



The Avenue to Discounts For Non-Profit Hospital Pharmacies

Meeting the Requirements of the Non-Profit Institutions Act

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In my commentary on page 632 in this issue of *P&T*, I discuss big changes in the federal government's Section 340B Drug Pricing Program. This program allows safety net hospitals and federally chartered health clinics to buy discounted pharmaceuticals; however, 340B is not the only federal program that kicks open the door to hospital purchases of discounted drugs.

Many hospital pharmacy directors and managers have never heard of the Non-Profit Institutions Act (NPIA) exemption to the Robinson-Patman Act of 1936. Understandably, all those who reside outside Washington, D.C., are probably rolling their eyes at that seemingly incomprehensible bit of bureaucratism, but the principle is rather simple. The Robinson-Patman Act—also called the Anti-Price Discrimination Act—was passed in 1936 to respond to the perceived unfairness of manufacturers that sold products at cheaper prices to chain stores, thereby creating a disadvantage to the chain's single-store competitors in a given town. The NPIA became law two years later and created a loophole for manufacturers to sell discounted products to *non-profit* entities such as hospitals, libraries, and universities that met certain criteria; the chief requirement was that they had to purchase the products for their *own use*.

The NPIA allows a hospital outpatient or inpatient pharmacy to use its volume purchasing to extract a price from a drug manufacturer that is lower than what the manufacturer would charge a retail pharmacy around the corner from the hospital. Again, the hospital pharmacy must designate the discounted drugs for its own use, a category that the Supreme

Court defined in a 1975 court case involving Abbott Labs. In that case, a retail pharmacy association in Portland, Oregon, sued Abbott, claiming that its discounted sales to a hospital under the NPIA posed a disadvantage to local Oregon pharmacies.

Of course, a non-profit hospital that also qualifies as a safety net hospital probably doesn't need the NPIA. However, keep in mind that safety net hospitals must meet a disproportionate share hospital (DSH) adjustment of 11.75%, which is a measure of the number of Medicaid patients it serves. These facilities must also agree not to buy drugs through a group purchasing organization (GPO). Not all non-profit hospitals can meet that 11.75% standard or want to forgo GPO pricing. For them, the NPIA is an alternative route for obtaining discounted drugs in addition to the use of a GPO.

In the Abbott case, the Supreme Court held that the NPIA exemption was a limited one; it did not give hospitals "a blank check" that applied to "whatever new venture the hospital finds attractive." Rather, the Court interpreted the "own use" test to shield only purchases that

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.

The Federal Trade Commission (FTC) has been applying the Supreme Court language ever since. If they wish, hospitals can ask the FTC for confirmation that they are eligible for NPIA status and that their projected "use" is kosher. An FTC blessing, however, is neither a safe harbor nor a protection against a private lawsuit.

The latest blessing conferred by the FTC came in August to Yakima Valley Memorial Hospital in the state of Washington. The request, as well as the FTC's approval, shows how complicated it is

to clarify the NPIA exemption. Yakima Hospital had already asked the FTC to approve its use of NPIA for drugs purchased for its own employees, and an advisory opinion had been forthcoming on that score. Therefore, Yakima could, in essence, approach the drug manufacturers supplying its inpatient and outpatient pharmacies and play one off against the other within a category; for example, it could hand out its purchases of antidepressants to the lowest bidder—and the manufacturers could agree to a lower price than what it charges the local CVS or Walgreens without running afoul of the Robinson-Patman Act. The discounts obtained are based on negotiation, not the 340B discounts, which are determined by a confusing, opaque formula dictated by the federal government.

Having received the FTC's blessing for NPIA sales to its hospital employees, Yakima Hospital was coming back for approval to buy NPIA discounted drugs for the employees of two subsidiaries: Memorial Physicians, PLLC, and Valley Imaging. In its analysis, the FTC concluded that the hospital and Valley Imaging were eligible non-profits but that Memorial Physicians was not. However, the FTC opined that any profits earned by Memorial Physicians would be used to advance its *intended institutional operation*, the boilerplate requirement from the Abbott case. Moreover, the agency concluded that the hospital had control over the two subsidiaries and that all three should be treated as one unit, making Memorial a *de facto* non-profit.

In the case of Yakima Hospital, it dispenses discounted drugs to employees. The intent here is to lower its health insurance costs for employees (and for the hospital itself). But some public hospitals declare NPIA status—with or without FTC approval—in order to provide cheaper drugs to patients. That was the case with the St. John's Regional Health Center in Joplin, Missouri. The center wanted to provide those discounted

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drugs to patients of clinics serviced by its three hospital-owned pharmacy sites. The hospital was already receiving preferential price treatment in its purchase of pharmaceuticals for treatment of hospital inpatients. The FTC had no objection to allowing it to get discounts for outpatients too, as long as St. John's established a separate accounting mechanism of the type mentioned in the *Abbott* case to make sure that patients coming in from the street (the 10% or so who did not fill prescriptions at the three pharmacies with a prescription from a St. John's physician in hand) did not get the cheaper drugs. ■