

# Vinson & Elkins

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July 25, 2012

Markus H. Meier  
Assistant Director  
Federal Trade Commission  
Bureau of Competition  
Health Care Services and Products  
601 New Jersey Avenue  
Washington, D.C. 20001

***Re: Request for Staff Advisory Opinion Relating to the Non-Profit Institutions Act***

Dear Mr. Meier,

On behalf of The Methodist Hospital System (“Methodist”), I am submitting a request for a staff advisory opinion pursuant to 16 C.F.R. §1.1 regarding the applicability of the Non-Profit Institutions Act (“NPIA”) to the sale of pharmaceuticals by Methodist to Baytown EMS.

**Factual Background**

Methodist is a non-profit hospital system based in Houston, Texas, that purchases its pharmaceuticals through a distributor at a GPO discount. Methodist is comprised of five inpatient facilities as well as numerous outpatient surgery centers, imaging centers and emergency care centers. The discounted pharmaceuticals purchased by Methodist are used for its hospitalized patients for inpatient needs, emergency room patients, in-clinic treatment, as well as periodic discharge prescriptions.

Baytown EMS is a division of the City of Baytown, Texas. It employs 21 paramedics and provides critical medical care and emergency medical transportation services to the citizens of Baytown. As the exclusive transport providers for 9-1-1 service for the City of Baytown, Baytown EMS responds to approximately 8,200 calls for service each year, resulting in approximately 5,300 transports.<sup>1</sup> Baytown EMS patients are typically transported to Methodist’s Baytown facility, San Jacinto Methodist Hospital, a 392-bed general acute care inpatient facility located approximately 30 miles from Houston. It is the only facility in the Baytown area that offers a full range of acute care inpatient health services.

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<sup>1</sup> <http://www.baytown.org/safetyhealth/ems>

As you may know, drug shortages in the United States have been increasing in frequency and severity in recent years and adversely affecting patient care. As a result of these shortages, Baytown EMS has experienced difficulties keeping its ambulances stocked with certain prescription drugs that are critical to ensure quality patient care. In an effort to resolve the problem, Baytown EMS seeks to purchase certain drugs from Methodist that are in short supply.

Methodist's central institutional function is to deliver comprehensive acute health care services, including pharmaceuticals, to all of its patients. Its patients include Baytown area residents who rely on Baytown EMS's emergency transport services. Methodist is dedicated to quality patient care, and thus, would prefer that certain drugs be administered to patients while in transport to its Baytown facility rather than once the patient has arrived at the hospital. The administration of critical drugs at the first point of care rather than after transport can be critical to a patient's clinical outcome. Methodist, therefore, seeks to sell pharmaceuticals to Baytown EMS to ensure that the patients it serves receive critical care in a timely manner. Methodist proposes to sell pharmaceuticals to Baytown EMS at a price that does not exceed its direct costs in purchasing and transporting the drugs. In most cases the drugs are likely to be picked up by paramedics employed by Baytown EMS when making normal transport runs to Methodist's Baytown facility.

For the reasons explained below, we believe that the NPIA should apply to pharmaceuticals transferred by Methodist to Baytown EMS, but are writing to request an opinion from the FTC staff regarding the extension of the NPIA to this government agency.

### **Analysis**

The Robinson-Patman Act ("the Act") prohibits price discrimination between different purchasers to whom contemporaneous sales of like goods are made, where the effect of such discrimination may be to adversely affect competition. The Non-Profit Institutions Act ("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."<sup>2</sup> 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."<sup>3</sup>

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<sup>2</sup> 15 U.S.C. § 13c (emphasis added).

<sup>3</sup> *Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1 (1976).

According to the Commission's holding in *St. Peter's Hospital*, the Act covers the transfer of supplies, at cost, from a non-profit hospital to another charitable organization that is entitled to NPIA protection for its own purchases, so long as those supplies are for the receiving institution's "own use" within the meaning of the NPIA.<sup>4</sup>

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

The basic purpose of the Robinson-Patman Act is to eliminate unfair competition among those engaged in private enterprise where such practices might result in restraint of trade or injury to competition. The law seeks to cover within its scope every person engaged in business whose activities might restrain or monopolize commerce. Courts have held the federal government immune from liability under the Act, and in the NPIA, Congress specifically excluded non-profit organizations and certain other entities that are not otherwise engaged in competition in the private market.

As a division of the City of Baytown, Baytown EMS is a government instrumentality entitled to coverage under the NPIA. The rationale underlying the exclusion of public libraries, hospitals, and other non-profit institutions from the proscriptions of the Robinson-Patman Act are easily extended to Baytown EMS. Baytown EMS is engaged in a traditional government function of ensuring the health, safety and welfare of area residents. It does not compete with private parties within the meaning of the Act (e.g., it is the exclusive EMS service in Baytown), and its activities are not affected by a profit-making motivation. To the contrary, the services provided by Baytown EMS are undertaken on behalf of the City of Baytown to ensure the health of its citizens. In that sense the central institutional function of Baytown EMS is to provide a traditional government function, not to gain competitive advantage in the private market. Thus, Baytown EMS's eligibility under the NPIA appears entirely consistent with the intent of the NPIA to make the Act's exemption available to hospitals, public libraries and other charitable organizations.

2. Pharmaceuticals for Baytown EMS's "Own Use"

The sole purpose of Baytown EMS is to transport patients in need of emergency medical services to an area inpatient facility for acute care medical treatment. To alleviate the instances in which Baytown EMS lacks the appropriate drugs (as a result of the national drug shortage) to treat patients at the point of care, it seeks to purchase drugs from Methodist. The pharmaceuticals will be used by Baytown solely for the treatment of patients under its care

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<sup>4</sup> *St. Peter's Hospital of the City of Albany*, 92 F.T.C. 1037 (1978).

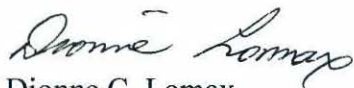
prior to or while en route to an acute care medical facility. The immediate administration of such drugs will enhance Baytown's ability to provide quality care to patients prior to their arrival at an acute care medical facility and enhance its ability to have good patient outcomes. Since the sole purpose of Baytown's use of the pharmaceuticals will enable it to carry out its activities as an emergency medical service provider to provide quality health care to area residents, we believe that the provision of discounted pharmaceuticals to Baytown EMS as part of its provision of emergency medical services to patients would be for its "own use," and thus would be covered by the NPIA exemption.

### **Conclusion**

As discussed above, we believe that the sale of pharmaceuticals by Methodist to Baytown EMS should receive coverage under the NPIA. Given its institutional purpose and function, Baytown EMS should be characterized as an NPIA-eligible institution. The pharmaceuticals will be sold to Baytown EMS at cost and will be used solely by Baytown EMS to care for patients prior to or while transporting patients to Methodist's Baytown facility or other acute care facilities. In many ways, the services provided by Baytown EMS are essentially an extension of Methodist's basic services to area residents and contributes directly to Methodist's ability to fulfill its central institutional function to deliver high-quality comprehensive acute health care services to its patients.

Should you have any questions or comments, please do not hesitate to contact me at 202-639-6610.

Sincerely,



Dionne C. Lomax  
Counsel for The Methodist Hospital System