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

Health Care Division
Bureau of Competition

March 7, 2014

James L. S. Cobb
Wyrick Robbins Yates & Ponton LLP
4101 Lake Boone Trail, Suite 300
Raleigh, North Carolina 27607

Re: Quest NPIA Advisory Opinion

Dear Mr. Cobb:

This letter responds to your request for an advisory opinion on whether a group purchasing organization based prescription-drug program that Quest Analytics Group intends to operate for the benefit of a group of non-profit schools, colleges, and universities would fall within the Non-Profit Institutions Act ("NPIA").[1] As we understand it from your letter and from our conversations with you, schools, colleges, and universities have asked Quest to design the program to help them address the increasing cost of specialty drugs.[2] Based on the information that you provided, we conclude that, subject to certain caveats set forth below, the NPIA exemption applies to the purchase of specialty drugs through Quest's proposed program by the educational institutions identified below.

Description of the Proposed Program

We understand from your letter that Quest develops and distributes audit, sourcing, group purchasing organization, and technology lease services. It also designs and implements audit and purchasing tools for hospitals, insurance companies, long-term care facilities, and self-funded employer groups.[3]

The Independent Colleges and Benefits Association ("the Association"), which is a health-care cooperative serving Florida non-profit educational institutions,[4] has obtained audit and strategy

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[1] 15 U.S.C. § 13c. The NPIA exempts from the Robinson-Patman Act "purchases of . . . supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

[2] *See* Letter from James L.S. Cobb, Wyrick Robbins Yates & Ponton LLP, to Donald S. Clark, Federal Trade Commission, 1, 3 (Jan. 10, 2014) (hereinafter "Quest Request Letter").

[3] *See* Quest Request Letter, at 2.

[4] *See* http://www.icuba.org (viewed Jan. 16, 2014); Quest Request Letter, at 3.

consulting services from Quest since 2010.[5] As you have explained, the Association approached Quest in 2012 to obtain assistance in controlling specialty-drug costs for its member institutions.[6]

In response to the Association's request, Quest proposes to establish and operate a prescription-drug benefit program[7] to enable certain non-profit educational institutions (collectively the "educational institutions") to benefit from the NPIA exemption. Those educational institutions are Arthur I. Meyer Jewish Academy, Barry University, Beacon College, The Bolles School, Central Florida Area Health Education Center, Clearwater Christian College, Corbett Preparatory School of IDS, Edward Waters College, Everglades Area Health Education Center, Florida Institute of Technology, Florida Memorial University, Good Shepard Episcopal School, Nova Southeastern University, Palm Beach Atlantic University, The Poynter Institute, Rollins College, Saint Edward's School, Saint Leo University, Saint Mark's Episcopal Day School, Saint Paul's School, San Jose Episcopal Day School, Tampa Preparatory School and The University of Tampa.[8] Only the educational institutions' employees, retirees, and their dependents (the "members") will be eligible to participate in the program. All of the educational institutions currently provide health programs with prescription-drug benefits to their members, but these programs do not include NPIA-discounted drugs.[9] The program's goal is to allow the educational institutions to access NPIA pricing when that pricing is the least expensive option.[10]

Under the proposed program, Quest will (1) negotiate discounts with specialty-drug manufacturers for the educational institutions' specialty-drug needs, (2) audit claims to determine whether any are eligible for NPIA-discount pricing and to monitor compliance with pharmacy benefits manager ("PBM") contracts, (3) request rebates from specialty pharmaceutical manufacturers when the NPIA price is the lowest available price, and (4) provide reports to the educational institutions on claims volumes, rebates received, and other data points. Quest will not be purchasing any specialty drugs itself.[11]

To implement the program, Quest will engage the services of pharmacies and PBMs.[12] The program's initial pharmacy will be NSU Clinic Pharmacy, a non-profit pharmacy affiliated with

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[5] *See* Quest Request Letter, at 3, 6.

[6] *See* Quest Request Letter, at 3.

[7] We understand from your letter and from our discussions with you that the program is modeled on, though not identical to, the program described in our 2010 advisory opinion to the University of Michigan.

[8] *See* Quest Request Letter, at 2.

[9] *See* Quest Request Letter, at 2.

[10] *See* Quest Request Letter, at 3.

[11] *See* Quest Request Letter, at 6.

[12] You state that Quest may add additional educational institutions, pharmacies, and PBMs to the program at a later time. As explained further below, this opinion only applies to the program as currently structured and described in your January 10, 2014 letter.

Nova Southeastern University. Catamaran PBM of Illinois ("Catamaran") will be the program's initial PBM.[13] The program will work as follows:

- The pharmacy will fill members' prescriptions by mail or retail distribution, collect co-pays, execute best practice customer service, manage the cost of the claims for the educational institution, and submit claims to the PBM for processing and payment.

- Upon receipt of the claims, the PBM will reimburse the pharmacy for the prescriptions dispensed to program members at the pharmacy's billed costs plus a dispensing fee. The dispensing fee will be a flat fee not dependent on the type of claim (NPIA or not) processed.

- The applicable educational institution then will pay the PBM, per its contract, for the cost of the drugs plus the dispensing fee paid to the pharmacy. Any administrative fees charged by the PBM will also be flat fees not dependent on the type of claim (NPIA or not) processed.

- The PBM periodically will provide the educational institutions' claims data to Quest, and Quest, using its proprietary algorithms, will compare prices already paid by the educational institutions with the NPIA-discounted rate available through the group purchasing organization from manufacturers with which Quest has negotiated discounts.

- If Quest determines the NPIA-discounted rate is lower than the rate already paid, Quest will submit a claim to the manufacturer to rebate the difference in the rates directly to the educational institution or place it in a non-interest bearing escrow account administered by a bank for distribution to the educational institution.

The program's goal, in other words, is to allow the educational institutions to obtain the NPIA price, where that price is the lowest price available, thereby reducing the cost educational institutions incur for health-benefits programs.[14]

Analysis

The NPIA exemption is limited to certain eligible non-profit entities' purchases of supplies for their own use. Thus, our analysis of whether Quest's proposed program is eligible for the NPIA exemption requires us to determine (1) whether those educational institutions for whose benefit the proposed program will operate are eligible entities under the statute, and (2) whether the NPIA-discounted pharmaceuticals are properly considered "supplies" for the educational

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[13] *See* Quest Request Letter, at 3.

[14] *See* Quest Request Letter, at 3-4.

institutions' "own use."[15] Additionally, because the proposed program also involves various for-profit entities, including Quest and Catamaran, we address whether these entities affect eligibility for the exemption through their involvement in the proposed program.

1. The Educational Institutions' Eligibility for the NPIA Exemption

The NPIA exempts from the Robinson-Patman Act "purchases of . . . supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."[16] You represent in your letter that the educational institutions are all non-profit schools, colleges, or universities.[17] Thus, as the types of eligible entities specifically listed in the language of the statute, the educational institutions appear to be eligible for the NPIA exemption to the Robinson-Patman Act.[18]

2. The "Supplies" and "Own Use" Requirements

We next examine whether the proposed program involves the purchase of "supplies" for the educational institutions' "own use" as required by the statute. Courts have construed the term "supplies," as used in the NPIA, broadly to include "anything" required to meet the eligible institution's needs.[19] The term "own use" means use by an eligible entity "that is part of and promotes the [entity's] intended institutional operation."[20]

As you explain, the educational institutions currently provide health-insurance plans with a prescription-drug benefit to their employees, retirees, and their dependents. Continuing to offer this program as an employee benefit contributes to their ability to attract and maintain a capable and healthy workforce. We reached similar conclusions in our 2010 University of Michigan and

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[15] 15 U.S.C. § 13c.

[16] 15 U.S.C. § 13c.

[17] Our understanding is that they are either specifically incorporated as non-profits or to the extent they are not explicitly incorporated as non-profits (some because their organization predates such statutory requirements), they have all the indicia of non-profit entities. For instance, they operate for the advancement of education, do not operate for the profit of any individual, and maintain 501(c)(3) classifications under the federal tax code. *See* Quest Request Letter, at 4 (fn. 8). Additionally, we understand that the two Health Education Centers are non-profit 501(c)(3) organizations affiliated with Nova Southeastern University and established to extend health education and resources to Florida's underserved communities. *See* Quest Request Letter, at 2 (fn. 4); http://flahec.org (visited Jan. 17, 2014). It seems to us that these entities, based on their affiliations with local universities and their educational missions, could qualify as schools under the NPIA and that, in any event, they likely qualify as non-profit "charitable" institutions.

[18] 15 U.S.C. § 13c.

[19] *See Logan Lanes v. Brunswick Corp.*, 378 F.2d 212, 216 (9th Cir. 1967), *cert. denied*, 389 U.S. 893 (1967); *see also Abbott Lab. v. Portland Retail Druggists Ass'n*, 425 U.S. 1, 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.").

[20] 425 U.S. 1, at 16 (1976).

2006 Alpena Public Schools advisory opinions.[21] In those opinions, we noted that employees enable schools, colleges, and universities to carry out their educational missions. The availability of health benefits, including a prescription-drug benefit, has become a critical consideration in an individual's employment decision-making process, and as such, the continued availability of these plans is essential to the educational institutions' ability to attract and retain the employees necessary to carry out their institutional purposes. Providing a prescription-drug benefit to employees also promotes an organization's efficient operation by making medicine more affordable and accessible to its employees, thereby improving their health and reducing employee absences.

We believe that this analysis is consistent with the Supreme Court's decision in *Abbott Laboratories v. Portland Retail Druggists Association.*[22] In *Abbott Laboratories*, retail pharmacies sued pharmaceutical manufacturers under the Robinson-Patman Act, challenging the discounted sale of pharmaceuticals to non-profit hospitals. The hospitals resold those discounted pharmaceuticals to various types of patients. The Court held that pharmaceuticals purchased for resale to hospital employees and their dependents were covered by the NPIA, because the employees were essential for the hospital to function. In the Court's view, providing them with pharmaceuticals enhanced the hospital's operation.[23] Thus, consistent with *Abbott Laboratories* and with prior FTC staff advisory opinions, we find that the educational institutions' provision of discounted pharmaceuticals to their employees and their dependents as part of their programs of providing employee benefits would be covered by the NPIA exemption. It contributes to their ability to maintain the workforce necessary to further their educational missions.

Further, we conclude that including retirees in the proposed program does not affect eligibility for the NPIA exemption. As we explained in our University of Michigan advisory opinion, retiree benefits are an integral part of the compensation package offered to current and prospective employees and may help the educational institutions attract and retain qualified employees. In this regard, providing a prescription pharmaceutical benefit to retirees furthers the educational institutions' missions just as in the case of current employees. Thus, it is our view that application of the NPIA discount to retirees' prescription-drug claims as part of an established retirement benefit plan is within the educational institutions' "own use" in the same way as it is for current employees' claims.[24]

Finally, we do not think the fact that the educational institutions will access the NPIA discount through a rebate program, rather than through the actual transfer of NPIA-discounted pharmaceuticals, affects the analysis. In fact, a rebate program seems to mitigate the risk that

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[21] *See* University of Michigan (Apr. 9, 2010) (FTC staff opinion letter); Alpena Public Schools (May 22, 2006) (FTC staff opinion letter). *See also* Valley Baptist Medical Center (Mar. 31, 2003) (FTC staff opinion letter).

[22] 415 U.S. 1 (1976).

[23] *Id.* at 16.

[24] *See* University of Michigan (Apr. 9, 2010) (FTC staff opinion letter).

NPIA-discounted pharmaceuticals could be inappropriately diverted for ineligible uses, because the rebate system will ensure that the NPIA discount is only applied after Quest determines a claim is NPIA eligible.

3. The Involvement of For-Profit Entities

The proposed program will involve a number of for-profit entities, initially including Quest and Catamaran and potentially expanding to include other for-profit PBMs and pharmacies. Although the involvement of for-profit entities does not automatically disqualify the program for NPIA eligibility, it does require caution to ensure that the for-profit entities—which are ineligible for the NPIA exemption—do not benefit from it in any way.[25]

First, we address Quest's role to develop and implement the proposed program. As we understand it, Quest developed the program at the request of the NPIA-eligible educational institutions. Those institutions were concerned about the rising cost of continuing to provide a health-benefit plan that includes specialty-drug coverage. They asked Quest, which already provided them with certain services through the Independent Colleges and Benefits Association, for assistance, and Quest proposed this program. As explained above, Quest's role in the program is limited to negotiation of discounts, claims auditing, rebate processing, and data reporting. The educational institutions will pay Quest for these services on a flat-fee-per-claim basis whether or not Quest determines the claim is NPIA eligible.[26] Quest will not charge any membership fees for participation in the proposed program nor will it charge the educational institutions a percent-of-dollars-spent on group purchasing organization services. Thus, any financial benefit Quest receives under the program will be in exchange for its administrative services only and will not result from the application of the NPIA discount. This is a critical feature of the program because Quest, as a for-profit entity, is ineligible to benefit in any way from the NPIA exemption. The exemption applies only to the eligible educational institutions. Furthermore, we understand that Quest may seek to add additional educational institutions to the program or otherwise expand it at some time in the future. This advisory opinion only addresses Quest's proposal in its current form. Any changes or additions to the proposed program would also need to comply with the NPIA.

Next, we examine the role of Catamaran, the for-profit PBM, and the possible eventual inclusion of for-profit pharmacies in the proposed program. Again, we understand that the PBMs and pharmacies involved in the program will provide only administrative services to the educational institutions. Fees earned by Catamaran and the pharmacies will cover only their costs and a flat fee that does not depend on the NPIA eligibility of the claim. Thus, as we understand the program, neither Catamaran nor any for-profit pharmacy that may participate in the program stands to benefit from the NPIA exemption. If, however, over the course of the program's

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[25] We also note that Independent Colleges and Benefits Association, though not a for-profit entity, does not appear to qualify as one of the types of entities eligible for the exemption.

[26] *See* Quest Request Letter, at 6.

operation, it turns out that any ineligible for-profit entity (e.g., Quest, Catamaran, or a pharmacy) is benefitting financially from the NPIA exemption, the reasoning contained in this opinion would not apply.

Finally, we understand that the structure of the proposed program, whereby Quest will confirm each claim's eligibility for the NPIA discount before arranging the rebate, should effectively eliminate the risk of the exemption being applied to ineligible claims such as walk-in customers. In any event, Quest will maintain an auditable record through which it will confirm on an ongoing basis that the program is operating within the boundaries of the NPIA.[27]

Conclusion

As discussed above, and with the noted caveats, it is our opinion that the non-profit educational institutions' purchases of specialty drugs through Quest's proposed program as described in your January 10, 2014 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 Federal Trade Commission's Rules of Practice, and based on the facts as presented by the requesting entity. Under 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 it would be in the public interest to do so.

Sincerely,

Markus H. Meier
Assistant Director

[27] *See* Quest Request Letter, at 7.