



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

Bureau of Competition
Health Care Division

September 2, 2021

John B. Reiss, Esq.
Vice-President, General Counsel
and Chief Compliance Officer
Doylestown Health
595 West State Street
Doylestown, PA 18901

Re: Doylestown Health Advisory Opinion

Dear Mr. Reiss:

This letter responds to your request on behalf of Doylestown Health Foundation d/b/a Doylestown Health for an FTC staff advisory opinion. The question you raise is whether VIA Affiliates d/b/a Doylestown Health Physicians, a subsidiary of Doylestown Health, qualifies to provide discounted pharmaceuticals and medical devices to Doylestown Health's affiliated hospital, Doylestown Hospital, under 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, and with the noted caveats, we conclude that the NPIA exemption applies to Doylestown Health Physicians' proposed arrangement to sell discounted pharmaceuticals and medical devices to Doylestown Hospital.

Doylestown Health

We understand from your letter² that the Village Improvement Association of Doylestown, Pennsylvania ("Association"), a not-for-profit, 501(c)(3) corporation, established Doylestown Health to carry out the Association's purpose of "encouraging and promoting public health work," "improving the health and welfare of the residents of . . . Doylestown and Bucks County," and "supporting a community hospital and other health care facilities for the benefit of all persons."³ Doylestown Health is a healthcare system that provides a range of care, including inpatient and outpatient, skilled nursing, urgent care, home health, hospice, and other services. Doylestown Health Physicians and Doylestown Hospital, two not-for-profit, 501(c)(3)

¹ 15 U.S.C. § 13c.

² Letter from John Reiss, Doylestown Health, to Robert Canterman (April 16, 2021) ("Doylestown Letter").

³ Amended and Restated Articles of Incorporation of Village Improvement Association of Doylestown, Pennsylvania at § 3 (Doylestown Letter, Exhibit B.1).

corporations,⁴ are part of Doylestown Health, and the same executive team manages both organizations.⁵

Doylestown Health Physicians has approximately 100 primary care and specialist physicians practicing in 23 locations in the Doylestown area. Several of the specialists' offices are located on Doylestown Hospital's campus and most primary care offices are within 10 miles of the hospital. The physicians treat their patients requiring inpatient or outpatient care at Doylestown Hospital. Doylestown Health Physicians' purpose includes "conducting exclusively charitable, scientific and educational activities within the meaning of Section 501(c)(3) of the Internal Revenue Code . . . including directly or indirectly managing and supporting the provision of health care and related services and making donations and other transfers to or for the benefit of the Village Improvement Association . . . , Doylestown Health Foundation and Doylestown Hospital."⁶

Doylestown Hospital is a community hospital with 271 beds that serves Bucks County and part of Montgomery County in Pennsylvania, and parts of Hunterdon and Mercer Counties in New Jersey. Doylestown Hospital's purpose includes "operating and maintaining a community hospital . . . for the benefit of all persons" and "encouraging and promoting public health in general."⁷ Doylestown Hospital maintains a pharmacy at its facility for dispensing products for in-hospital use and does not have any affiliated retail pharmacy.⁸ While Doylestown Hospital also participates in a number of joint ventures that are for-profit, or include for-profit participants, to provide community health, medical imaging, outpatient surgery, and other services, you have indicated that the hospital's participation in these joint ventures does not affect its not-for-profit, tax-exempt status.⁹

Description of the Proposed Arrangement

As you explain, Doylestown Health Physicians currently purchases discounted pharmaceuticals and medical devices to provide infusion therapy and other treatments administered to patients in its physician offices. Patients do not receive a prescription or have access to these products outside Doylestown Health Physicians' offices. As we understand from your proposal, Doylestown Health Physicians seeks to purchase similar pharmaceuticals and medical devices for inpatients and outpatients treated at Doylestown Hospital's facilities.

⁴ Articles of Incorporation of VIA Affiliates ("Physicians Articles of Incorporation") at § 3 (Doylestown Letter, Exhibit B.2); Amended and Restated Articles of Incorporation of Doylestown Hospital ("Hospital Articles of Incorporation") at § 3 (Doylestown Letter, Exhibit D).

⁵ Doylestown Letter at 3.

⁶ Physicians Articles of Incorporation at § 3.

⁷ Hospital Articles of Incorporation at § 3.

⁸ Email from John Reiss to Robert Canterman (June 22, 2021) ("June 22 Email").

⁹ Doylestown Letter at 1.

We understand from your letter that one or more Doylestown Health Physicians' offices will purchase and arrange for delivery of the discounted pharmaceuticals and medical devices to the Doylestown Hospital pharmacy (and not a retail pharmacy) or other appropriate location at the hospital.¹⁰ A Doylestown Health Physicians office manager will have responsibility for implementing the proposed arrangement and maintaining the chain of custody of the products. Similarly, a Doylestown Hospital manager in the pharmacy or other department will have responsibility for receiving and maintaining the products. These administrators will closely track the purchases and chain of custody to ensure the discounted products are used only for patients of Doylestown Hospital or Doylestown Health Physicians, whether they are treated in the physicians' offices or at the hospital. The executive team that manages both Doylestown Health Physicians and Doylestown Hospital will ultimately be responsible for overseeing the proposed arrangement.¹¹

We understand that Doylestown Hospital will only dispense the pharmaceuticals and use the medical devices at hospital inpatient and outpatient facilities.¹² Doylestown Hospital will pay an administrative fee to Doylestown Health Physicians to cover the costs of the proposed arrangement and not for any other purpose. You have represented that Doylestown Hospital's for-profit joint ventures will not receive or use any of the discounted products and will not receive any benefit from the arrangement.¹³

Analysis

The NPIA exemption is limited to certain "eligible" not-for-profit entities' purchases of "supplies" for their "own use."¹⁴ As we understand your proposal, Doylestown Health Physicians will purchase and offer the discounted pharmaceuticals and medical devices to Doylestown Hospital for treating inpatients and outpatients at Doylestown Hospital's facilities. Therefore, we analyze below whether (1) Doylestown Health Physicians is an "eligible entity," and (2) the discounted pharmaceuticals and medical devices that Doylestown Health Physicians proposes to offer to Doylestown Hospital are properly considered "supplies" for Doylestown Health Physicians' "own use."

1. Doylestown Health Physicians Appears to be Eligible for the NPIA Exemption

An "eligible entity" under the NPIA includes, "schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."¹⁵ In finding that health

¹⁰ Doylestown Letter at 1.

¹¹ *Id.* at 3.

¹² June 22 Email.

¹³ *Id.*

¹⁴ 15 U.S.C. § 13c.

¹⁵ *Id.*

plans are “charitable institutions” under the NPIA, the court in *De Modena v. Kaiser Foundation Health Plan* recognized that “all non-profit organizations which promote health are considered charitable under the law of charitable trusts.”¹⁶ We concluded in an earlier FTC staff advisory opinion that a not-for-profit, charitable multispecialty clinic qualified as an eligible entity.¹⁷

While multispecialty physician group practices like Doylestown Health Physicians are not one of the types of institutions specifically enumerated in the NPIA, we believe that it qualifies as an “eligible entity” under the NPIA as a “charitable institution not operated for profit.” In fact, Doylestown Health Physicians currently purchases discounted pharmaceuticals and medical devices for its physicians to treat their patients in their offices. Based on your letter, Doylestown Hospital, a not-for-profit hospital, also appears to be an eligible entity under the NPIA and could itself qualify to purchase NPIA-discounted pharmaceuticals and medical devices in accordance with the “own use” requirement discussed below.

2. Doylestown Health Physicians’ Provision of Discounted Pharmaceuticals and Medical Devices to Doylestown Hospital Appears to Be for Doylestown Health Physicians’ Own Use

We next consider whether the proposal involves the purchase of “supplies” for Doylestown Health Physicians’ “own use.”

a. “Supplies”

We determined in previous advisory opinion letters that pharmaceuticals are “supplies” within the meaning of the NPIA in applying the exemption.¹⁸ The same analysis would likely apply to medical devices and equipment. The Ninth Circuit in *Logan Lanes, Inc. v. Brunswick Corp.*¹⁹ interpreted the term “supplies” broadly to include “anything required to meet the institution’s needs, whether it is consumed or otherwise disposed of, or whether it constitutes, or becomes part of, a material object utilized to enable the institution to carry on its activities.” The court noted that “the underlying intent of granting such an exemption was undoubtedly to permit institutions which are not in business for a profit to operate as inexpensively as possible.” And it held that a not-for-profit university’s bowling alleys were “supplies” because the university used the facilities for students to fulfill physical education requirements and all net income was used

¹⁶ 743 F.2d 1388, 1392 (9th Cir. 1984).

¹⁷ Harvard Vanguard Medical Associates, Inc. (December 18, 2001) (FTC staff opinion letter) (sale of pharmaceuticals by not-for-profit, multispecialty clinic to employees and patients of the clinic).

¹⁸ See, e.g., Quest Analytics Group (March 7, 2014) (FTC staff opinion letter) (NPIA exemption applied to educational institutions’ purchases of discounted specialty drugs for their own use); Yakima Valley Memorial Hospital (August 16, 2010) (FTC staff opinion letter) (not-for-profit hospital’s provision of pharmaceuticals to employees of its affiliates qualified for NPIA exemption); see also *Abbott Labs. 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”).

¹⁹ 378 F.2d 212, 216 (9th Cir.), cert. denied, 389 U.S. 898 (1967).

to finance other student activities and improvements to the university.²⁰ Because physicians and hospitals use pharmaceuticals and medical devices “to carry on their activities” of treating patients, we also find that they are “supplies” within the NPIA.

b. “Own Use”

The term “own use” means an eligible entity’s use that “is a part of and promotes the [entity’s] intended institutional operation.”²¹ The principal authority on the meaning and scope of the “own use” requirement is the Supreme Court’s decision in *Abbott Laboratories v. Portland Retail Druggists Ass’n*.²² In *Abbott*, not-for-profit hospitals purchased discounted pharmaceuticals from manufacturers and resold them to hospital patients. Retail pharmacies challenged the discounted sale of pharmaceuticals to the hospitals under the Robinson-Patman Act. The Supreme Court held that the NPIA exemption is limited and does not give hospitals a “blank check” for all purchases of supplies.²³ Rather, the Court held that the exemption applies to purchases for a hospital’s “own use,” and that own use means “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.”²⁴ The Supreme Court determined that a not-for-profit hospital’s purchases of pharmaceuticals are for its own use when dispensed to patients for treatment at the hospital.

Whether the exemption applies to Doylestown Health Physicians’ purchases of pharmaceuticals and medical devices for Doylestown Hospital’s inpatients and outpatients depends on whether this use is part of and promotes Doylestown Health Physicians’ institutional mission.²⁵ Based on Doylestown Health Physicians’ stated purpose in its Articles of Incorporation, Doylestown Health Physicians’ purchases would appear to promote “managing and supporting the provision of health care and related services” and “making donations and other transfers to or for the benefit of . . . Doylestown Hospital.” As part of an integrated health system, the physicians treat their patients requiring inpatient care at Doylestown Hospital. Doylestown Health Physicians’ purchase of discounted pharmaceuticals and medical devices for Doylestown Hospital’s patients will support the provision of health care and related services at Doylestown Hospital. Consistent with *Abbott*, we find that the NPIA exemption appears to cover Doylestown Health Physicians’ proposal to offer discounted pharmaceuticals and medical devices to Doylestown Hospital. Similarly, Doylestown Hospital’s purchase of these supplies from Doylestown Health Physicians appears to be for Doylestown Hospital’s “own use” because it will use the supplies to further its

²⁰ 378 F.2d at 212 (sale of bowling equipment and lanes to a university was exempt from the Robinson-Patman Act under the NPIA).

²¹ *Abbott Labs. v. Portland Retail Druggists Ass’n*, 425 U.S. 1, 14 (1976).

²² *Id.*

²³ *Id.* at 13.

²⁴ *Id.* at 14.

²⁵ *Id.*

institutional purpose to operate “a community hospital . . . for the benefit of all persons” and promote public health.

We emphasize that this opinion is premised on your representation that Doylestown Hospital’s for-profit joint ventures will not have access to the discounted pharmaceuticals and medical devices and your assurance that the joint ventures, or any other for-profit entities, will not benefit financially from the proposed arrangement in any way.

Conclusion

As discussed above, and with the noted caveats, it is our opinion that Doylestown Health Physicians’ proposal to extend the sales of discounted pharmaceuticals and medical devices to its affiliate, Doylestown Hospital, as described in your April 16, 2021 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 Commission’s Rules of Practice, based on the facts you have presented to us. 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 would be in the public interest to do so.

Sincerely,

Markus H. Meier
Assistant Director