



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

Bureau of Competition
David Pender
Acting Assistant Director
(202) 326-2549

April 18, 2005

Mr. Gordon J. Oakes
Director of Pharmacy
Stevens Hospital
21601 76th Avenue West
Edmonds, WA 98026

Dear Mr. Oakes:

This letter responds to your request on behalf of Stevens Hospital for an advisory opinion concerning whether Stevens' proposed pricing of pharmaceuticals would fall within the scope of 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 Stevens' proposed pricing would fall within the scope of the NPIA.

As we understand the facts based on information you provided in your letter and in telephone conversations, Stevens is a nonprofit hospital that owns a number of clinics, as well as four physician practices. The physicians that work at the clinics are all Stevens employees, and all medical services provided at the hospital and at the clinics are billed under Stevens' tax identification number. Stevens also maintains liability insurance for the clinics and staff.

Stevens Hospital's pharmacy purchases pharmaceuticals at reduced pricing from Cardinal, a drug wholesaler. It currently uses these pharmaceuticals for its hospitalized patients for inpatient needs, for periodic discharge prescriptions, and to supply Stevens' emergency department, its outpatient surgical program, and its clinics for in-clinic treatment. You advised us that Stevens plans to expand the use of its reduced-priced pharmaceuticals, by selling those pharmaceuticals to patients receiving treatment from its clinic physicians.

Analysis of whether the NPIA covers Stevens' proposed use of its reduced-price pharmaceuticals for patients receiving treatment from its clinic physicians depends on whether the pharmaceuticals would be for Stevens' "own use." The principal authority on the meaning and scope of the "own use" test is *Abbott Laboratories v. Portland Retail Druggists Association (Abbott Labs)*.² In that case, retail pharmacies sued pharmaceutical manufacturers under the Robinson-

¹15 U.S.C. § 13c.

²425 U.S. 1 (1976).

Patman Act, challenging the discounted sale of drugs to nonprofit hospitals. The hospitals resold those drugs to patients in a number of different situations. The Supreme Court held that the NPIA exemption is a limited one, and does not give hospitals “a blank check” that applies to “whatever new venture the hospital finds attractive.”³ Rather, the Court interpreted the “own use” test to shield only purchases that “reasonably may be regarded as use *by the hospital* in the sense that such use is a part of and promotes the hospital’s intended institutional operation in the care of persons who are its patients.”⁴

Applying this test, the Court found that pharmaceuticals were purchased for the hospital’s own use when they were resold to hospital inpatients, emergency room patients, and registered outpatients for consumption on the premises; when they were used to fill limited “take-home” prescriptions given to hospital inpatients, emergency room patients, and registered outpatients upon discharge as a continuation of, or supplement to, the treatment that was administered at the hospital; and when they were dispensed to a hospital employee, a student, or a non-employee member of the hospital medical staff for his or her own use or the use of a dependent. Pharmaceuticals dispensed to former patients (through refills of the take-home prescriptions), sales to non-hospital patients of staff physicians, and sales to walk-in customers of the hospital pharmacy were deemed insufficiently related to the hospital’s institutional function and therefore outside the exemption.

We conclude, based on the facts you present, that Stevens’ central institutional function, within the meaning of *Abbott Labs*, is to deliver comprehensive and continuing health care services, including pharmaceuticals, to all of its patients. The clinics, which are owned by Stevens and staffed by Stevens-employed physicians, contribute to the furtherance of this mission. Having the clinics’ pharmacies dispense pharmaceuticals to clinic patients contributes directly to the ability of the clinics to deliver comprehensive care. This analysis is consistent with that contained in earlier staff advisory opinions, including *Harvard Vanguard*,⁵ and covers Stevens’ proposed use of its reduced pricing. This use includes prescriptions written by doctors at the clinic and prescriptions written by specialists to whom patients are referred as part of a continuing course of treatment by a clinic physician with whom they maintain an ongoing relationship. If, however, a patient who is referred by Stevens’ or its clinics’ staff to a specialist becomes a regular patient of the specialist and no longer sees the Stevens’ or clinic staff for primary care, we would consider the patient no longer a patient of Stevens or its clinics and the exemption would be lost.⁶

We also conclude that refills for clinic patients who are under the ongoing care of a clinic physician are covered by the exemption. But, *Abbott Labs* does not extend the exemption to refills for former patients.⁷ Thus, if a patient is no longer seeing a Stevens physician or clinic staff for care on an ongoing basis, that patient would become a former patient, and the exemption would be lost as

³425 U.S. at 13.

⁴*Id.* at 14 (emphasis in original).

⁵(Dec. 18, 2001) (staff opinion).

⁶*See* Valley Baptist (Sept. 1996) (staff opinion).

⁷425 U.S. at 15.

to refills for that patient.

Based on the factors discussed above, it is our opinion that the clinic pharmacies may dispense products purchased under the NPIA to all patients who are treated at clinics staffed by employed physicians and who are under the continuing care of such physicians. Walk-in customers to Stevens' retail pharmacy, Hadfields, on the other hand, would not be eligible to receive reduced price pharmaceuticals, as those patients would not be considered to be under the ongoing care of a Stevens' physician.

This letter sets out the views of the staff of the Bureau of Competition, as authorized by the Commission's Rules of Practice. Under Commission Rule § 1.3©, 16 C.F.R. § 1.3©) (1994), the Commission is not bound by this staff opinion and reserves the right to rescind it at a later time. 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 otherwise would be in the public interest to do so.

Sincerely,

David Pender
Acting Assistant Director