



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

Bureau of Competition
Health Care Division

July 2, 2010

Vincent D. Childress, Jr.
Roberts & Stevens, P.A
P.O. Box 7647
Asheville, North Carolina 28802

Re: Community CarePartners, Inc. Advisory Opinion

Dear Mr. Childress:

This letter responds to your request on behalf of Community CarePartners, Inc. (“CarePartners”) for an advisory opinion concerning whether its proposal to extend sales of discounted pharmaceutical products to its in-home hospice patients 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 CarePartners’ proposal would fall within the scope of the NPIA.

Factual Background

As we understand the facts based on information you provided, CarePartners is a North Carolina non-profit corporation that offers a full range of post-acute care health services in the Asheville, North Carolina area. Services offered by CarePartners include inpatient rehabilitation, inpatient and in-home hospice and palliative care (the “Hospice Program”), and home health and adult day care services. At its main location in Asheville, CarePartners operates: (1) a licensed rehabilitation hospital that includes outpatient therapy services; (2) a licensed inpatient hospice facility and administration of in-home hospice services; (3) a licensed adult day care facility; (4) administration for licensed home health care services; and (5) administration of licensed private duty services. These programs are all operated under the management of a single board of directors and under one tax identification number. The Hospice Program is considered to be hospital-based for Medicare purposes and operates under a sub-number of the hospital.

CarePartners currently uses NPIA-discounted pharmaceuticals in connection with its treatment of patients at its inpatient hospice facility. The inpatient facility is used for patients who need

¹ 15 U.S.C. § 13c.

round-the-clock care for symptom control, for short-term respite care, and in end-of-life situations where the patient requests inpatient care.² The primary purpose of the Hospice Program, however, is to serve patients in their places of residence, which could be the patient's home, a nursing home, or an assisted living facility. The in-home hospice patients currently receive their medications at a non-discounted rate from CarePartners through a contract with a local pharmacy.³ CarePartners would like to extend its use of NPIA-discounted pharmaceuticals to the care of these patients.

As you have explained in your correspondence, the decision to enter a patient into hospice care is made by the patient's community-based physician. Usually, the community-based physician will refer a patient to hospice care when it is determined that the patient has a life expectancy of less than six months and that the patient would benefit from the type of end-of-life care offered by hospice. For patients who are referred to CarePartners, CarePartners' staff will assess the patient to determine if the patient meets the criteria for admission to its Hospice Program. Patients who meet the criteria for admission are formally admitted as CarePartners' patients, and the CarePartners Hospice Inter-Disciplinary Group (which includes a CarePartners employed hospice physician) creates a plan of care to govern the patient's treatment.

In most in-home hospice cases, the CarePartners employed physician serves in a consulting role throughout the patient's affiliation with CarePartners' Hospice Program, and works in conjunction with the patient's community-based physician. Over the course of the patient's in-home hospice treatment, a variety of CarePartners employees, including physicians, nurses, nurses aides, social workers, and clergy, provide direct and ongoing care to the patient. The CarePartners staff who treat in-home hospice patients maintain a continuing relationship with the patients until their death.

Prescription medications required by an in-home hospice patient for symptom control or pain management related to the terminal illness are reviewed by a CarePartners hospice physician and identified on the patient's plan of care. When a patient needs a refill of a current medication, or if a medication is added by the CarePartners hospice physician, the CarePartners hospice physician orders it. All medications used in the treatment of the in-home hospice patients are reviewed by the pharmacist under contract with CarePartners during the biweekly Inter-Disciplinary Group review.⁴

² Letter from Vincent D. Childress, Jr., Roberts & Stevens, to Donald S. Clark, FTC (Feb. 26, 2010).

³ Email from Vincent D. Childress, Jr., Roberts & Stevens, to Ellen Connelly, FTC (Mar. 30, 2010).

⁴ Email from Vincent D. Childress, Jr., Roberts & Stevens, to Ellen Connelly, FTC (Apr. 15, 2010).

Analysis

1. Eligibility of CarePartners for Exemption from the Robinson-Patman Act Under the NPIA

To fall within the NPIA exemption to the Robinson-Patman Act, an organization must be an “eligible entity” and must use the exemption to purchase supplies for its “own use.”⁵ Because the NPIA is limited in its application to certain types of “eligible entities,” we begin our analysis with a discussion of CarePartners’ eligibility for the exemption. Among other “eligible entities,” the NPIA exempts from the Robinson-Patman Act “hospitals, and charitable institutions not operated for profit.”⁶ As you state in your letter, CarePartners is a non-profit, charitable health-care organization. It is an integrated entity; all of its programs, are governed by one board of directors, and operate under one tax identification number.⁷ Thus, by the language of the statute, CarePartners, including its Hospice Program, appears to be an entity eligible for the exemption. Moreover, it is our understanding from your letter that CarePartners already uses the exemption in connection with its purchase and resale of pharmaceuticals to its inpatients.

2. Pharmaceuticals for CarePartner’s “Own Use”

Having established eligibility for the exemption, the question before us becomes whether CarePartners may extend its use of NPIA-discounted pharmaceuticals to its in-home hospice patients without losing the exemption. The answer to this question depends on whether this proposed use of the NPIA-discounted pharmaceuticals would be for CarePartners’ “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)*.⁸ In that case, retail pharmacies sued pharmaceutical manufacturers under the Robinson-Patman Act, challenging the discounted sale of drugs to non-profit 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.”⁹ Rather, the Court interpreted the “own use” test to shield only purchases that

⁵ 425 U.S. 1 (1976).

⁶ 15 U.S.C. § 13c.

⁷ Letter from Vincent D. Childress, Jr., Roberts & Stevens, to Donald S. Clark, FTC (Feb. 26, 2010).

⁸ 425 U.S. 1.

⁹ 425 U.S. at 13.

“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.”¹⁰

As we understand it, CarePartners is dedicated to helping people live fully despite injury, illness, disability, or age. In furtherance of this mission, it offers a variety of services, including a rehabilitation hospital, a hospice program, and adult day and home health care.¹¹ The goal is to be able to meet its patients’ needs, whether they are best served in their places of residence or as inpatients at one of CarePartners’ facilities, and to be able to provide uninterrupted care to those patients, by following them from hospital to residence as needed. Like the inpatient hospice patients, the in-home patients are formally admitted to the CarePartners system. Their care while admitted to CarePartners is managed by the CarePartners Hospice Inter-Disciplinary Group and provided by CarePartners employees, including CarePartners physicians. In this regard, the in-home patients differ from the CarePartners’ inpatient hospice patients only by their place of treatment, and their place of treatment is – above all – a clinical decision made in the best interest of the patients. The place of treatment may change during the course of the patients’ care as the condition may improve or worsen, but at all times, the patients are Hospice Program patients. We do not believe that the patients’ eligibility to receive NPIA-discounted pharmaceuticals should turn on whether the same medical condition requires inpatient treatment or allows for in-home care at a particular moment in time. In fact, the ability to follow a patient over the entire course of the condition – from home to hospital – is, as you have explained, the primary point of the Hospice Program.¹²

We conclude, based on these facts, that CarePartners’ central institutional function, within the meaning of *Abbott Labs*, is to deliver comprehensive and continuing post-acute health care services, including pharmaceuticals, to all of its patients.¹³ Its patients include the in-home

¹⁰ *Id.* at 14 (emphasis in original).

¹¹ See www.carepartners.org (visited Mar. 23, 2010).

¹² See *Elkhart General Hospital, Inc.*, at 3 (June 13, 1994) (staff opinion) (available at <http://www.ftc.gov/bc/adops/008.sthm>) (“We believe that Elkhart’s provision of services under its home health program would be considered simply an extension of the hospital’s basic services beyond its four walls and that therefore pharmaceuticals and other goods purchased for distribution within the context of the program would be purchased for Elkhart’s own use”)

¹³ In this regard, its patients are similar to the HMO members in *DeModena v. Kaiser Foundation Health Plan*, 743 F.2d 1388 (9th Cir. 1983). There the court held that Kaiser’s sale of NPIA-discounted pharmaceuticals to its members was permissible because Kaiser’s intended institutional function was broadly to provide the full range of health services on an ongoing basis to its members. CarePartners’ intended institutional function appears similarly broad.

hospice patients. The in-home patients and the inpatient patients are not separate categories of patients, but rather are all Hospice Program patients, whose conditions may change over time, thus allowing in-home treatment at some points and requiring hospitalization at others. It would not make sense to treat these patients differently when they are still admitted to the Hospice Program, but are temporarily able to be treated in their homes.

The extension of CarePartners' use of the NPIA-discounted pharmaceuticals to the in-home hospice setting contributes directly to its ability to fulfill its central institutional function and is consistent with both *Abbott* and prior staff advisory opinions.¹⁴ *Abbott* did not restrict "own use" to pharmaceuticals literally consumed on the hospital's premises.¹⁵ Rather, the important factor in *Abbott*, and thus in this case, was that the pharmaceuticals be used in connection with the treatment received at the hospital. The Supreme 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, however, were deemed insufficiently related to the hospital's institutional function and therefore outside the exemption.

Here, in-home hospice patients are CarePartners' patients clinically and administratively. The in-home hospice patients are treated by CarePartners staff physicians, and these physicians maintain an ongoing relationship with the in-home patients until the time of death. The decision to treat these patients in their place of residence or as inpatients is determined based on clinical evaluation, cost, and patient comfort. For these reasons, CarePartners' use of NPIA-discounted pharmaceuticals in connection with the treatment provided to these patients by the physicians affiliated with the Hospice Program seems to us to fit squarely within *Abbott*, by allowing CarePartners to further its intended institutional function of providing a full continuum of care to all of its patients. We emphasize, however, that the NPIA exemption is dependent on the maintenance of an ongoing relationship between CarePartners and the patients. If that

¹⁴ See Elkhart General Hospital (June 1994) (staff opinion); see also North Mississippi Health Services, at 1 (Jan. 7, 1998) (staff opinion) (available at <http://www.ftc.gov/bc/adops/normiss2.fin.shtm>) ("The hospital's sales of cancer treatment drugs to the hospital's own patients – whether inpatient or outpatient – qualify as the hospital's 'own use'")

¹⁵ 425 U.S. at 10-11, 14.

relationship were to end – for instance if the patient began to see a physician outside of the CarePartners system for hospice care – the exemption would be lost.

Conclusion

As discussed above, and with the noted caveats, we conclude that CarePartners' proposal to extend the sales of discounted pharmaceuticals to its in-home hospice patients as part of its Hospice Program 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. 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 it otherwise would be in the public interest to do so.

Sincerely,

Markus H. Meier
Assistant Director