

Re: The application of the Non-Profit Institutions Act to sales of pharmaceuticals by non-profit hospitals to related non-profit long-term care facilities. [Presentation Health System, P934006]

December 21, 1993

Dear Ms. Lee:

This letter responds to your September 1, 1993, letter requesting an advisory opinion from the Commission on the application of the Non-Profit Institutions Act, 15 U.S.C. 13c, to sales of pharmaceuticals by non-profit hospitals to related non-profit long-term care facilities.

According to your letter, your client, Presentation Health System, manages hospitals and long-term care facilities that are separate corporate non-profit entities controlled and sponsored by a single religious order, The Sisters of the Presentation of the Blessed Virgin Mary of Aberdeen, South Dakota. You ask whether the hospitals, which own and operate in-house pharmacies and receive preferential price treatment that is exempt from the Robinson-Patman Act, 15 U.S.C. 13, by virtue of the Non-Profit Institutions Act, may resell pharmaceuticals at cost to their long-term care affiliates. Based on the information provided in your letter, we believe that the sales you describe would be similarly exempt under the Non-Profit Institutions Act, as long as the long-term care facilities purchase the pharmaceuticals for their own use.

The Non-Profit Institutions Act exempts from the Robinson-Patman Act "purchases of their supplies for their own use by . . . hospitals, and charitable institutions not operated for profit." Although the phrase "for their own use" limits the categories of individuals to whom the supplies can be resold, *see Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1 (1976), the Commission has said that the "own use" limitation is not "intended to apply to resales of supplies, at cost, by one charitable institution to another that are limited, in turn, to the latter charitable

institution's own use." Commission Opinion Letter, 89 FTC 689 (1977).¹ The Commission further stated that:

A resale of this nature would constitute a not-for-profit transfer of supplies from one institution, eligible under the exemption, to another such institution, also eligible under the exemption. In the Commission's view, the exemption was intended to insulate from Robinson-Patman application all purchases of supplies (for their own use) by the designated classes of institutions not operated for profit. The transactions, as above described, would not appear in conflict with such a purpose.

Id.

In the situation that you describe, where the hospitals and long-term care facilities are affiliated, the Commission believes that there is a further basis for exemption under the Non-Profit Institutions Act. The Presentation organization may be regarded as a unit having purchased the pharmaceuticals for its "own use," comprised of the use by its hospitals and its long-term care facilities.

In light of the above, the Commission believes that the resales of pharmaceuticals as you describe would be exempt from the Robinson-Patman Act, provided that the pharmaceuticals are acquired for the long-term care facilities' "own use," as interpreted in Abbott Laboratories.

This advisory opinion, like all those issued by the Commission, is limited to the proposed conduct described in the petition being considered. The Commission retains the right to reconsider the questions involved and, with notice to the requesting party in accordance with Section 1.3(b) of the Commission's Rules of Practice, to rescind or revoke its opinion, if the public interest so requires.

Copies of your request and this response are being placed on the public record pursuant to Section 1.4 of the Commission's Rules of Practice.

¹ This opinion letter was issued in response to a request for advice from St. Peter's Hospital of the City of Albany. The request described a situation where a non-profit hospital receiving preferential price treatment permitted by the Non-Profit Institutions Act wished to resell pharmaceuticals, at cost, to a non-profit nursing home that was purchasing its drugs at retail from local drug stores.

Letter of Request

September 1, 1993

Dear Sir:

As legal counsel for the Presentation Health System (hereinafter referred to as "PHS"), a nonprofit corporation organized and existing under the South Dakota Nonprofit Corporation Act, I am hereby requesting an advisory opinion, pursuant to 16 CFR 1.1, *et seq.* from the Commissioner with regard to the following proposed sales of pharmaceuticals by nonprofit hospitals which are part of the Presentation Health System.

Facts

The Sisters of the Presentation of the Blessed Virgin Mary of Aberdeen, South Dakota, a 501(c)(3) religious order corporation, sponsors and controls certain nonprofit hospitals and nonprofit long-term care, nursing home entities within the State of South Dakota. The Presentation Health System, a nonprofit corporation, is delegated the managerial responsibilities for these health institutions (hospitals and long-term care facilities).

The hospitals own and operate pharmacies within the walls of the respective hospital institutions, and as such are entitled to the preferred price treatment permitted to such hospitals by virtue of the Nonprofit Institutions Act exemption under the Robinson-Patman Act. 15 U.S.C. 13c.

The hospitals referred to are all organized and exist under the South Dakota Nonprofit Corporation Act. The hospitals are each situated in separate communities within the State of South Dakota, and in each community wherein a hospital is located there is also, separately located, a long-term care institution.

It should be noted that the hospitals and long-term care facilities are separate corporate entities, however, all are controlled and sponsored by the Religious Order.

The hospitals are members of a group purchasing organization which enables purchasing of pharmaceuticals at discounts.

Issue

The hospitals wish to sell pharmaceuticals within this related group of long-term care facilities for the same reduced cost that the hospitals purchase from the pharmacy suppliers. The long-term care facilities do not have their own pharmacies and must purchase from local retail pharmacies at higher prices.

(1) Would proposed sales of pharmaceuticals from these hospitals to the long-term care facilities, which are related, be considered permissible sales under the Nonprofit Institutions Act exemption set forth in the Robinson-Patman Act?

(2) If it would not be a sale deemed to be permissible can such sale be justified on the grounds that the long-term care facility would in and of itself be entitled to preferential price treatment if it elected to own and operate a pharmacy within the long-term care facility?

Thank you for your time and attention to this matter. You may send the Advisory Opinion to me at the above address.

Very truly yours,

Tamara D. Lee
Office of General Counsel