



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

Bureau of Competition
Health Care Division

June 16, 2006

Kathleen A. Reed
Dykema Gossett PLLC
400 Renaissance Center
Detroit, Michigan 48243

Re: Alpena Public Schools Advisory Opinion

Dear Ms. Reed:

This letter responds to your request on behalf of Alpena Public Schools for an advisory opinion on whether a prescription-drug benefit program proposed by the school district would fall within the Non-Profit Institutions Act ("NPIA"). 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."¹ Based on the information that you have provided, both in your written request and in subsequent telephone conversations, we have concluded that, subject to certain caveats set forth below, the NPIA exemption would apply to the Alpena Public Schools' proposed program to have pharmaceuticals transferred to it for use by its employees, by the Alpena Regional Medical Center, with actual distribution of the pharmaceuticals being made by certain Alpena-area pharmacies.

Program Description

We understand that Alpena Public Schools ("APS") is a non-profit public school district serving the city of Alpena, Michigan, and the surrounding rural area. APS currently provides its employees with health insurance, including a prescription-drug benefit, through a third-party health insurer. To reduce the cost of continuing to provide this benefit to its employees, APS proposes to have Alpena Regional Medical Center, a non-profit hospital in Alpena, purchase pharmaceuticals through its existing group-purchasing arrangement with a pharmaceutical wholesaler. Those pharmaceuticals, in turn, will be transferred for use by APS employees. According to your letter, Alpena Regional Medical Center has access to discounted pharmaceuticals because of its own status as an NPIA-eligible non-profit institution. Alpena Regional Medical Center would conduct all transactions related to the pharmaceuticals purchased for APS through a separate account called the "APS Account."

¹ 15 U.S.C. § 13c.

Because various state and federal laws prohibit APS from purchasing and handling prescription drugs directly, Alpena Regional Medical Center cannot transfer the pharmaceuticals to APS for distribution to its employees. Therefore, APS proposes to have various area pharmacies (“APS Participating Pharmacies”) dispense the discounted pharmaceuticals to APS employees on its behalf. Upon filling prescriptions for APS employees, the APS Participating Pharmacies will record the filled prescriptions using special software that will automatically order from Alpena Regional Medical Center’s wholesaler the pharmaceuticals necessary to replace those dispensed to APS employees. The wholesaler will deliver the replacement pharmaceuticals to Alpena Regional Medical Center which, in turn, will deliver them to the appropriate APS Participating Pharmacies. The wholesaler will generate an invoice for the replacement pharmaceuticals and forward that invoice directly to Alpena Regional Medical Center. Alpena Regional Medical Center will pay the invoiced amount to the wholesaler, and APS will reimburse the medical center for the invoiced amount paid. Any fees, other than the actual cost of the pharmaceuticals, charged in connection with this proposed course of action will only cover direct costs incurred as a result of providing the pharmaceuticals to APS employees. The discounted pharmaceuticals also will be distributed only to APS employees, not to walk-in patients or other customers of the APS Participating Pharmacies.

Analysis

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

We first address the question of whether APS is an entity to which the NPIA exemption from the Robinson-Patman Act applies. APS is a non-profit school district. Though the language of the NPIA expressly includes schools, school districts are not explicitly mentioned. Nevertheless, in *Burge v. Bryant Public School District of Saline County*, a federal district court treated a school district as an eligible entity under the NPIA.² Moreover, since the school district’s sole purpose is to operate Alpena’s public schools, this construction appears entirely consistent with the intent of the NPIA to make the Act’s exemption available to schools. Thus, we conclude that APS appears to be an entity eligible for the NPIA exemption.

² *Burge v. Bryant Public School Dist. of Saline County*, 520 F. Supp. 328 (E.D. Ark. 1980), *aff’d on other grounds* 658 F.2d 611 (8th Cir. 1981) (per curiam). In *Burge*, the court simply treated a school district as an eligible entity under the NPIA, without addressing the question of whether, for purposes of the Act, there was any distinction between “schools” and a school district.

2. Pharmaceuticals as “Supplies” for APS’s “Own Use”

Next, we examine whether pharmaceuticals can properly be considered “supplies” purchased for APS’s “own use.” The term “supplies,” as used in the NPIA, has been construed broadly to include anything required to meet an institution’s needs.³ Thus, the question becomes whether pharmaceuticals can properly be considered necessary to meet APS’s needs and, further, whether the proposed distribution of pharmaceuticals to APS’s employees is for the school district’s “own use.”

Our analysis of this issue begins with the Supreme Court’s decision in *Abbott Laboratories v. Portland Retail Druggists Association*.⁴ In *Abbott Laboratories*, the Court held that the NPIA exemption is a limited one that covers purchases of supplies by eligible entities only insofar as they are for the entities’ “own use;” that is, for use by the entity “in the sense that such use is part of and promotes the [entity’s] intended institutional operation.”⁵ In holding that pharmaceuticals purchased for resale to hospital employees were covered by the NPIA, the Court based its conclusions on the determination that employees enabled the hospital to function, and that providing them with pharmaceuticals enhanced the hospital’s operation.⁶

Similar reasoning leads us to conclude that APS’s employees enable the school district to carry out its educational mission, and that continuing to offer a prescription-drug program as an employee benefit contributes to their ability to maintain a capable workforce. As you explained in your letter, and further clarified in a telephone conversation with staff, APS provides its employees with health insurance, including a prescription-drug benefit. With the well-documented rise in health-care costs, the availability of an employer-offered health benefit plan has become a critical consideration in an individual’s employment decision-making process. The continued availability of APS’s health-insurance program is essential to its ability to attract and keep the employees it needs to carry out its institutional purpose. Providing a prescription-drug benefit to its employees also promotes APS’s efficient operation by making medicine more affordable and accessible to these employees, thereby improving their health and providing

³ 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 in that case, in an oral opinion, had ruled that purchases of pharmaceuticals by the hospitals were purchases of “supplies” for the hospitals’ “own use.”)

⁴ 425 U.S. 1 (1976).

⁵ *Id.* at 14.

⁶ *Id.* at 16.

incentives for reduced employee turnover.⁷ Thus, consistent with *Abbott Laboratories* and with prior FTC staff advisory opinions, we find that APS's provision of discounted pharmaceuticals to its employees and their dependents as part of its program of providing employee benefits would be for its "own use," and thus would be covered by the NPIA exemption.⁸

3. Involvement of Alpena Regional Medical Center in Implementing APS's Proposed Program

Next, we examine whether the structure of the proposed program, involving the transfer of pharmaceuticals between Alpena Regional Medical Center and APS, and distribution of the pharmaceuticals through the APS Participating Pharmacies, affects our analysis. The NPIA clearly permits Alpena Regional Medical Center, as a non-profit hospital, to purchase pharmaceuticals to care for its patients and to provide benefits to its employees and retired employees.⁹ In fact, the medical center currently purchases pharmaceuticals for those "own use" purposes, based on its qualification under the NPIA. Similarly, as we conclude above, the NPIA would permit APS, absent the applicable federal and state limitations on its handling of pharmaceuticals, to purchase pharmaceuticals at a discount for distribution to its employees as part of its employee benefits program. Since APS's employees are not Alpena Regional Medical Center patients or employees, the NPIA would not apply to pharmaceuticals dispensed directly by the medical center to those individuals (unless, of course, they became patients at Alpena Regional Medical Center).

The Federal Trade Commission, however, has concluded that the NPIA does cover the transfer of supplies, at cost, from a non-profit hospital to another organization that is NPIA-eligible for its own purchases, so long as those supplies are for the receiving institution's "own use" within the meaning of the NPIA.¹⁰ Again, such a construction appears consistent with the NPIA's purpose, simply allowing an NPIA-eligible entity to obtain indirectly through another eligible entity supplies for its "own use" that it is entitled to obtain directly. Thus, the transfer of supplies from Alpena Regional Medical Center to APS for the school district's "own use" under its proposed program appears to fall within the scope of the NPIA.

⁷ See Valley Baptist Medical Center (Mar. 13, 2003) (FTC staff opinion letter).

⁸ *Id.*; see also Connecticut Hospital Association (Dec. 20, 2001) (FTC staff opinion letter).

⁹ 425 U.S. 1 (1976).

¹⁰ St. Peter's Hospital of the City of Albany, 92 F.T.C. 1037 (1978) (FTC advisory opinion).

4. Involvement of APS Participating Pharmacies in Implementing APS's Proposed Program

Under the proposed program, however, Alpena Regional Medical Center will not transfer the pharmaceuticals directly to APS for sale or distribution to the school district's employees and their dependents. Rather, the employees will purchase the pharmaceuticals from the APS Participating Pharmacies. The use of these pharmacies potentially raises concern under the Robinson-Patman Act because of their status as retail pharmacies operating in competition with other retail pharmacies in sales to the general public. If these pharmacies, for example, were to sell the discounted pharmaceuticals to walk-in customers, such activity would not qualify as being for APS's "own use," and the NPIA exemption for purchasing those pharmaceuticals at a discount by Alpena Regional Medical Center for APS would not apply.

In the proposed program, however, the involvement of the retail pharmacies is limited to serving as a mechanism to transfer the discounted pharmaceuticals from one NPIA-eligible institution to another, and to distribute them to the transferee's employees for that entity's "own use." Under federal and state law, APS itself is not permitted to directly distribute pharmaceuticals to its employees; this activity must be undertaken by a licensed and statutorily authorized entity, such as a pharmacy. The involvement of the APS Participating Pharmacies, which themselves are not covered by the NPIA exemption, will be limited to acting as agents for Alpena Regional Medical Center and APS in the transfer of the discounted pharmaceuticals to employees of the school district. In order to avoid any improper sales of the discounted pharmaceuticals to a non-exempt entity or for a non-exempt use, the APS Participating Pharmacies will establish a separate accounting mechanism of the type mentioned in *Abbott Laboratories*, to track these transactions.¹¹ We therefore do not believe that the use of the APS Participating Pharmacies as intermediaries for APS changes the substance of the analysis.¹²

This reasoning, and eligibility of the proposed program for the NPIA exemption, would not apply, however, if APS's proposed program resulted in the distribution of the discounted pharmaceuticals in a manner that did not qualify as being for the school district's permissible "own use" – for example if the APS Participating Pharmacies also filled prescriptions for walk-in customers using the pharmaceuticals purchased at a discount by Alpena Regional Medical Center for APS's program.

¹¹ See 425 U.S. at 19.

¹² APS's proposed program differs from that held not to fall within the NPIA exemption in *Students Book Co. v. Washington Law Book Co.*, 232 F.2d 49 (D.C. Cir. 1956), where the court held that the purchases involved were for resale by non-eligible campus bookstores for their own benefit, rather than for the benefit of the NPIA-eligible universities in which the bookstores were located.

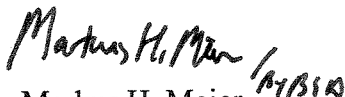
Likewise, the NPIA exemption would not apply if the discounted pharmaceuticals were to be sold by Alpena Regional Medical Center or the APS Participating Pharmacies at a profit. As we concluded in the FTC staff advisory opinion regarding *North Ottawa Community Hospital*, an institution making a transfer to another NPIA-eligible institution may charge the receiving institution only its acquisition cost for the materials plus a fee sufficient to cover any additional costs it incurs as a direct result of making the transfer (but not overhead expenses that the institution would incur without regard to the transfer).¹³ Alpena Regional Medical Center will retain the protection of the NPIA, therefore, so long as its transfer of pharmaceuticals to APS through the proposed program is at a price that does not exceed its direct costs in purchasing and transferring the materials. This limitation on Alpena Regional Medical Center's charges to APS for pharmaceuticals under the program also requires that Alpena Regional Medical Center not pay or reimburse the APS Participating Pharmacies, and pass back to APS as program costs, any charges by those pharmacies (such as overhead, fixed costs, or profit) beyond the direct costs attributable to their handling and dispensing under the proposed program the pharmaceuticals covered by the NPIA exemption.

Conclusion

As discussed above, and with the noted caveats, we conclude that the pharmaceutical-purchase-and-distribution program proposed by Alpena Public Schools 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. 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