



BUREAU OF COMPETITION

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

June 1, 1992

Linus W. Walton, Esq.
City Attorney
City of Oneida Department of Law
233 Cedar Street
Oneida, NY 13421

Dear Mr. Walton:

This letter responds to your request for an advisory opinion concerning the applicability of the Robinson-Patman Act to the sale of prescription drugs by the city-operated Oneida City Hospital to City of Oneida employees at a price reflecting discounts received by the hospital. As we explained to you in our telephone conversation on May 5, your letter raises at least one question that is not clearly resolved by current authorities. However, we believe that if the City Hospital were to pursue the proposed course of action, it would not be able to invoke the Non-Profit Institutions Act exemption from the Robinson-Patman Act ("the Act") and would otherwise be subject to the requirements of the Act. We do not address the separate question of whether, assuming that the Act applied, procuring drugs at a discount for resale to city employees would violate it.

You ask three specific questions. One is whether the City is exempt from the Robinson-Patman Act as a governmental entity. You also ask whether the Non-Profit Institutions Act's exemption to the Act would cover the City Hospital's dispensing to City of Oneida employees who do not work at the hospital. Your third question concerns whether the City Hospital is a non-profit institution under the Non-Profit Institutions Act. As we have discussed, this letter does not discuss your third question because the answer to the second question makes it moot.

Coverage of Governmental Bodies

We believe we can confidently answer the first question in the negative. The Supreme Court in Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories, 460 U.S. 150, 103 S.Ct. 1011, 74 L.Ed.2d 882 (1983), held that the Robinson-Patman Act applies to the sale of pharmaceutical products to state or local government hospitals for resale in competition with private pharmacies, assuming these activities are not exempt under the Non-Profit Institutions Act.

Own Use

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

Nothing in [the 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.

Since the City Hospital is generally subject to the Act, any possible exemption would depend on, among other things, whether the purchase of drugs for resale to city employees not employed by City Hospital amounts to a purchase for the hospital's "own use." Our view is that this activity would not qualify as "own use."

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, or the sale to employees of

drugs to be used by non-dependent third persons, was held to be beyond the protection of the statute. Your letter indicates hope that, since sales by the hospital to its employees were specifically exempt in Portland Retail Druggists, sales by the Oneida City Hospital to city employees would also be exempt.

We know of no authority that more specifically addresses the issue of "own use" as it applies to a non-profit institution's employees. However, it may be useful to look at decisions that deal with sales to other persons who have a particular connection with the institution in question. In an FTC advisory opinion dated July 19, 1978, the Commission advised a gerontology foundation that its proposed course of action would not qualify for Non-Profit Institutions Act exemption from Robinson-Patman. The question before the Commission was whether the Foundation for Later Life Enrichment, a non-profit foundation created to fund gerontology research and to provide goods and services to the aged at low cost, could resell donated products and products obtained at wholesale prices to the elderly. In its advisory opinion, the Commission interpreted the Portland Retail Druggists decision to say that "own use" meant "[t]he dispensation or sale of drugs to patients under the hospital's care, or to persons essential to the hospital's function". (emphasis added). The Commission went on to state that it did not view the purchase of products for resale to the elderly "as in any manner a function integral to the operation, institutionally, of a gerontological research foundation."² Additionally, it has been held that purchases by an HMO for resale to its plan members were exempt from the Act as purchases for the HMO's own use.

Conclusion

When we consider these authorities together with the information we have about the role of the City Hospital, we conclude that the hospital's proposed course of conduct cannot meet the "own use" test. As we understand it, the City Hospital functions like any other general purpose hospital. We further understand that the hospital and city administrations are not closely linked, and that the hospital operates as a separate entity. The basic institutional function of the City Hospital does not differ from that of the hospitals in Portland Retail Druggists or most general purpose hospitals, and does not include the resale of prescription drugs to city employees who have no

¹ 3 E. Kintner & J. Bauer, Federal Antitrust Law, § 25.9, p. 468 (1983).

² 92 FTC 1019, 1020.

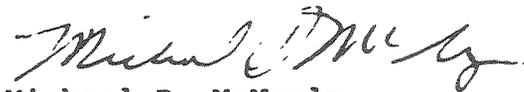
³ De Modena v. Kaiser Foundation Health Plan, Inc., 743 F.2d 1388 (9th Cir. 1984).

direct relationship to the hospital. Consequently, purchases for resale to city employees not employed by the hospital would not constitute purchases for the City Hospital's own use that are exempt under the Non-Profit Institutions Act.

We hope this opinion letter is helpful to you. It is limited to the request described above, as explained in your letter of February 27, 1992 and in our May 5 telephone conversation. It does not constitute approval for actions that are different from those described, or that are not specified in your letter.

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,



Michael D. McNeely
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Bureau of Competition