

October 29, 2012

Federal Trade Commission  
Office of the Secretary  
Room H-113 (Annex X)  
600 Pennsylvania Ave, NW  
Washington, DC 20580

**Re: Pet Medications Workshop, Project No. P12 – 1201**

Dear Sir or Madam:

My name is Beatrice Lacey and I am wearing multiple hats in writing this letter – I am a pet owner and a regular contributor to the pet industry’s billions in yearly revenue, and I am also a law student interested in the rapidly developing field of animal law.

From a legal and practical standpoint, I strongly oppose H.R. 1406, the Fairness to Pet Owners Act. This comment will focus on a few of the most pertinent defects and inadequacies which led me to my position in opposition.

**I oppose H.R. 1406 because:**

1. **It seeks to increase marketplace competition at the impermissible price of consumer protection.**

While this proposed legislation may foster certain pro-consumer benefits, such as increased choice and convenience, it does so at a price that national trends show consumers are unwilling to pay: increased risks in the supply and quality of pet health products;

2. **The FCLCA provides a cautionary tale against the policies and framework of H.R. 1604.**

The basic framework of the bill has already proved to be a recipe for failure in the consumer protection arena, as evidenced all too well by the aftermath of the Fairness to Contact Lens Consumers Act (“FCLCA”); &

3. **It is unjustified in light of the additional regulatory burdens it will impose and the potentially for a mess of confusion regarding veterinarian civil liability.**

This legislation is unnecessary in light of current state rules and regulations and would undoubtedly serve to further muddy the already cloudy waters of veterinary malpractice.

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In the supplementary information section on p. 58840, column 2, paragraph 6 of the Federal Register Notice, the FTC acknowledges that the market for pet products has exploded in the last few years, with pet owners spending significantly more money on their pets than in past decades. In the efforts to increase marketplace competition and consumer choice, it is important that we keep in mind the need to promote legislation that reflects the evolving nature of our relationships with our pets and our increased concern for their health.

“According to the AVMA, 98% of pet owners now consider their animals to be either ‘family members’ or ‘companions,’ compared with only 2% who consider their pets to be simply ‘property.’ Moreover, pet owners who consider their animals to be “family members” spend 345% more on veterinary care than those who consider their animals “property.” AVMA, U.S. Pet Ownership & Demographics Sourcebook, 1 (AVMA 2007).

As currently drafted, H.R. 1406 accomplishes the goal of increasing marketplace competition, but woefully neglects to consider the potentially massive increase in risk to consumers’ ability to obtain the highest quality and most cost-effective healthcare products for their pets. The policy considerations underlying this bill demonstrate a complete departure from the rapidly developing national trend in favor of additional protections for our companion animals. This proposed legislation does nothing to improve the ability of consumers to verify the safety and efficacy of pet medications that they purchase.

H.R. 1406 will benefit big pharmaceutical businesses under the guise of pro-consumer policies, while in reality exposing consumers to an increased risk due to probable lack of enforcement of the necessary safeguards. The contact lens industry provides certain parallels to the issues the pet industry is facing, and provides an especially compelling argument against H.R. 1406, which is almost identical in content and purpose to the contact lens industry’s FCLCA.

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**The FCLCA provides a cautionary tale against the policies and framework of H.R. 1604.**

*The basic framework of the bill has already proved to be a recipe for failure in the consumer protection arena, as evidenced all too well by the aftermath of the Fairness to Contact Lens Consumers Act (“FCLCA”).*

In the Federal Register Notice at p. 58842, column 1, paragraph 10, the Commission noted that parallel restricted distribution and prescription portability issues in the contact lens industry prompted Congress to pass the Fairness to Contact Lens Consumers Act (“FCLCA”) in 2003 – “Industry participants have noted both similarities and differences between the contact lens industry and the pet medications industry which may provide insights about the potential impact

of H.R. 1406.” In February of 2005 the FTC issued a report about the strength of competition in the sale of prescription contact lenses, which included results from their study of the effect of the FCLCA and did not suggest a prevalence of substantial consumer protection issues.

The American Optometric Association (“AOA”), however, is claiming different results, and has submitted to the FTC their comments in connection with competition and consumer protection issues in the pet medications industry. Importantly, the AOA’s position is that there are “problems with both the crafting and the enforcement of the current statute that weaken the patient protection goals of the FCLCA. This reality negatively affects the contact lens wearing population, and is a cautionary tale for the pet medications industry.”

The AOA’s comment to the Commission refers to several studies which have found that those who purchased contact lenses online were more likely to disregard the FDA’s recommendations on contact lens safety than those who had purchased their contacts from their eye doctor. The AOA also notes that the FCLCA’s practice of requiring only passive verification of prescriptions (where a physician’s failure to respond to a request for prescription verification within eight business hours allows the seller to complete the sale without the verification) has led to unscrupulous business practices by sellers and a resultant lack of protection for consumers from potentially risky medical devices.

In the practice of veterinary medicine, effective client communication includes securing informed consent from the client, communicating with the client about aftercare, medication and drugs, warning the client about the dangers associated with prescription drugs, warning and instructing the client when the client assists with a procedure, and informing prospective adopters of communicable diseases. Passive verification procedures encourage the unscrupulous business tactics seen in the contact lens industry and will almost certainly lead to a higher incidence of the distribution of illegal prescription medication in the context of the pet medication industry.

If, as the AOA claims, the FCLCA has led to a higher incidence of unhealthy and risky behaviors among eye care consumers, the nearly identical structure of H.R. 1406 stands little chance of being implemented as directed. If the FTC is unconcerned with enforcing prescription standards for a human medical product, the prospects for enforcement within the pet health industry are dismal.

*According to Dr. Newman of the AOA, “when combined with the very low bar that is passive verification and all of the abuses endured by prescribers there, the FCLCA is too far weighted toward consumerism over patient protection.”*

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**Lastly, I oppose H.R. 1406 because it is unjustified in light of the unreasonable burdens it will impose and the mess of confusion it will undoubtedly spawn regarding veterinarian civil liability.**

*In light of current veterinary practices, rules, and regulations, this legislation is not necessary and will undoubtedly serve to further muddy the already cloudy waters of veterinary malpractice.*

The very nature of the practice of veterinary medicine presents an array of potential sources of legal liability. Historically, malpractice claims have been relatively rare in the world of veterinary medicine because courts have traditionally held that animals are the personal property of their owner and, as a result, most jurisdictions have limited damages in these matters to compensation for the fair market value of the pet. However, as noted above, the booming pet industry has evidenced a change in the nature of the relationship between Americans and their pets – we are increasingly unsatisfied in a regime that does not recognize these changes.

When public attitudes change, the law should too. As an increasing number of jurisdictions elect to heed the modern trend, the law will likely expand to allow compensation for emotional pain and suffering in connection with the loss of a pet, and as awards of these non-economic damages become more and more frequent, the historically low incidence of veterinary malpractice actions will begin to increase dramatically.

As currently written, H.R. 1406 gives rise to immediate concerns and confusion about the boundaries of a veterinarian's potential liability. The confusion within the current regime will only be exacerbated by a constantly evolving and changing area of law and with the predicted increase in veterinary malpractice claims.

H.R. 1406 would prohibit the veterinarian from having a consumer sign a waiver of liability and also from himself disclaiming liability for the accuracy of the veterinary prescription, as a condition of providing a copy of such prescription or verifying such prescription under paragraph. This provision would have untold effects on a veterinarian's potential liability because it effectively eliminates the veterinarian's protection if the consumer fills the prescription at an alternative pharmaceutical retailer who ends up being disreputable or unlicensed.

Additionally, requiring a veterinarian to validate an electronic prescription gives rise to an increased risk in the potential for fraud which is not present with physical, written prescriptions. The AVMA has expressed concerns that the provision requiring verification of prescriptions, regardless of whether the pharmacy is accredited or licensed, not only "places the vet in an ethical and legal dilemma," but also puts consumers at risk.

The market for animal health products is complex and diverse and there are real concerns about product safety and authenticity of pet medications coming from secondary suppliers and retailers. There is currently a large enough market for these suppliers and retailers to create an adequate environment of competition and consumer choice and, in light of the increased burdens and legal uncertainty it will spawn, H.R. 1406 is wholly unnecessary and is not good policy.

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## **Conclusion**

The bottom line is that competition in the pet medication marketplace may be further developed if H.R. 1406 became law, but it would be at the impermissible expense of increased risk to consumers. As the experts on competition and consumer protection, the FTC should have serious concerns about the effect this proposed legislation would have on consumer protection issues in the pet medications industry. Consumers and industries will suffer the results of a burdensome and unnecessary rule that exposes veterinarians to potentially boundless liability and promotes bad public policy by adopting rules that put consumers at increased risk. The FTC should oppose H.R. 1406 or, alternatively, develop additional consumer safeguards and provisions regarding boundaries of potential liability for veterinarians and other responsible actors involved in the medication industry.

Thank you for the opportunity to comment on this proposed legislation.

Very truly yours,

Beatrice Lacey  
Law Student & Animal Law Enthusiast