



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition
Health Care Division

September 13, 2006

Michael Merrigan
General Counsel
St. John's Health System
1235 East Cherokee Street
Springfield, Missouri 65804

Re: St. John's Health System Advisory Opinion

Dear Mr. Merrigan:

This letter responds to your request on behalf of St. John's Health System ("St. John's") for an advisory opinion on whether St. John's Regional Health Center ("Hospital") may provide pharmaceuticals to its Hospital outpatients and to patients of St. John's Clinic ("Clinic"), through three Hospital-owned pharmacy sites, under the Non-Profit Institutions Act ("NPIA"). The NPIA exempts from the Robinson-Patman Act "purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."¹ For the reasons explained below, we have concluded that the NPIA would apply to pharmaceuticals provided by the Hospital through its three Hospital-owned pharmacies to both the Hospital's outpatients and the Clinic's patients, because it would be for St. John's "own use," so long as the pharmaceuticals are prescribed in connection with ongoing treatment that patients receive at the Hospital or the Clinic.

Based on information you provided, St. John's is a non-profit Missouri corporation currently receiving preferential price treatment in its purchase of pharmaceuticals for treatment of Hospital inpatients as permitted under the NPIA. St. John's would like to extend the use of NPIA discounted pharmaceuticals for use by Hospital outpatients and by Clinic patients filling prescriptions at the three Hospital-owned pharmacies.

St. John's is an integrated health services delivery system, and manages the care of approximately 280,000 covered lives through various arrangements it has with third-party payers. The Hospital, a fully-owned subsidiary of St. John's, is a Missouri non-profit corporation that has provided services in the Southwest Missouri area for over 100 years. It is a full-service tertiary-care hospital, and is the only Level 1 trauma center in Southwest Missouri. The Clinic, which is also a fully-owned subsidiary of St. John's and a Missouri non-profit corporation, has a number of office locations both on the Hospital's grounds and in other buildings owned by St. John's. Approximately 465 Clinic-employed physicians of various specialties treat the Clinic's patients.

¹

15 U.S.C. § 13c.

As explained in your letter, the Hospital offers pharmacy services to its outpatients and to Clinic patients. Those patients can fill Hospital and Clinic prescriptions in the main Hospital facility, or at three pharmacies that are 100 percent owned by the Hospital: the Fremont Pharmacy, the Smith-Glynn Pharmacy, and the Nixa Medical Building pharmacy. The Fremont Pharmacy is located on the Hospital's grounds. Both the Smith-Glynn Pharmacy and the Nixa Medical Building pharmacy are located in medical office complexes occupied by Clinic physicians and Hospital departments. The three Hospital-owned pharmacies are also open to the public.

The NPIA applies to pharmaceuticals purchased by a hospital or other eligible institution for its "own use."² Though not explicitly enumerated as eligible institutions in the NPIA's statutory language, non-profit integrated health delivery systems, such as St. John's, appear to be a type of non-profit charitable institution that Congress intended to exempt in the statute. Specifically, in *De Modena v. Kaiser Foundation Health Plan, Inc.*, a United States court of appeals treated a similarly structured organization as an eligible entity under the NPIA.³ We believe the same treatment is warranted for St. John's, the Hospital, and the Clinic.

The NPIA requires, however, that even an institution eligible for the NPIA exemption must purchase the discounted pharmaceuticals for its "own use." The starting point for analysis of the "own use" requirement is the Supreme Court's opinion in *Abbott Laboratories v. Portland Retail Druggists Association*.⁴ In *Abbott*, the Court suggested that to determine what constitutes an eligible institution's own use, one should focus on the function performed by the institution in its purchase and resale role. The Court stated, "'their own use' is what reasonably may be regarded as use [by the eligible institution] in the sense that such use is a part of and promotes [its] intended institutional operation."⁵ The treatment of its own patients through the Hospital and the Clinic is clearly part of St John's institutional mission as a non-profit provider of integrated health services. Whether that treatment requires the dispensation of pharmaceuticals on an inpatient basis or the filling of a prescription written in connection with the Hospital's or the Clinic's ongoing care of an outpatient at one of the three Hospital-owned pharmacies does not change the analysis. One may justifiably regard the St. John's organization as a whole as having purchased pharmaceuticals for its "own use," which includes treatment of patients of both the

² *Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1, 14 (1976).

³ *See De Modena v. Kaiser Foundation Health Plan, Inc.*, 743 F.2d 1388, 1391-92 (9th Cir. 1984) (treating for analytical purposes a number of hospitals and health plans as one eligible organization).

⁴ *See Abbott* at 14.

⁵ *Id.*

Hospital (whether inpatient or outpatient) and the Clinic.⁶ This is what the Commission previously concluded in an advisory opinion letter it issued in response to a similar request for advice.⁷

Further, we do not believe that the use of the three Hospital-owned pharmacies, whose profit accrues solely to the Hospital to be used in the furtherance of St. John's mission, changes the analysis, provided that proper safeguards are taken to ensure that the pharmaceuticals purchased at NPIA pricing are not dispensed to patients who are not patients of the St. John's system. If these pharmacies, for example, were to sell the discounted pharmaceuticals to walk-in customers, such activity would not qualify as being for St. John's "own use," and the NPIA exemption for purchasing those pharmaceuticals at a discount would not apply.

Based on the information you have provided, "over 90% of the prescriptions filled and dispensed at [the three Hospital-owned pharmacies] are written by Clinic physicians for the benefit of their patients." The remainder of the prescriptions filled at the three Hospital-owned pharmacies are for non-St. John's patients. To avoid any improper sales of the discounted pharmaceuticals to a non-exempt entity or for a non-exempt use, St. John's will establish a separate accounting mechanism of the type mentioned in *Abbott* to track these transactions.⁸ Thus, with these caveats, we conclude that the pharmaceutical purchase and distribution program proposed by St. John's would fall within the NPIA exemption to the Robinson-Patman Act.

This letter sets out the views of the staff of the Bureau of Competition, as authorized by the Federal Trade Commission's Rules of Practice. Under Rule § 1.3(c), the Commission is not bound by this staff opinion and reserves the right to rescind it at a later time.⁹ In addition, this office retains the right to reconsider the questions involved and, with notice to the requesting party, to rescind or revoke the opinion if implementation of the proposed program results in substantial anticompetitive effects, if the program is used for improper purposes, if facts change significantly, or if it would be in the public interest to do so.

Sincerely,

Markus H. Meier
Assistant Director

⁶ See *De Modena* at 1392.

⁷ *Presentation Health System*, 16 F.T.C. 1526 (1993).

⁸ See 425 U.S. at 19.

⁹ 16 C.F.R. § 1.3(c).