



UNITED STATES OF AMERICA
Federal Trade Commission
Washington, D.C. 20580

Bureau of Competition
Health Care Division

October 20, 2017

Jennifer R. Bolster, Esq.
Hancock Estabrook, LLP
1500 AXA Tower I
100 Madison Street
Syracuse, NY 13202

Re: Crouse Health Hospital Advisory Opinion

Dear Ms. Bolster:

This letter responds to your request on behalf of Crouse Health Hospital (“Crouse Hospital”) for an advisory opinion concerning whether its proposal to sell discounted pharmaceutical products to the employees, retirees, and their dependents of its affiliate, Crouse Medical Practice, PLLC (“Crouse Medical Practice”), 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, and with the noted caveats, we conclude that the NPIA exemption applies to Crouse Hospital’s proposal.

Description of the Proposal

We understand from your letter that Crouse Hospital is a not-for-profit corporation that is located in Onondaga County, New York, and provides a variety of health-care services to patients living in a 15-county area in central New York.² Crouse Hospital’s mission is to “provide the best in patient care,” “promote community health,” and “provid[e] physician services designed to improve the access to and quality of health care.”³ As you explain, Crouse Hospital currently provides a benefits package with a prescription-drug benefit to its employees, retirees, and their dependents. Crouse Hospital also owns and operates an on-site pharmacy that offers NPIA-discounted pharmaceuticals only to Crouse Hospital employees, retirees, and their dependents. The employee pharmacy is separate from another pharmacy that serves Crouse Hospital

¹ 15 U.S.C. § 13c.

² Letter from Jennifer R. Bolster, Hancock Estabrook, LLP, to Office of the Secretary, Federal Trade Commission at 1 (September 29, 2017) (“Crouse Request Letter”).

³ *Id.*

inpatients.⁴ As we understand your proposal, Crouse Hospital seeks to purchase NPIA-discounted pharmaceuticals to fill prescriptions for employees, retirees, and their dependents of its affiliate, Crouse Medical Practice, at Crouse Hospital's on-site employee pharmacy.

Crouse Hospital formed Crouse Medical Practice to develop an integrated medical service system to encourage both organizations to "work in conjunction with each other to improve access to care and to provide better care for patients in the community."⁵ The approximately 73 primary care and specialist physicians and other health-care professionals employed by Crouse Medical Practice treat patients at Crouse Hospital and at offices close to Crouse Hospital or in nearby communities within Crouse Hospital's service area. Crouse Medical Practice requires its physicians to hold and maintain good standing on Crouse Hospital's medical staff and requires or encourages its physicians to refer their patients to Crouse Hospital unless the patient prefers otherwise or such referral is not in the patient's best medical interest. Crouse Medical Practice physicians provide call coverage at Crouse Hospital.⁶

We understand from your letter that Crouse Hospital formed Crouse Medical Practice as a for-profit, professional limited liability company in compliance with requirements under New York law governing the corporate practice of medicine. As you explain in your letter, Crouse Hospital does not own Crouse Medical Practice because only a physician can own corporations employing physicians in an outpatient, non-hospital setting under New York law.⁷ Although Crouse Hospital does not own Crouse Medical Practice, Crouse Medical Practice has in place "various structural and financial components to ensure [Crouse] Hospital has ultimate control over the practice."⁸ For example, the sole member of Crouse Medical Practice is a Crouse Hospital physician employee. Crouse Hospital may require the member to transfer all of his or her interest to a Crouse Hospital designee.⁹ Crouse Hospital appoints the Practice Administrator, Physician Administrator, and Executive Director of Crouse Medical Practice. These individuals, along with Crouse Hospital representatives, manage the day-to-day practice for Crouse Medical Practice and ensure that the practice complies with Crouse Hospital's charitable purpose.

The sole member of Crouse Medical Practice must manage and operate it "consistent with an organization operated exclusively to promote and support the charitable purposes of [Crouse]

⁴ *Id.* at 4.

⁵ *Id.* at 2.

⁶ *Id.* at 3.

⁷ *Id.* at 2.

⁸ *Id.*

⁹ Amended and Restated Operating Agreement of Crouse Medical Practice ("Operating Agreement") at § 7.2 (Crouse Request Letter, Attachment 2).

Hospital.”¹⁰ In furtherance of this requirement, Crouse Medical Practice obtained 501(c)(3) tax-exempt status under the Internal Revenue Code based on its affiliation with and control by Crouse Hospital.¹¹ Crouse Hospital also must approve various business transactions for Crouse Medical Practice, including admitting new members, selling property, incurring certain debts or loans, dissolving the medical practice, or merging with or acquiring other physician practices.¹² No part of the net earnings of Crouse Medical Practice may inure to the benefit of any members, employees, officers, or private individuals other than reasonable compensation for their services.¹³ The sole member also irrevocably assigns his or her right to any dividends or profits to Crouse Hospital.¹⁴

Analysis

The NPIA exemption is limited to certain “eligible” non-profit entities’ purchases of “supplies” for their “own use.”¹⁵ As we understand your proposal, Crouse Hospital will purchase and offer the NPIA-discounted pharmaceuticals to Crouse Medical Practice employees, retirees, and their dependents. Therefore, we analyze below whether (1) Crouse Hospital is an “eligible entity,” and (2) the NPIA-discounted pharmaceuticals that Crouse Hospital proposes to offer to Crouse Medical Practice are properly considered “supplies” for Crouse Hospital’s “own use.”¹⁶

1. Crouse Hospital’s Eligibility for the NPIA Exemption

An “eligible entity” under the NPIA includes, among others, “hospitals . . . not operated for profit.”¹⁷ As you state in your letter, Crouse Hospital is a not-for-profit hospital. Therefore, based on the language in the NPIA, Crouse Hospital appears to qualify as an eligible entity and, in fact, currently uses the exemption to offer NPIA-discounted pharmaceuticals to its own employees, retirees, and their dependents.

¹⁰ *Id.* at § 5.2.

¹¹ Letter from Internal Revenue Service to Crouse Hospital (Crouse Request Letter, Attachment 1).

¹² Crouse Request Letter at 2.

¹³ Operating Agreement at § 2.5(c).

¹⁴ *Id.* at § 4.3.

¹⁵ 15 U.S.C. § 13c.

¹⁶ Because we determine that Crouse Hospital qualifies as an “eligible entity” and that the NPIA-discounted pharmaceuticals offered to Crouse Medical Practice are for Crouse Hospital’s “own use,” we do not need to reach the question of whether Crouse Medical Practice—a for-profit corporation with 501(c)(3) tax-exempt status—qualifies as an “eligible entity.”

¹⁷ *Id.*

2. Crouse Hospital's Provision of NPIA-Discounted Pharmaceuticals to Crouse Medical Practice Appears to Be for Crouse Hospital's Own Use

We next consider whether the proposal involves the purchase of “supplies” for Crouse Hospital’s “own use.” As we have found in prior advisory opinions, the term “supplies,” as used in the NPIA, may include an eligible entity’s purchases of pharmaceuticals.¹⁸ The term “own use” means an eligible entity’s use that “is a part of and promotes the [entity’s] intended institutional operation.”¹⁹

The principal authority on the meaning and scope of the “own use” requirement is *Abbott Laboratories v. Portland Retail Druggists Ass’n*.²⁰ In *Abbott*, not-for-profit hospitals purchased discounted pharmaceuticals from manufacturers and resold them to hospital patients. Retail pharmacies challenged the discounted sale of pharmaceuticals to the hospitals under the Robinson-Patman Act. The Supreme Court held that the NPIA exemption is limited and does not give hospitals a “blank check” for all purchases of supplies.²¹ Rather, the Court held that the exemption applies to purchases for the hospital’s “own use,” and that own use means “what 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.”²² The Supreme Court determined that pharmaceuticals dispensed to hospital employees and their dependents, among other individuals, would qualify for the hospital’s own use. In the Court’s view, employees enable a hospital to function and providing them with pharmaceuticals “enhances the hospital function.”²³ Consistent with *Abbott*, we determined in prior advisory opinions that offering employees, retirees, and their dependents health-insurance plans with prescription-drug benefits helped hospitals and other eligible entities attract and maintain a capable and healthy workforce to further their intended institutional missions.²⁴

¹⁸ See, e.g., Quest Analytics Group (March 7, 2014) (FTC staff opinion letter) (NPIA exemption applied to educational institutions’ purchases of discounted specialty drugs for their own use); Yakima Valley Memorial Hospital (August 16, 2010) (FTC staff opinion letter) (non-profit hospital’s provision of pharmaceuticals to employees of its affiliates qualified for NPIA exemption); see also *Abbott Labs. v. Portland Retail Druggists Ass’n*, 425 U.S. 1, at 5 (1976) (noting that the district court had ruled that purchases of pharmaceuticals by the hospitals were purchases of “supplies” for the hospitals’ “own use”).

¹⁹ 425 U.S. at 14.

²⁰ *Id.*

²¹ *Id.* at 13.

²² *Id.* at 14.

²³ *Id.* at 16.

²⁴ See, e.g., Quest Analytics Group (NPIA exemption applied to educational institutions’ employees, retirees, and their dependents); Yakima Valley Memorial Hospital (NPIA exemption applied to hospital employees of hospital affiliates); University of Michigan (April 9, 2010) (FTC staff opinion letter) (NPIA exemption applied to University’s employees, retirees, and their dependents); BJC Health System (November 9, 1999) (FTC staff opinion letter) (NPIA exemption applied to employees of health-care system).

Whether the exemption applies to Crouse Hospital's purchases of pharmaceuticals for Crouse Medical Group employees, retirees, and their dependents depends on whether this use of the pharmaceuticals is part of and promotes Crouse Hospital's institutional mission.²⁵ You have explained that Crouse Hospital's mission includes promoting community health and providing physician services designed to improve access to quality health care. In furtherance of its mission, Crouse Hospital formed Crouse Medical Practice to develop an integrated medical service system to encourage both organizations to work together to improve care and promote the charitable purposes of Crouse Hospital. Crouse Medical Practice physicians and other employees provide vital services to Crouse Hospital and its patients necessary to help Crouse Hospital fulfill its intended institutional function.

Crouse Hospital has ultimate decision-making control and authority for Crouse Medical Practice as described in your letter and Crouse Medical Practice's Operating Agreement. Furthermore, the Crouse Medical Practice member assigns any profits to Crouse Hospital and neither the member nor the employees are entitled to any net earnings. While Crouse Hospital does not have an ownership interest in Crouse Medical Practice, we believe that the substance of the relationship between Crouse Hospital and Crouse Medical Practice governs our analysis.²⁶ Based on this relationship, it is reasonable to conclude that Crouse Medical Practice is an integral part of Crouse Hospital's ability to fulfill its intended institutional function of providing care and promoting community health. And, accordingly, it is reasonable to treat Crouse Hospital and Crouse Medical Practice as one unit in analyzing the applicability of the NPIA exemption. This conclusion is consistent with prior staff opinions.²⁷ Therefore, consistent with *Abbott*, we find that the NPIA exemption covers Crouse Hospital's proposal to offer discounted pharmaceuticals to Crouse Medical Practice.

We emphasize that this opinion is premised on the relationship between Crouse Hospital and Crouse Medical Practice described in your letter and your assurance that any financial benefit from the proposal will ultimately accrue to Crouse Hospital pursuant to the relationship between the two entities.

²⁵ See 425 U.S. at 14.

²⁶ See, e.g., Arkansas Children's Hospital (March 13, 2003) (FTC staff opinion letter) (substance of relationship between two entities not under common ownership in the care of a common patient population supported conclusion that the exemption applied); Valley Baptist Medical Center (March 13, 2003) (FTC staff opinion letter) (the role contract workers had in hospital's provision of care to its patients, rather than the fact that the hospital chose not to employ the workers, was relevant to determining that the exemption applied).

²⁷ See, e.g., Yakima Valley Memorial Hospital (hospital's control over its affiliates effectively made affiliates part of the hospital to such a degree that could treat as one unit for the purpose of the NPIA exemption).

Conclusion

As discussed above, and with the noted caveats, it is our opinion that Crouse Hospital's proposal to extend the sales of discounted pharmaceuticals to its affiliate, Crouse Medical Practice, as described in your September 29, 2017 letter, 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 Commission's Rules of Practice, based on the facts you have presented to us. Under Commission Rule § 1.3(c), 16 C.F.R. § 1.3(c), 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 would be in the public interest to do so.

Sincerely,

Markus H. Meier
Assistant Director