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**Organization:** Drs. Foster and Smith

**State:** Wisconsin

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### **Submission Text**

My name is Dr. Race Foster. I am a veterinarian and co-owner of Drs. Foster and Smith (F&S) pet supplies/pharmacy. At the request of the Federal Trade Commission (FTC), I will be one of the panel participants in the FTC Pet Medications workshop October 2, 2012.

I have been a licensed veterinarian for nearly 30 years and co-owned four clinics in northern Wisconsin. I also served for four years on the Board of Directors for the Veterinary Teaching Hospital of Michigan State University. My wife, Lynne, and I are members of the Robert S. Shaw Society at Michigan State University and are major financial contributors to the College of Veterinary Medicine. Additionally, I am a member of the American Veterinary Medical Association (AVMA), the Wisconsin Veterinary Medical Association (WVMA) and the Michigan Veterinary Medical Association (MVMA).

As a veterinarian I am a strong supporter of the veterinary profession and served at Michigan State University to help further the profession and build the next generation of veterinary professionals. Combining that with my years managing clinics in private practice and the privilege I have had in working with millions of consumers and thousands of veterinarians at Drs. Foster and Smith pet supplies for over 29 years, provides me with a unique perspective in the industry, and on the industry.

As a strong supporter of the veterinary profession I speak here, as I will at the workshop, as an advocate for the profession. Veterinarians are among those professionals most trusted by the general public, a trust rightly earned by the commitment of veterinarians who think first of the animals they serve and not simply the profits of their practices.

### **DOCTORS FOSTER AND SMITH – WHO WE ARE**

F&S is a premier online and catalog seller of pet pharmaceuticals. Dr. Marty Smith and I began our business in 1983 and continue to be active owners. We both are licensed veterinarians and have other veterinarians on our staff, as well as a full range of pharmacists and other professional service personnel to ensure that clients receive the information and support needed to provide the best care for their pets.

F&S is based in Rhinelander, Wisconsin where we operate a full service pharmacy—which is

licensed in all 50 states—and fill prescriptions at our retail pharmacy, online and by mail order. F&S provides pet owners a safe and reliable Internet source of pet medications, while at the same time respecting and promoting the primary role of the attending veterinarian and a valid client-patient-relationship. Our goal from the beginning has been to meet or exceed the highest standards of both veterinary and pharmacy practice, which we consistently have done.

Our commitment to the highest standards is outstanding. For example, F&S is an accredited Veterinary Verified Internet Pharmacy Practice Site (Vet-VIPPS). Vet-VIPPS is a program of the National Association of Boards of Pharmacy (NABP) whose standards were established by a coalition of state and federal regulatory associations, professional associations, and consumer advocacy groups to certify compliance with the highest standards of pharmacy practice. Vet-VIPPS accredited pharmacies have been recommended by the AVMA and the U.S. Food and Drug Administration (FDA) as a reliable Internet source for obtaining prescription veterinary medications. At the present time only eighteen pharmacies nationwide have earned Vet-VIPPS certification.

In addition, our business is certified by the Pharmacy Compounding Accreditation Board (PCAB). PCAB has adopted a set of stringent requirements established by a Standards Committee composed of compounding pharmacists and nationally recognized experts in the compounding pharmacy profession. PCAB accreditation requires a pharmacy to comply with more stringent requirements than licensure in individual states.

Significantly, we understand that F&S is the only veterinarian-owned and operated pharmacy to have achieved accreditation by both boards and to be licensed in all 50 states.

## **RESTRICTED DISTRIBUTION**

Among the very important issues that the FTC is addressing in this workshop is the restricted distribution of pet medications and how it affects consumers. In my opinion, through restricted distribution and the sham appearance of restricted distribution, some drug manufacturers have attempted to manipulate the public by ignoring the real meaning of pharmacy terms and regulations. It is also my opinion that their system of restricted distribution violates fair business principles and federal antitrust laws and negates the goal of prescription portability as set forth by the AVMA. They have restricted distribution, in my view, at the expense of consumers and consumers' pets, all to enhance drug manufacturers' bottom lines.

### **Restricted Distribution of Over-The-Counter Pet Products**

For the public and others who are new to this, let me explain restricted distribution using flea and tick medication distribution as an example.

Most flea and tick medications are “over-the-counter” (OTC) medications. This means the manufacturer has had them tested and licensed to be sold over-the-counter to consumers. Neither a prescription nor a visit to a veterinarian is required to purchase an OTC product. This is exactly the same designation and freedom that exists with OTC human medications. The entire point of being labeled an OTC product is to assure the public that the product has been

judged safe for consumer use without a prescription and that consumers can shop online or walk into a store and buy the product, no doctor visit needed.

With some flea and tick pet medications, however, a manufacturer will license a product as OTC, but refuse to sell it to retailers, claiming it should only be dispensed by veterinarians.

Given that these are OTC products, this is a false claim and it is wrong to try to prevent pharmacies from selling these products. Why would manufacturers have products licensed as OTC and restrict their distribution only to certain veterinarians? Does not the consumer deserve ready access to pet health care products, particularly products purposely licensed as OTC?

By supposedly restricting distribution only to certain veterinarians, manufacturers get veterinary support for their products. Veterinarians recommend the supposedly “veterinary only” products to their clients and in doing so, without realizing it, become quasi-sales people for manufacturers. How so? They are both recommending a manufacturer’s product and have it on hand for the consumer to buy. At the same time, consumers are prevented from buying the product elsewhere from retailers due to the practice of restricted distribution.

When challenged about the restricted distribution of OTC products, manufacturers attempt to manipulate the public by playing the “scare” game. They imply or directly state that these flea and tick medications can only be safely sold by veterinarians. This is patently false, of course, in that the manufacturers themselves have had the products licensed to be sold over-the-counter!

### **Restricted Distribution of Pet Prescription Medications**

Some manufacturers also unfairly restrict distribution of pet medications that do require a veterinarian’s prescription. These manufacturers bring their distributors into their schemes to limit the sources from which consumers can buy prescription pet medications. Limiting the sources means limiting the competitors, which sell these products. This again leads to prices to consumers which are higher than they would be if the manufacturers, distributors and veterinarians who are caught up in the restrictions were not artificially, and we believe illegally, impeding competition.

Let me provide an example from our experience at F&S. A certain manufacturer makes well known pet medications. For years prior to June 2011, F&S had unrestricted access to this manufacturer’s prescription pet medicines through their authorized distributors. Those distributors are independently owned businesses which bought from the manufacturer and then in the normal course of business resold to F&S and others, providing F&S with a reliable source of products so it could meet consumer demands.

In fact, in April 2011 the manufacturer sent a letter to F&S verifying that certain prescription pet medicines would “continue to be available for purchase through . . . any one of (seven named) distributors partners.” Continued access to prescription pet medicines through distributors also was confirmed verbally by one of their executives in May 2011.

Then, unexpectedly, between May and early June 2011, and despite their written and verbal assurances of continued access to products, F&S received notice from multiple distributors that

they had been instructed to no longer sell this manufacturer's prescription pet medicines to F&S. F&S was shocked to learn that it was one of the pharmacies on the manufacturer's "do not sell to list." F&S was not provided any explanation for the abrupt reversal in policy. What F&S did learn is that the distributors agreed to join with the manufacturer and none of them would sell prescription pet medications to F&S. Without the collaboration from distributors, neither this manufacturer nor others which maintain "do not sell lists" would be able to restrict distribution of their products.

Subsequently, after our lawyers raised the illegality of this conduct, F&S worked out an arrangement by which the manufacturer agreed to sell prescription pet medications directly to F&S. Then, in April 2012, without any forewarning, the manufacturer told F&S that it would no longer sell any prescription pet medications to F&S.

It makes sense that manufacturers should be willing to have their products sold in a variety of licensed and qualified outlets including pharmacies and veterinary clinics. The American Veterinary Medical Association and other national and state associations have stated that "there are now many online pharmacies and non-veterinary pharmacies that carry veterinary prescription products" and that veterinary medicine "supports a client's choice to fill a prescription on-or-off site." F&S presents the best of both worlds for many clients, *i.e.*, fast, efficient service supervised by licensed veterinarians and pharmacists.

I agree with the AVMA's assessment and recommendation.

Our concern is heightened because this manufacturer and others try to excuse their refusal to sell by claiming that they will sell only to veterinarians who have clients with whom they have a direct veterinary-client-patient-relationship. As a requirement for a pharmacy to purchase medications from a manufacturer, maintenance of the direct veterinary-client-patient-relationship is a false issue. F&S only dispenses products when it receives a veterinarian's prescription from a veterinarian or pet owner who has obtained a prescription from a licensed veterinarian through a valid client-patient-relationship. As far as we can tell, restricting distribution has only one purpose: to maintain prices at higher levels than they would be with open competition. Who pays? Consumers.

Safety is also a false issue. F&S is doubly certified and welcomes manufacturers or others to visit our facility and study our pharmacy operations. In the twenty-nine years we have been in business F&S has never been fined or even reprimanded for a state or federal dispensing violation. We abide by all dispensing laws and are FDA inspected. We have licensed pharmacists and veterinarians present and handle veterinary prescriptions with the same quality assurance that human prescriptions receive and under the same licenses and regulations.

The FTC should explore the real motivation for the restricted distribution practiced by some manufacturers.

Let me add another aspect to the behind the scenes story of manufacturer-veterinarian conflict of interest behavior. In pet *prescription* medication, it is public knowledge that one well-known

drug manufacturer offers financial incentives to veterinarians and/or their clinic staff, to prescribe their products.

If a veterinarian or a member of their staff is being compensated by a drug manufacturer for prescribing and/or dispensing a product, how can a pet owner know for sure that the motivation for writing a prescription is because a pet needs the prescription and not that the clinic will gain more reward points for dispensing a particular drug manufacturer's medication? Similarly, how can a pet owner know that "medication x" is not being prescribed because the maker of "medication x" pays more to the clinic than the maker of "medication y," which may be a better medication for the owner's pet?

We need to maintain consumers' trust in our profession. This is best accomplished by eliminating direct financial incentives and kickbacks. Direct doctor kickbacks are not allowed in human medicine. How can consumers trust that their veterinarians are prescribing medications because their pet needs them, or are prescribing the most effective medications, when these kinds of incentive programs exist?

### **Diversion Is Sanctioned By Manufacturers**

Another aspect of the restricted distribution story was not well known until recently. Veterinary news reporters did an investigation and reported that drug manufacturers at times only claim they use restricted distribution. Behind the scenes, manufacturer representatives themselves have set up what is called "diversion" of product, that is, diversion to non-veterinarian sellers. At the same time as its own representatives set up product diversion to retailers through distributors or veterinarians themselves, the manufacturer simply looks the other way! In doing so, they are violating their own publicly stated policy of selling only through veterinarians. (See attached Exhibit A, VIN News Service article, 05/08/12.)

What I am saying is that manufacturer reps from companies that claim to only sell through veterinarians sometimes work to set up product diversion themselves by approaching retailers first, not the other way around. We have first-hand knowledge of drug manufacturer reps trying to set up product diversion.

When retailers give in to these drug manufacturer practices, the diversions come at a cost—they charge higher prices than the manufacturer's list price, sometimes, we are told, 15% higher or more, with no payment terms, and no volume price breaks. It is all or nothing pricing.

This practice of saying one thing but doing another creates a very clever price support system for the manufacturer in my view. This price support system hits the consumer in the pocketbook and enhances manufacturer profits by limiting serious price competition.

Here is how it works: A manufacturer claims that it has restricted distribution only to and through veterinarians. That encourages veterinarians to push its product instead of another brand's product. The price support comes in, because by refusing to sell direct to retailers but selling to them under the table, manufacturers are forcing extra layers of cost into the system. Commissions are made in the diversion process each time product changes hands. By winking

when distributors or veterinarians buy more product than they can possibly use, only to sell it via diversion to retailers, the manufacturer gains the volume of sales it wants through retailers, but at inflated prices to the consumer.

Who suffers with the above “wink-and-a-nod” practice of seeming restricted distribution? Consumers, who pay in aggregate millions of dollars a year more than they would have if normal market forces were allowed to come into play. In addition, pet owners cannot always be assured that their preferred pharmacy will have the products they need when they need them, because the diversion process removes a regular supply of products to retailers.

Add in manufacturer financial incentives to certain veterinarians and you see what a serious problem this is for the public.

My solution, one which protects consumers and helps restore consumer confidence in the veterinary profession, is to have an open and transparent distribution system; one in which manufacturers sell direct to veterinarians, distributors and qualified pharmacies, so that consumers have ready and affordable access from multiple sources to all pet medications, as they do in human medicine.

By eliminating manufacturer driven diversion practices, prices will remain affordable and proof of distribution becomes transparent, traceable, and trusted. Veterinarians and consumers deserve transparency from drug manufacturers.

## **PORTABILITY OF PRESCRIPTIONS**

A sensitive subject for the veterinary profession is the trend that, despite the aforementioned artificial price support system, prescriptions increasingly are being filled—as in human medicine—in places other than a doctor’s office. One of the issues the FTC will discuss at the workshop is related to this. It is “the ability of consumers to obtain written, portable prescriptions that they can fill wherever they choose.”

This issue has already been addressed by statements such as those found in the AVMA’s *Principles of Veterinary Medical Ethics* which says that a veterinarian should honor a client’s request for a prescription in lieu of dispensing.

See III C. 1 *Principles of Veterinary Medical Ethics*:

### **III. THE VETERINARIAN-CLIENT-PATIENT-RELATIONSHIP**

#### **C. Dispensing or prescribing a prescription product requires a VCPR**

1. Veterinarians should honor a clients request for a prescription in lieu of dispensing.

While I agree with the sentiment that clients should be given written prescriptions, I also believe that veterinarians should continue to be able to dispense medications, unlike human medicine where doctors are discouraged from doing so. Clients should be able to request a prescription if they choose to do so. State laws requiring and the AVMA’s principles encouraging veterinarians

to honor consumer's requests for written prescriptions represent a significant and positive advancement. However, putting the burden on the consumer creates pressure and intimidation which can be removed by having the veterinarian offer to provide a written prescription. If the consumer decides to have the veterinarian dispense the medication, the veterinarian need not write a prescription.

Unfortunately, when it comes to veterinarians dispensing prescriptions, the practices being followed by a minority of veterinarians are creating problems with consumers. These problems exist both in consumer perception of the veterinary profession and in personal consumer-veterinary relationships. What I am referring to is this: By various methods a minority of veterinarians are putting pressure on their clients to purchase prescriptions only from them, the veterinarian. These methods include requiring consumers to sign waivers and/or pay an "extra" fee if they choose to fill prescriptions anywhere other than the veterinarian's office.

Certainly veterinarians, just as physicians, have a right to be paid for their services, including the processing of faxes, record-keeping, correspondence and other tasks associated with prescriptions. I feel this is best accomplished with a simple office call or professional services fee, which are common practices in human medicine. To do otherwise pressures clients and reduces prescription portability.

Pressuring clients also damages veterinarians' credibility and the trusting relationship now enjoyed between veterinarians and clients. If continued, it will inevitably hasten the passage of H.R. 1406 or a bill like it.

I encourage the AVMA to continue addressing this issue and evolve the profession in a positive direction to meet consumer expectations.

### **Learning from the Consumer's Perspective**

As veterinarians, we perhaps need to gain a fresh perspective by looking at things from a consumer's point of view. Every day millions of human prescriptions are filled by brick and mortar pharmacies and online pharmacies. Some human insurance plans even require that prescriptions be filled by their plan's preferred provider via the mail.

Given that certifications like Vet-VIPPS exist—certifications created by the same National Association of Boards of Pharmacy that monitors human pharmacies—how, from a consumer's perspective, is it more dangerous or inappropriate to fill pet prescriptions online or through the mail than it is to fill prescriptions for human medications in the same way? How is it more dangerous or inappropriate when pet pharmacies have the same certifications as human pharmacies? In point of fact, there is no such thing as a pet pharmacy. A pharmacy is a pharmacy.

F&S' team of pharmacists is licensed to fill prescriptions—even human prescriptions—in all fifty states, and we have licensed veterinarians on staff, yet there is a cohort of some manufacturers and a few veterinarians who paint every online pharmacy with the same brush, claiming directly or implying to consumers that no online pharmacy is truly qualified to fill pet

prescriptions. Yes, there have been some bad players in the past; we all know who they are. However, not every online pharmacy falls into that category. There is no reason to deny products to licensed pharmacies which are compliant with pharmacy laws and regulations. I say again, that in the twenty-nine years we have been in business F&S has never had a federal or state dispensing violation.

To be clear, I also am firmly in favor of maintaining the ability of veterinarians to dispense medications, as opposed to the model in human medicine where physicians are generally discouraged from dispensing for profit.

What is at stake here and what we are facing right now, is increasing pressure from consumers to implement bills like H.R. 1406 or to have new FTC rules about the writing of pet prescriptions. In addition, we must remember whose interest comes first – the pet owners and their pets. Those interests include access to the proper medicine at the best price under safe circumstances. For some consumers, the answer will be to purchase from the veterinarian. For others, it will be to turn to a brick-and-mortar or online pharmacy. None of these choices should be denied to the consumer. (See attached Exhibit B, Pet Age article from 09/12.)

As a strong supporter of the veterinary profession, and as one concerned about our trusted relationship with clients, I think all veterinarians should continue to work toward the good goal of supporting our customers' needs. The AVMA is and has been addressing these issues.

## **PHARMACIST QUALIFICATIONS**

Regarding the qualifications of pharmacists, some making comments on the FTC workshop website have suggested that only veterinarians are qualified to dispense pet medications. That suggestion would imply that manufacturers might not be wrong to restrict distribution. However that suggestion is mistaken, in my opinion. For more than fifty years veterinary clinics have relied on local pharmacies to fill certain prescriptions. In working in at least ten practices and with over thirty veterinarians, I know of no veterinarian who doesn't occasionally rely on a human pharmacy for dispensing and/or compounding pet medications. Why is it ok sometimes, but not others?

Not only is the concept of human pharmacists filling pet prescriptions not new, it is the norm at the very colleges and universities that train veterinarians! In a recent survey we did of veterinary schools, of the twenty-eight surveyed—online and by phone—twenty-seven had pharmacies. In twenty-six of twenty-seven pharmacies, a pharmacist, not a veterinarian, heads up the pharmacy. The practice of pharmacists filling pet prescriptions is normal and widely accepted and has been so for decades.

And remember, a large portion of the drugs used in veterinary medicine is comprised of human drugs used legally for pets against the human label directions.

Pharmacies are both FDA and DEA inspected. There are certifications like Vet-VIPPS, outlined and enforced by the National Association of Boards of Pharmacy. Some claims have been made

that pharmacists lack training in animal pharmacology. While perhaps technically true, remember pharmacists are dispensing, not prescribing. Such pharmacies, especially ours with staff veterinarians, are fully qualified, and yet a drug manufacturer who sells those same pharmacies human medications, refuses to sell them pet medications to dispense. Why? The only answer seems to be price support.

Interestingly, some pet medications, like certain antibiotics, chemo-therapeutics, insulins, anti-depressants, pain relievers and anti-inflammatories may be identical to those used in humans. How can a pharmacy, staffed with pharmacists and veterinarians, be qualified to dispense the exact same insulin for use in humans, but not be qualified to dispense it for use in a pet? Again, in neither human medicine nor veterinary medicine is the pharmacist prescribing medication. They are *dispensing* medications as prescribed by a physician or licensed veterinarian. Restricted distribution and questioning the qualifications of licensed pharmacists to dispense pet medications becomes particularly perplexing when a pharmacy, like ours, also has veterinarians on staff. We know how the drugs are used in veterinary patients, and why.

## **FINAL THOUGHTS**

For the record, there are drug manufacturers and distributors who do not practice restricted distribution. These include Virbac, Farnam, Bayer, FidoPharm, Boehringer-Ingelheim, Cardinal Health and Anda. This is a big plus for consumers in terms of price and choice and the number of animal patients having access to proper treatment. We encourage all manufacturers to review the AVMA guidelines, principles and suggestions regarding prescription portability and consumer choice.

Regarding restricted distribution, once again the question has to be asked, “Who suffers?” The answer, in my opinion, is consumers and their pets.

Restricted distribution limits choices and causes consumers to pay more than necessary for prescription and OTC products. Pets may suffer if medications are not readily and economically available. Restricted distribution, in my view, affects both the availability and the cost of prescription and OTC medications to consumers and their pets.

Let me outline below some suggested changes relative to the distribution of medications and prescription portability, but first a brief summary of my thoughts.

As poll after poll has demonstrated, veterinarians are some of the most trusted professionals in America. The AVMA and its subsidiaries, comprised of dedicated veterinarians and staff, are leading the evolution and change necessary to ensure that consumers have prescription portability, quality assurance and a veterinary profession pet owners can trust.

- We should not risk having kickbacks, incentives, restricted distribution and diversion be the perceived guide for the therapeutic choices made for our clients’ pets.
- We should not risk having others outside the profession come to the conclusion that veterinarians should not be dispensing medications.

- We should not denigrate the role of pharmacists nor risk consumer dissatisfaction by resisting prescription portability. Pharmacists have been an aid to the practice of veterinary medicine for over fifty years. The Animal Medicinal Drug Use Clarification Act of 1994 (AMDUCA) allows veterinarians to prescribe extra-label use of certain approved human drugs for animals under certain conditions. As such, we see animal health as a partnership between veterinarians and pharmacists.
- What we should do is promote the practice and continued evolution of the AVMA's Principles of Veterinary Medical Ethics.
- We should encourage the AVMA and the profession to take a proactive role in developing policies and practices that meet consumer demands and expectations.

## **SUGGESTED CHANGES**

1. **Make it illegal for drug manufacturers who have licensed products as OTC to claim such products should only be dispensed by a veterinarian; and, make it illegal to restrict distribution of OTC products based on that claim.**

If a manufacturer licenses a product as OTC, then certain claims and distribution practices relative to its dispensing should be disallowed as misleading to the public. If a product is not an OTC product, do not license it as such.

2. **Prevent manufacturers of prescription medications from withholding those medications from legitimately certified pharmacies.**

Without prescription portability, there is no legitimate choice for the consumer and an effective, if not actual, monopoly exists. We support the view expressed by the Iowa Veterinary Medical Association's submission to the FTC Public Comment page, where they state that "natural market forces" are the best remedy. However, unless medications are freely and readily available from multiple qualified sources and channels without restrictions, natural market forces are absent.

Lack of competition and choice hurts the pet owner and the pet by driving up prices via the quasi-price control, price support system that presently exists. Lack of portability and choice is contrary to AVMA guidelines and goals. Practices followed by manufacturers and distributors of veterinary medications should parallel the goals set forth by the AVMA, that consumers should have a choice of where they purchase their medications.

3. **Outlaw the practice of drug manufacturer financial incentives to veterinarians for prescribing medications.**

Consumers need to know that there is no conflict of interest involved when their veterinarian prescribes a particular medication. The present practice by at least one large drug manufacturer to financially incentivize clinics to prescribe its medications raises serious conflict of interest questions.

**4. Consumers should have a choice of where they purchase prescription medications.**

When a veterinarian prescribes a medication, the veterinarian should simply offer a written prescription to the client, but also can let the client know that he or she has the medication available if the client wants to buy it from the veterinarian. If the client decides to take a written prescription and fill it elsewhere, there should not be any recriminations, pressure, waivers or extra charges for writing prescriptions, and no painting all online pharmacies with the same brush; just service to the pet owner and the pet. This allows the consumer to make a choice without coercion.

**5. The AVMA should continue to evolve and maintain the five-star rated credibility veterinarians currently enjoy with their customers.**

This can be accomplished if the AVMA and the profession continue to evolve their policies and practices to meet consumers' demands and expectations.

## **EXHIBITS**

- A. Veterinarian investigates illicit diversion of flea product, VIN News Service, 05/18/12
- B. The New Pet Med Market, Pet Age, September, 2012