



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

Bureau of Competition  
Health Care Division

August 16, 2010

Robert J. Walerius  
4400 Two Union Square  
601 Union Street  
Seattle, Washington 98101

**Re: Yakima Valley Memorial Hospital Advisory Opinion**

Dear Mr. Walerius:

This letter responds to your request on behalf of Yakima Valley Memorial Hospital (“Memorial”) for an advisory opinion concerning whether its proposal to sell discounted pharmaceutical products to employees of two affiliates, Memorial Physicians, PLLC (“MP”) and Valley Imaging (“Valley”) would fall within the scope of 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.”<sup>1</sup> For the reasons explained below, and with the noted caveats, we have concluded that Memorial’s proposal would fall within the scope of the NPIA.

**Factual Background**

As we understand the facts based on information you provided, Memorial is a Washington non-profit corporation.<sup>2</sup> It began as an acute care hospital, and, over time, to better meet the needs of the population it serves, expanded the range of services it offers to include clinical care services.<sup>3</sup> It currently operates an on-site pharmacy and offers NPIA-discounted pharmaceuticals to its employees through the pharmacy. It now wants to extend the availability of the NPIA-

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<sup>1</sup> 15 U.S.C. § 13c.

<sup>2</sup> See Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 1 (Oct. 8, 2009).

<sup>3</sup> See Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 2 (June 4, 2010) (citing a desire to protect against potential physician shortages in its service area and a general trend among hospitals to function more as multipurpose health systems).

discounted pharmaceuticals to employees of two other affiliated entities: MP and Valley. Specifically, Memorial proposes to use NPIA-discounted pharmaceuticals in connection with prescriptions filled for MP and Valley employees at Memorial's on-site pharmacy.<sup>4</sup>

MP is a member-managed Washington professional limited liability company.<sup>5</sup> It operates a group of Memorial-owned outpatient medical clinics, providing services such as human resources, billing, and information systems for those clinics.<sup>6</sup> Memorial is MP's sole member. As MP's sole member, Memorial owns 100 percent of MP and "has total control over all of MP's operations, officers, and employees."<sup>7</sup> For instance, Memorial manages and controls MP's business affairs, appoints and removes MP officers, and makes decisions regarding MP's finances.<sup>8</sup> Furthermore, according to MP's Operating Agreement, MP at all times must "be operated in a manner consistent with and so as to preserve Memorial's 501(c)(3) tax exempt status under the Internal Revenue Code."<sup>9</sup>

Valley is a Washington State corporation that has elected to be treated as a non-profit corporation under Washington State law.<sup>10</sup> In 2008, it received an Internal Revenue Service

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<sup>4</sup> See Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 1 (Oct. 8, 2009).

<sup>5</sup> See Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 2 (Jan. 29, 2010).

<sup>6</sup> Memorial is in the process of merging these clinics into MP to reduce Washington State tax liability and to streamline their operations. The mergers will have no effect on the clinics' ownership or relationship to Memorial. See Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 5 (Mar. 30, 2010).

<sup>7</sup> See Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 4 (Mar. 30, 2010). Despite the ownership relationship between MP and Memorial, MP's employees are not covered by Memorial's health plan, because, after acquiring MP, Memorial decided to allow the MP employees to retain their plans for their convenience. See *id.*, at 4-5.

<sup>8</sup> See *id.*, at 3 - 4.

<sup>9</sup> See Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 2 (Jan. 29, 2010).

<sup>10</sup> See Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 1 (Oct. 8, 2009).

determination letter confirming its status as a 501(c)(3) tax-exempt entity.<sup>11</sup> It is a free-standing outpatient diagnostic imaging center that provides imaging services for Memorial's patients, and is geographically separate from Memorial. Valley does not operate under Memorial's hospital license or provider number, but Memorial is Valley's sole member.<sup>12</sup> As Valley's sole member, Memorial has "the exclusive right to control Valley by electing directors, authorizing the sale, lease, exchange of all or substantially all the property and assets of Valley, amending Valley's Articles of Incorporation and Bylaws, and voting on a merger or dissolution of the corporation."<sup>13</sup> You have represented that Valley is operated "exclusively for the benefit of, to perform the functions of, and to carry out the purposes of Memorial."<sup>14</sup>

## Analysis

### 1. Memorial's, MP's and Valley's Eligibility for the NPIA Exemption to the Robinson-Patman Act

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>15</sup> Because the NPIA is limited in its application to certain types of "eligible entities," we begin our analysis with a discussion of Memorial's, Valley's, and MP's eligibility for the exemption. Among other "eligible entities," the NPIA exempts from the Robinson-Patman Act "hospitals, and charitable

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<sup>11</sup> *See id.*

<sup>12</sup> *See* Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 3 (Jan. 29, 2010). *See also* Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 2 (Mar. 30, 2010). In your June 4, 2010 letter you clarified that apparent discrepancies between your representations relating to Memorial's membership in Valley and Valley's Articles of Incorporation were the result of Valley's change from a corporation to a non-profit. *See* Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 3 (June 4, 2010).

<sup>13</sup> *See* Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 4 (June 4, 2010). Only some of Valley's employees are covered by Memorial's health plan. As with MP, this is the result of Valley's acquisition history. Prior to 2004, Valley was owned by Memorial and another hospital. In 2004, Memorial obtained complete ownership of Valley and for their convenience, allowed Valley employees to keep their existing plan. *See* Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 5 (Mar. 30, 2010).

<sup>14</sup> *See* Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 2 (Oct. 8, 2009).

<sup>15</sup> 425 U.S. 1 (1976).

institutions not operated for profit.”<sup>16</sup> As you state in your letter, Memorial is a non-profit hospital.<sup>17</sup> Thus, by the language of the statute, Memorial appears to be an entity eligible for the exemption, and indeed already uses the exemption with regard to its hospital employees.<sup>18</sup>

Similarly, Valley has elected to be treated as a non-profit corporation as permitted under Washington State law. As we understand from the materials you have provided, the Washington State Nonprofit Corporations Act (RCW 24.03) allows Washington corporations to elect non-profit status without having to go through the expense and logistical complications of dissolving and reincorporating.<sup>19</sup> We further understand from the information that you have provided that a corporation making a non-profit election under Washington State law may only do so if it would otherwise qualify for non-profit treatment. That is, Valley was able to make the election for non-profit treatment because it would have met all of the requirements for incorporation as a non-profit in the first instance.<sup>20</sup> Furthermore, you have provided an Internal Revenue Service determination letter confirming Valley’s classification as a public charity.<sup>21</sup> Thus, Valley, as a non-profit, charitable organization appears also to be an eligible entity under the NPIA and could itself qualify to use NPIA-discounted pharmaceuticals in accordance with the “own use” requirement discussed below.

MP, on the other hand, is not a non-profit corporation. It is a professional limited liability company (“PLLC”).<sup>22</sup> You explain that MP must operate “in a manner consistent with and so as

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<sup>16</sup> 15 U.S.C. § 13c.

<sup>17</sup> See Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 1 (Oct. 8, 2009).

<sup>18</sup> See *id.*

<sup>19</sup> See Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 2 (Mar. 30, 2010).

<sup>20</sup> See Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 2 (Jan. 29, 2010). See also RCW 24.04.017 (“Any corporation organized under any act of the state of Washington for any one or more of the purposes for which a corporation may be organized under this chapter and for no purpose other than those permitted by this chapter, and to which this chapter does not otherwise apply, may elect to have this chapter and the provisions thereof apply to such corporation”).

<sup>21</sup> See Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at Tab C (Mar. 30, 2010).

<sup>22</sup> See Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 2  
(continued...)

to preserve Memorial's 501(c)(3) status,"<sup>23</sup> but, in our view, that requirement alone is not sufficient to allow us to conclude that MP is itself a non-profit eligible for the NPIA exemption. MP's eligibility must depend on its association with, and relationship to, an eligible entity – in this case Memorial.

## **2. Memorial's Provision of NPIA-Discounted Pharmaceuticals to MP and Valley Employees and the "Own Use" Requirement**

As we explained above, we conclude that both Memorial and Valley (but not MP) appear to be eligible entities under the NPIA and thus each could use NPIA-discounted pharmaceuticals for its "own use." As we understand the proposal, however, it is Memorial, through its on-site pharmacy, that will provide the NPIA-discounted pharmaceuticals to the Valley and MP employees.<sup>24</sup> Thus, we base the rest of our analysis on whether this use by Memorial (as the eligible entity) can properly be considered for Memorial's "own use."

The principal authority on the meaning and scope of the "own use" test is *Abbott Laboratories v. Portland Retail Druggists Association (Abbott Labs)*.<sup>25</sup> In that case, retail pharmacies sued pharmaceutical manufacturers under the Robinson-Patman Act, challenging the discounted sale of drugs to non-profit hospitals. The hospitals resold those drugs to patients in a number of different situations. The Supreme Court held that the NPIA exemption is a limited one, and does not give hospitals "a blank check" that applies to "whatever new venture the hospital finds attractive."<sup>26</sup> 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

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<sup>22</sup>(...continued)  
(Jan. 29, 2010).

<sup>23</sup> See Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 1 (Oct. 8, 2009).

<sup>24</sup> We note that there may be a variety of ways for Valley, which itself appears to be an eligible entity under the NPIA, to obtain the NPIA-discounted pharmaceuticals for its "own use." For instance, it would appear that as an eligible entity, Valley itself, independent of its affiliation with Memorial, could purchase and distribute the NPIA-discounted pharmaceuticals to its employees, or that Memorial could transfer NPIA-discounted pharmaceuticals to Valley for Valley's "own use." With this opinion, however, we only address the current proposal – to have Memorial extend the use of its NPIA-discounted pharmaceuticals to Valley's employees.

<sup>25</sup> 425 U.S. 1 (1976).

<sup>26</sup> *Id.*, at 13.

patients.”<sup>27</sup> The Court went on to determine that pharmaceuticals dispensed to certain categories of individuals, including hospital employees, would qualify for the hospital’s own use. Hospital employees were considered necessary for the hospital to carry out its intended institutional mission.<sup>28</sup>

As you explain, Memorial’s mission is to improve the health of those it serves.<sup>29</sup> It has operated as an acute care hospital. More recently, to continue to meet the changing needs of the community it serves, and in response to changes in the health care industry, it has expanded the range of health care services it offers to include clinical care.<sup>30</sup> To this end, you explain that it has acquired or formed entities such as MP and Valley,<sup>31</sup> and depends on the services provided by MP and Valley to meet its goal of improving the health of its patients.<sup>32</sup>

As we understand from your letters, both MP and Valley operate for the express purpose of supporting Memorial’s aim of fully meeting the health care needs of the people it serves. Both MP and Valley are controlled by Memorial and operated exclusively for Memorial’s benefit. Any profits earned by MP will be used to advance Memorial’s charitable mission.<sup>33</sup> Valley’s sole purpose is to offer its imaging technology in support of Memorial.<sup>34</sup>

We conclude, based on the facts you have provided, that Memorial’s central institutional function, within the meaning of *Abbott Labs*, is to deliver comprehensive health care services to

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<sup>27</sup> *Id.*, at 14 (emphasis in original).

<sup>28</sup> *Id.*, at 16.

<sup>29</sup> See Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 3 (June 4, 2010).

<sup>30</sup> See Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 3 (Mar. 30, 2010).

<sup>31</sup> See Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 2 (Jun. 4, 2010).

<sup>32</sup> See Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 3 (Jan. 29, 2010).

<sup>33</sup> See Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 2- 3 (Mar. 30, 2010).

<sup>34</sup> See Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 2 (Oct. 8, 2009).

its patients.<sup>35</sup> In furtherance of this mission, it acquired and operates MP and Valley. By virtue of its 100 percent ownership interest in MP and its status as sole member of Valley, Memorial effectively has ultimate control and decision-making authority over those entities.<sup>36</sup> It is our view that Memorial's control over both MP and Valley effectively makes those entities part of Memorial to such a degree that one could treat Memorial, MP, and Valley as one unit. This conclusion is consistent with a number of prior staff advisory opinions.<sup>37</sup> The employees of MP and Valley provide critical services to Memorial's patients, and these services are key to Memorial's ability to fulfill its intended institutional function of improving the health care of those it serves.<sup>38</sup> It thus appears to us to be consistent with both *Abbott* and prior advisory opinions to find that Memorial's provision of NPIA-discounted pharmaceuticals to employees of MP and Valley falls within the exemption.<sup>39</sup>

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<sup>35</sup> See *De Modena v. Kaiser Foundation Health Plan, Inc.*, 743 F.2d 1388, 1392-93 (9<sup>th</sup> Cir. 1984) (discussing the changing nature of the health care industry and accepting a broad institutional function of providing "a complete panoply of health care" services).

<sup>36</sup> See Letter from Robert J. Walerius, Miller Nash LLP, to Ellen Connelly, FTC, at 3- 4 (Mar. 30, 2010).

<sup>37</sup> See e.g. St. John's Health System (Sept. 2006) (staff opinion) (proper to treat the St. John's organization as a whole) (available at <http://www.ftc.gov/bc/advisoryopinions/060913stjohnsadvistoryopinion.pdf>); Valley Baptist Medical Center (Sept. 1996) (staff opinion) ("Valley Baptist's provision of medical services through its [affiliated] family practice clinic would be considered simply an extension of the hospital's basic services beyond its four walls and into a setting more accessible to the community and that therefore pharmaceuticals and other goods purchased for distribution as part of treatment provided by the Clinic would be purchased for Valley Baptist's own use") (available at <http://www.ftc.gov/bc/adops/valleyba.shtm>); William W. Backus Hospital (June 1996) (staff opinion) (treating the Backus organization as a whole) (available at <http://www.ftc.gov/bc/adops/backusfn.shtm>); Presentation Health System (Dec. 1993) (Commission opinion) (proper to treat hospitals and long-term care facilities that are separate corporate non-profit entities, but controlled by a single religious order, as a unit) (available at <http://www.ftc.gov/bc/adops/010.shtm>).

<sup>38</sup> We do not believe that, given the circumstances of Memorial's acquisition of MP and Valley, and its desire to allow the employees of those entities to maintain continuity of care, the particular health plan (Memorial or non-Memorial) to which the employees belong is determinative. The important points are that they appear to be properly considered employees of the Memorial system and that they enable Memorial to carry out its intended institutional function.

<sup>39</sup> See 425 U.S. 1, 16 (1976); Connecticut Hospital Association (Dec. 2001) (staff  
(continued...)

We emphasize, however, that the NPIA exemption is dependent on Memorial ensuring that no ineligible entity benefits from the exemption. MP itself does not appear to be independently eligible for the exemption, and our opinion is based on your assurance that any financial benefit from the proposal ultimately will accrue to Memorial by virtue of Memorial's relationship with MP.

### **Conclusion**

As discussed above, and with the noted caveats, we conclude that Memorial's proposal to extend the sales of discounted pharmaceuticals to employees of two affiliated entities – MP and Valley – appears to 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. 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 otherwise would be in the public interest to do so.

Sincerely,

Markus H. Meier  
Assistant Director

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<sup>39</sup>(...continued)  
opinion) (available at <http://www.ftc.gov/opa/2001/12/chaadvisopinionletter.shtm>); BJC Health System (Nov. 1999) (staff opinion) (treating BJCHS and its affiliates as part of one unit and finding that "BJCHS' employees, as a group, like the hospital employees in Abbott Labs, are directly related to the accomplishment of their employer's core functions") (available at <http://www.ftc.gov/bc/adops/bjclet.shtm>).