granted to Approved Livestock Marketing Facilities. However, in order to retain a true voluntary system, LMA believes this option should be added.

Appeal Process (71.20(b)(4))

LMA opposes the proposed change to the appeal process. Under the current regulation, before withdrawing approved facility status, the USDA must notify the facility operator of the reasons for the *proposed* withdrawal. The facility operator then has 10 days to appeal. Thereafter, the Administrator will notify the operator whether the appeal has been granted or denied. If there is a conflict as to a material fact, a hearing will be held. Under the proposed regulation, the USDA's notice would be notice of an accomplished fact, i.e., withdrawal. The facility operator would then have 10 days to file an appeal. Then, the USDA would either grant or deny the appeal, based solely on written submissions, with no possibility of a hearing. The proposed regulation would take away the right to appeal a proposed withdrawal and would remove the current ability for a hearing if there were a conflict of material fact relating to a withdrawal or denial of status. This would deprive a facility of a significant legal right. While the appeal process is seldom used, it provides important legal protection for livestock markets that are or desire to become Approved Livestock Marketing Facilities. The appeals process and notification of *proposed* withdrawal should be retained.

In addition, LMA would like to see an adjustment to the number of days an applicant has to initiate an appeal. Requiring that an appeal to a denial or withdrawal of status be made in writing within 10 days of notification and include all facts and reasons the facility is appealing is a tight turn around. This short time frame will be particularly onerous if the notice arrives on a Friday or immediately prior to a holiday. The time frame for appeal should be lengthened to at least 20 days and preferably to 30 days.

Backtag Location

USDA also requested comments on whether the regulations should specify the location for placing backtags, and, if so, where the backtag should be placed. While market owners are open to guidance from USDA on appropriate backtag location, this is not an item we believe should be outlined in regulations. LMA prefers either a recommendation within the ADT General Standards document or a separate guideline to regulation, finding these options to be appropriate places for this information. Backtag location is a detail that falls a bit outside the scope of regulation. The regulations should specify general requirements, such as when a backtag must be applied, and other documents can detail specifics on how to meet a general requirement, such as where to be apply a backtag.

In the supplementary information to this proposed rule, USDA recognizes that there is disagreement regarding ideal backtag location. Focus of backtag placement should be on helping ensure backtags are applied safely and retained. When working with animals, the safety of both the animals and the people handling them must be key considerations in determining how and where backtags will be applied. Facility design must also be taken into consideration. Another key factor is placing backtags in a location that will maximize retention for that age and class of animals. Market owners and operators will gladly work to place backtags in the requested location, keeping these key considerations in mind.

PROPOSED CHANGES TO LIVESTOCK MARKETING FACILITY AGREEMENT

Agreement not in Regulations

LMA strongly opposes USDA's proposal to remove the Approved Livestock Marketing Facilities agreement from the regulations and instead include it in the ADT General Standards document. The agreement spells out the key requirements of Approved Livestock Marketing Facilities including their duties relating to identification, veterinary services, handling different classes of animals, equipment, and facility standards. Under the proposal, these requirements would no longer be codified in the regulation.

With the inclusion of the agreement in the regulation, as it is now, approved facilities have the assurance that they will receive notice and the opportunity to comment on proposed changes to these core duties. As you will see in LMA's comments below, language included in this agreement has a significant effect on Approved Livestock Marketing Facilities. Changes to the agreement without formal comment could have unintended consequences.

Stripping market owners of the formal notice and comment protection is troublesome. While current USDA leadership may be committed to engaging market owners in the event of future changes, this may not be the case in the future. LMA strongly believes that the agreement should remain in the regulations so regulated businesses retain the opportunity for a formal notice and comment period.

Markets' Duties Listed in Agreement

The proposed facility agreement lists a variety of requirements that Approved Livestock Marketing Facilities must meet in section III (A)(7)(c). Based on our conversations with USDA, LMA is confident that the intent behind these requirements is a goal that we share – that USDA and Approved Livestock Marketing Facilities work together to enhance compliance with livestock movement requirements. However, we have significant concerns that reading the plain language of the requirements could lead some to believe that markets are expected to take on a regulatory role.

Requiring livestock markets to police livestock movement requirements is an inappropriate expectation for private businesses and one that presents legal challenges. Livestock markets provide a service to producers by selling livestock on a commission basis. The markets do not own the livestock they sell. Because of this, their ability to restrict the movement of those livestock is extremely limited. In addition, markets are limited in their ability to refuse to sell livestock to certain buyers. In the past, USDA's Grain Inspectional Packers and Stockyards Administration (GIPSA) has required that livestock markets sell to certain buyers with whom they would rather not do business. Market owners have a legitimate concern that if they refuse to sell to certain buyers, GIPSA might contend that they have unjustly discriminated when providing stockyard services.

To be clear, livestock market owners and operators see themselves as partners with state and federal animal health officials and veterinarians. Livestock markets would like to do their part to work together where possible to increase compliance with livestock movement requirements. A couple of slight changes to the phrasing of facility requirements in III (A)(7)(c)(ii)(iii) and (iv) could help alleviate the concerns.

Facility Requirements - III(A)(7)(c)(ii)

Section III(A)(7)(c)(ii) of the proposed agreement currently states that facilities *"May not sell livestock to out-of-State buyers or allow the animals to move to interstate destinations requiring ICVIs under 9 CFR part 86 or State of destination import requirements unless the facility operator makes available an accredited veterinarian to complete the certificates."*

Some have read the initial part of the sentence as a strict prohibition against selling to out-of-state buyers. Livestock markets do not want to limit the number of buyers bidding on producers' livestock unnecessarily and also do not want to risk a GIPSA discrimination complaint by excluding buyers.

Another reading of the sentence has livestock market operators concerned that USDA may be requiring them to not allow buyers to move cattle from the livestock market to an interstate destination. This is concerning because the buyers, not the markets, are the owners of the livestock. Livestock markets do not want to expose themselves to legal problems by limiting a buyer's access to cattle.

While LMA does not necessarily agree with these readings of the requirement, we would like to see the language clarified to avoid the great deal of confusion and concern this component has created.

LMA believes that the key component of this section is that livestock marketing facility operators must make an accredited veterinarian available to complete health certificates when needed, as it often is for out-of-state buyers. This is repetitive of the requirement found in III(A)(7)(c)(i) which states that the facility *"Shall arrange for an accredited veterinarian to be available when needed at the facility to carry out State and Federal regulations, including but not limited to the issuance of ICVIs."* Because of this, we believe section III(A)(7)(c)(ii) of the agreement should simply be deleted.

If USDA would like to keep the references to out-of-state buyers and cattle being shipped out of state, this could be accomplished by adjusting III(A)(7)(c)(ii) to read "Livestock markets selling to out-of-State buyers or selling animals moving to interstate destinations requiring ICVIs under 9 CFR part 86 or state of destination import requirements must make available an accredited veterinarian to complete the certificates." While this does not change the effect of the requirement, shifting the language would reduce confusion and unnecessary concern that USDA is prohibiting markets from selling to out-of-state buyers.

Facility Requirements - III(A)(7)(c)(iii)

Another area of concern in proposed agreement language is found in III(A)(7)(c)(iii) which states that facilities *"Shall see that buyers and consignors are aware of ICVI requirements."*

Livestock market owners worry this is shifting the burden of communicating about livestock movement requirements, a role typically led by federal and state animal health officials, to their private businesses. It is also concerning that some could assume the burden of livestock owners to comply with ICVI requirements is being shifted to the selling agent. While livestock markets see themselves as a partner in this effort, animal health officials, veterinarians, and livestock owners also play key roles.

Additionally, to some the requirement that buyers and sellers are "aware" of requirements could indicate market responsibility for comprehension of federal and state ICVI requirements by others. No amount of education efforts would guarantee that all buyers and sellers fully understand ICVI requirements.

LMA proposes that the requirement be replaced with a clause that states facilities "Shall make information regarding ICVI requirements available to buyers and consignors."

Facility Requirements - III(A)(7)(c)(iv)

Livestock market owners have also expressed concerns about the proposed agreement language in III(A)(7)(c)(iv), which states that facilities *"Shall see that the accredited veterinarian is advised of livestock being moved interstate or that need an ICVI."*

One concern is that the onerous to determine when an animal is in need of an ICVI is being placed on the facility owner, rather than the veterinarian or livestock buyer. Market owners also have explained that while they often know when livestock are moving interstate, this is not always the case. Sometimes, the only way they can determine if livestock are moving interstate is by asking the buyer. This system is not fool proof, as a buyer may initially intend to keep livestock in state and later decide to send them out of state. Or, in extreme cases, a buyer could provide dishonest information.

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The most reasonable way to address this would be for markets to continue asking if livestock are leaving the state or advertising that buyers leaving the state should work with the market veterinarian. However, these markets should not be held strictly liable in cases where, despite their best efforts, livestock are moved interstate without their knowledge. More favorable language for this requirement in the agreement could read, "*Markets shall alert their accredited veterinarian when they are aware livestock are being moved interstate.*"

Disease Restriction - III(A)(6)

Section III(A)(6) of the proposed agreement states "*No reactor, suspect, exposed, high-risk, or scrapie-positive livestock, nor any livestock that show signs of being infected with or that have tested positive for any infectious, contagious, or communicable disease, may be sold at or moved from the facility, except in accordance with 9 CFR parts 71, 75, 77, 78, 79, 80, 81, 85, and 86*."

While LMA member markets are actively engaged in and supportive of reducing the transmission of disease in livestock, some wonder if this component of the agreement has been written too broadly. The term "communicable disease" is broad including things such as ringworm and lice. The requirement most likely is aimed at focusing on those diseases that are reportable diseases to state and federal authorities. Replacing "communicable disease" with "reportable disease" would be a positive shift in the agreement requirements.

Tagging Site Addendum

Many livestock markets chose to be both an Approved Livestock Marketing Facility and a tagging site. LMA supports the fact that the proposed Approved Livestock Marketing Facilities agreement has an optional section in IV(1) allowing markets to also sign up to be a tagging site. This will streamline the process for livestock markets seeking both designations, but also give markets only wanting to become an Approved Livestock Marketing Facility the ability to decline to become a tagging site. The only improvement to this which LMA would suggest is also allowing markets to sign up with USDA to become a tagging site without signing up to become an Approved Livestock Marketing Facility. This approach would provide the greatest flexibility allowing markets to apply for only the desired voluntary designation.

Again, we greatly appreciate the opportunity to comment on the proposed changes and your consideration of these key issues. If you have any questions or would like to discuss our requests further, please contact Chelsea Good at Livestock Marketing Association at cgood@lmaweb.com or 816-305-9540.

Sincerely,

Dan Harris, President
Livestock Marketing Association

cc Dr. John Clifford, APHIS Deputy Administrator for Veterinary Services
Neil Hammerschmidt, Program Manager, Animal Disease Traceability

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