



BUREAU OF COMPETITION

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FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20540

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Dear Mr. Miller:

In two letters dated October 8, 1992, you requested advisory opinions from the staff of the Federal Trade Commission on the application of the Non-Profit Institutions Act, 15 U.S.C. § 13, to purchases of pharmaceuticals by a hospital. During telephone conversations that you and I had on November 10, 1992, and January 11, 1993, you provided some facts in addition to those discussed in your letters. In this letter, I will address the questions raised in your two letters.

You explained that your client is a company that provides computer services to hospitals, including insurance claims processing and purchasing of drugs. The client needs advice on whether a hospital may, under the Non-Profit Institutions Act, purchase drugs to be dispensed to certain persons. As you described one situation, a nonprofit hospital entered an agreement with a nonprofit health maintenance organization ("HMO") to provide acute care and prescription drugs to members of the HMO. The HMO pays the hospital a set fee per month for each member and, in exchange, the hospital purchases and provides all the drugs prescribed for the members. Thus, the hospital has assumed the financial risk of providing drugs to the HMO's members. The drugs are dispensed by the hospital to plan members whether or not they are patients of the hospital. Some drugs are dispensed by the pharmacy located in the hospital and others are dispensed from other sites operated by the hospital. Those sites are not pharmacies open to the public, but serve only members of the HMO, charge the patient only the copayment, and may or may not be staffed by a pharmacist.

You asked whether the hospital's purchase of drugs to be dispensed to the HMO's members under the agreement between the hospital and the HMO, whether from the hospital's pharmacy or from other sites, would be covered by the Non-Profit Institutions Act. If they are, the hospital's purchases of drugs for those customers at the prices offered to nonprofit institutions would be exempt from Section 2(a) of the Clayton Act, 15 U.S.C. § 13.

You also inquired whether drugs purchased by the hospital for subscribers of other health plans with which the hospital has contracted to supply drugs would be covered by the Act.

In the second situation that you presented, a hospital proposes to establish and operate a program for senior citizens. Each senior citizen participating would be assigned a physician and a counsellor. The senior citizen would be screened for diseases, sent notices reminding of recommended follow-up care and regular immunizations, and monitored to be sure he or she is taking the drugs prescribed. The program also would include lectures and information on certain diseases and conditions, financial planning, and powers of attorney. There would be no cost to the senior citizen for participation in the program. The hospital also would sell prescription drugs to the senior citizens through its pharmacy. You asked whether the hospital's purchases of drugs to be dispensed to the members of the senior citizen's program would come under the Non-Profit Institutions Act.

To answer your questions, we would have to determine whether providing pharmaceuticals to members of an HMO or senior citizens enrolled in a hospital program is the intended institutional operation of a nonprofit hospital, a determination that we cannot make on the basis of the facts available to us. Thus, while we can explain the analytical framework we would apply to these questions, we cannot give you the advice you seek.

The Robinson-Patman Act, Section 2a of the Clayton Act, provides:

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce. . . .

The Non-Profit Institutions Act, Section 13c of the Robinson-Patman Act, states:

Nothing in [the Robinson-Patman Act] shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches,

hospitals, and charitable institutions not operated for profit.

For the purpose of addressing your inquiry, we assume that the hospital is not operated for profit within the meaning of the Non-Profit Institutions Act, that the hospital is charged less for drugs than are retail pharmacies, and that the hospital is "selling" drugs to the members of the HMO and the senior citizens in competition with retail pharmacies so as to create a possibility of secondary line injury and potential liability under the Robinson-Patman Act. (See 3 Kintner & Bauer, Federal Antitrust Law 293 (1983)). Under these assumptions, the answer to your question turns on whether dispensing drugs to the members of the HMO and the senior citizens is the hospital's "own use", as provided in the Non-Profit Institutions Act.

As we will discuss below, the concept of "own use" is neither static nor open-ended. The leading case on "own use" is Abbott Laboratories v. Portland Retail Druggists Ass'n, Inc., 425 U.S. 1, 96 S.Ct. 1305, 47 L.Ed.2d 537 (1976). In that case, drug manufacturers were selling pharmaceuticals more cheaply to certain private, non-profit hospitals than to retail pharmacies. The plaintiff, an association of retail pharmacists, complained that these purchases violated the Robinson-Patman Act because the hospitals were reselling some of the drugs at a profit to out-patients and others for off-premises use. The Supreme Court suggested that in order to determine what constitutes a hospital's own use, we should focus on the function performed by the institution in its purchase and resale role:

"Their own use" is 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. (emphasis in the original).

425 U.S. at 14. The Court proceeded to conclude that certain categories of sales of drugs amounted to sales for the hospital's "own use" and were exempt. These were sales to in-patients, emergency room patients, out-patients for use on hospital premises, in-patients and out-patients for take home use, hospital employees and medical students for their use or use by their dependents, and sales to the hospital's medical staff for their personal use or use by their dependents. The Court declined to exempt sales of prescription refills, sales to the hospital's medical staff for resale in private practice, and sales to walk-in customers who were not being treated at the hospital. The purchase and resale of drugs to out-patients and to hospital personnel for their personal use were exempt because these transactions were a continuation of the hospital's basic institutional function. On the other hand, the mere refilling of prescriptions for former patients, sales to walk-in customers, or

the sale to employees of drugs to be used by non-dependent third persons, were held to be beyond the protection of the statute.

In determining the limits of "own use" in Abbott, the Supreme Court recognized that the intended institutional operation of charities changes over time but refused to permit each charity to define the limits of its operation under the Non-Profit Institutions Act. The court examined the function of hospitals at the time of its decision, rather than relying rigidly on the definition of a hospital at the time of passage of the Act and noted that the concept of a nonprofit hospital and its activity had changed since 1938. The court, however, found nothing in the Act indicating that its exemption should be applied to "whatever new venture the nonprofit hospital finds attractive in these changing days." Abbott, 425 U.S. at 13. The Supreme Court's opinion thus suggests that nonprofit institutions' "own use" is not a static concept, but that the Act does not cover every enterprise in which a single hospital chooses to engage.

In De Modena v. Kaiser Foundation Health Plan, Inc., 743 F.2d 1388 (9th Cir. 1983), the Kaiser Health Plans ("Kaiser"), which included hospitals and HMOs, were nonprofit institutions that contracted with consumers to provide them medical care in return for monthly dues. Kaiser also offered a drug plan under which, for an additional monthly charge, members could obtain the right to purchase drugs at little or no cost. Retail pharmacies brought an antitrust suit against Kaiser alleging that Kaiser bought pharmaceuticals at discriminatorily low prices in violation of the Robinson-Patman Act. The Ninth Circuit first determined the basic institutional function of the Kaiser Health plans and then decided which sales were in keeping with this function. The court noted that HMOs are designed to provide a full range of health care to their members, including preventive care, and distinguished hospitals which provide health care on a temporary and remedial basis. The court held that, because of the very broad institutional function of an HMO, any sale of drugs to a member falls within the basic function of the HMO and therefore the purchase of drugs by an HMO for dispensing to its members is for its "own use" and within the Non-Profit Institutions Act.

In the instance you presented of the purchase of drugs to be dispensed by the hospital to members of an HMO, there is no definite answer to whether the purchase falls within the Non-Profit Institutions Act. The hospital is not an HMO, nor is it clear whether it is acting as the agent of the HMO. Rather, the hospital is paid a fixed fee per HMO member per month and assumes the financial risk of supplying the members' pharmaceutical needs.

De Modena teaches that dispensing drugs to members is the basic institutional function of an HMO, but that opinion does not answer the question as to hospitals independent of the HMO. In fact, the court in De Modena distinguished the function of a hospital, which is to provide temporary and remedial care, from the broader function of an HMO, which is to furnish continuing and preventive care. Furthermore, the Supreme Court's language in Abbott excluding the supply of pharmaceuticals to walk-in patients might be read to answer the question, but it does not really address the issue of customers who are members of a subscriber group. In sum, no precedent directly resolves the issue you raised. Abbott and De Modena furnish only guideposts for determining a hospital's "intended institutional operation." Without an investigation that would be far more extensive than is appropriate for a staff advisory opinion, we cannot determine whether providing pharmaceuticals to members of an HMO may now be regarded as part of the intended institutional operation of hospitals and therefore the purchase of such pharmaceuticals is for the hospital's "own use". See 16 C.F.R. § 1.1(2)(b)(2).

You also asked about the purchase of drugs to be dispensed to members of other health plans. Since you provided no further information about those plans or the relationship between the plans and the hospital, we have no basis on which to provide an opinion.

Also, as to the senior citizens' program operated by the hospital, it is unclear whether drugs purchased to dispense to the senior citizens are for the hospital's "own use". The hospital's proposed program for senior citizens would include persons in the local community who are not patients of the hospital, either as outpatients or patients occupying hospital beds. It would provide financial and legal information as well as health-related information. We do not have enough information to determine whether operation of programs incorporating education, screening, monitoring, and drug dispensing is so common to nonprofit hospitals today that it would be regarded as their intended institutional operation. Consequently, for the same reasons applicable to your first question, we cannot say whether or not purchases of drugs by a hospital for such a program are covered by the Non-Profit Institutions Act.

We hope this opinion letter, by explaining how we would analyze such questions, is helpful to you. It is limited to the requests described above and is based on the facts as you presented them in your October 8 letters and our November 10 and January 11 phone conversations.

The above advice is an informal staff opinion. Under Commission's Rule of Practice § 1.3(c), the Commission is not bound by this advice and reserves the right to rescind it at a later time. In addition, this office retains the right to reconsider the question involved and, with notice to the requesting party, to rescind or revoke its opinion if the request is used for improper purposes, or if it would be in the public interest to do so.

Sincerely yours,

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