

Competition in the Pet Medications Industry: FTC 2015 Staff Report

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Food & Drug

Last week, the Federal Trade Commission (FTC) issued a staff report¹ (the report) analyzing competition in the pet medications industry. FTC undertook the research reflected in the report in response to recent legislative proposals regarding pet medication prescriptions and because of the pet medications industry's economic significance to U.S. consumers.

The report's publication has the potential to encourage both litigation against industry participants and additional proposed legislation designed to make pet medications more available through non-veterinary retailers.

The report primarily focuses on two issues that FTC determined directly affect the public's access to competitively priced pet medications: (1) the availability of "portable" pet medication prescriptions; and (2) manufacturer distribution policies and practices. It concluded:

- Consumer access to portable prescriptions would likely enhance pet medications industry competition;
- Exclusive distribution practices may have adverse effects on competition, but could also benefit consumers and arise from legitimate business considerations; and
- Increased availability of low-priced generic animal drugs would likely result in significant consumer cost-savings.

This alert includes a brief summary of the research FTC conducted as the basis for the report, FTC's conclusions and recommendations, and key issues industry should consider related to FTC's conclusions.

Basis for the Report

FTC's analysis focused on three questions:

- To what extent, if any, does limited consumer knowledge of and access to portable prescriptions adversely affect pet medications industry competition?
- To what extent, if any, do manufacturer distribution practices that restrict non-veterinary retailers' access to pet medications adversely affect that competition?

¹ The report is *available at* <https://www.ftc.gov/system/files/documents/reports/competition-pet-medications-industry-prescription-portability-distribution-practices/150526-pet-meds-report.pdf>.

- To the extent current pet medications industry practices may adversely affect competition, could less restrictive approaches be used to enhance competition without compromising animal health and safety?

In October 2012, FTC conducted a public workshop to gather information about competition and consumer protection issues in the pet medications industry.² FTC also received more than 700 written public comments regarding issues addressed in the workshop. The report summarizes information FTC received during and after the workshop and other publicly available information regarding the pet medications industry, reflects the Commission's conclusions regarding issues identified during the inquiry, and recommends areas that could benefit from further study. FTC intends the report to be useful to stakeholders in the pet medications industry, including businesses and policymakers, interested in the economic aspect of the industry and new business practices or legislation that could impact competition and consumer protection.

Key Findings and Recommendations

Prescription Portability

FTC first considers the relationship between prescription portability and consumer access and competition. Prescription portability describes the practice of a veterinarian providing a prescription to a client that the client can then fill at a retail pharmacy. Unlike medical doctors, veterinarians have traditionally dispensed pet medications to clients, rather than writing prescriptions. As the number of non-veterinary retail pharmacies that carry pet medications has increased, however, so has consumer demand for prescription portability, due in large part to the potential for greater cost savings. While some states require veterinarians to issue prescriptions to their clients upon request and/or provide notice that clients may request a portable prescription, many states impose no such requirements. Federal legislation that would require veterinarians to provide portable prescriptions for every medication was introduced in 2011, 2014, and 2015,³ but was never passed.

Prescription portability advocates argue that such requirements would expand consumer access to pet medications, foster competition within the pet medication industry, and result in lower prices for certain pet medications. They also assert that improved prescription portability would spur new product innovation, resulting in, among other products, additional generic pet medications because increased competition and distribution opportunities would create incentives to develop new pet medications. Critics argue that such requirements would threaten the traditional veterinarian-client-patient relationship, which typically includes the dispensing of medications and related discussions (including, as necessary, guidance on dosing procedures) as part of a broader treatment plan. They also assert that many retail pharmacists cannot dispense pet medications as safely as veterinarians because pharmacists typically lack

² See FTC Pet Medications Workshop, *available at* <http://www.ftc.gov/news-events/events-calendar/2012/10/pet-medications-workshop>.

³ See Fairness to Pet Owners Act of 2015, S. 1200, 114th Cong. (2015), *available at* <https://www.congress.gov/bill/114th-congress/senate-bill/1200/text>; Fairness to Pet Owners Act of 2014, S. 2756, 113th Cong. (2014), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-113s2756is/pdf/BILLS-113s2756is.pdf>; Fairness to Pet Owners Act of 2011, H.R. 1406, 112th cong. (2011), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1406ih/pdf/BILLS-112hr1406ih.pdf>.

veterinary pharmacology training. Finally, they argue that prescription portability requirements would lead to significant administrative burdens for veterinarians resulting from the need for increased consultation with outside pharmacists and additional time spent writing prescriptions and keeping related records.

The report concludes that “improved consumer access to portable prescriptions would likely enhance competition in the pet medications industry,” which could reduce what consumers pay for pet medications. FTC notes, however, that current data did not provide a basis for evaluating the overall economic effect of any particular prescription portability requirement. It intends to continue to monitor this issue and consider whether to recommend specific requirements in the future.

Industry Distribution Practices

FTC also evaluated various pet medication distribution practices and their impact on pet medications industry competition. Specifically, FTC considered exclusive veterinary distribution policies (requiring that products be sold through veterinary practices only) and exclusive agreements between manufacturers and distributors (which prevent distributors from also distributing competing products). FTC notes that most major U.S. pet medication manufacturers use some form of exclusive distribution, although one major manufacturer also currently sells pet medications directly to non-veterinary retailers. Most common pet medications also reach the market through “secondary distribution”, meaning non-veterinary retail pharmacies purchase pet medications outside of the exclusive distribution policies and then sell those products directly to consumers.

The report describes potential benefits of exclusive distribution policies, including ensuring product quality, reducing dispensing errors, promoting distribution efficiency, increasing incentives to promote products, and protecting the veterinarian-client-patient relationship. FTC predicts that exclusive pet medication distribution policies will continue to predominate so long as they continue to maximize costs and concludes that there could be very legitimate business reasons for maintaining exclusive distribution policies. It notes, however, that exclusive distribution policies could harm consumers by hindering competition, particularly if the practice is widespread.

FTC additionally evaluated both arguments that manufacturers typically use to support exclusive distribution policies, on the one hand, and, on the other, that retail pharmacies typically use in favor of expanded distribution. For example, the report considers whether the safety justification for these policies (that they limit the possibility that retail pharmacists might dispense medication in a manner other than as prescribed by veterinarians) is warranted, given that there is a regulatory mechanism in place to address pharmacist wrongdoing, which could mitigate manufacturers’ safety concerns. In considering whether manufacturers’ direct distribution to retail pharmacies would better help ensure the quality and integrity of pet medications than current distribution policies and practices, however, the report concludes that products sold through secondary distribution are not necessarily unsafe.

The report addresses whether exclusive distribution policies hinder the development of generic pet medications, reflecting some generic manufacturers’ assertions that exclusive distribution policies preventing distributors from also distributing competing products impede competition. FTC concluded that evidence on this issue is contradictory, in part because of insufficient information to determine how common such exclusive distribution policies actually are.

With regard to exclusive distribution policies in general, the report concludes that these policies could potentially adversely affect competition, but may also benefit consumers, and there may be legitimate business reasons for continuing with them. FTC is interested in evaluating this issue in more detail and analyzing exclusive distribution policy trends.

Recommendations for Future Research

Finally, FTC recommended further research into the following areas: (1) the pricing of pet medications across different channels of distribution; (2) the rate of retail pharmacists' and veterinarians' errors in dispensing pet medications; (3) the need for and impact of automatic prescription release (*i.e.*, portability) requirements; and (4) details regarding the secondary distribution system for pet medications.

Resulting considerations

The spotlight the report focuses on the pet medication industry may incentivize plaintiff class-action counsel hoping to use the report to support anti-competition claims. We would recommend that companies buying or selling pet medications examine their distribution arrangements to ensure they are defensible should the need arise in the litigation context. Because the report will also likely encourage additional proposed legislation in this area, interested companies should continue to monitor such proposals and consider engaging with their advisors or representatives as they deem appropriate.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Food & Drug practice group:

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