U.S. Department of Labor Pension and Welfare Benefits Administration
Washington, D.C. 20210

SEP 21 1989

ERISA OPINION 89-22A
Sec. 4(b)(5)

Mr. Peter M. Kelly
Bell, Boyd, & Lloyd
Three First National Plaza
Suite 3200
70 West Madison Street
Chicago, Illinois 60602

Dear Mr. Kelly:

This responds to your request for an advisory opinion regarding the status of the Walgreen Co. Irrevocable Grantor Trust (Trust) and the Walgreen Co. Supplemental Profit-Sharing Plan (Plan). Specifically, you inquired whether the operation of the Trust as described herein causes the Plan to be other than "unfunded" under section 4(b)(5) of the Employee Retirement Income Security Act of 1974 (ERISA). The facts and representations contained in your submission, as supplemented in a telephone conversation on October 10, 1988, with a representative of this Office, are summarized below.

Walgreen Co. (Walgreen) maintains a tax-qualified profit-sharing plan (qualified plan). In addition, Walgreen maintains the Plan to provide benefits to participants in the qualified plan who are employed at or above a specified salary grade, to the extent the contribution limitations of section 415 of the Internal Revenue Code (Code) prevent such benefits from being provided under the qualified plan. The Plan is intended to constitute an "excess benefit plan" within the meaning of section 3(36) of ERISA.

In general, the benefit provided by the Plan to a participant is determined in the following manner. The participant elects to defer the payment of compensation in the amount of 401(k) salary reductions and voluntary "after tax" contributions which would have been effected under the qualified plan but for the limitations of section 415 of the Code. The election to defer compensation must be made before performance of the services which give rise to the deferral and is irrevocable for the remainder of the plan year. The deferred compensation amounts, which are withheld from salary on a "before tax" basis, are credited to a bookkeeping account in favor of the participant. Other credits are made to a similar account in the amount of Walgreen matching contributions that also are not made to the qualified plan because of the section 415 limitations. The amounts credited to the bookkeeping accounts are adjusted to reflect the earnings, expenses, etc., that would be credited or debited if the amounts had been credited originally to similar accounts under the qualified plan. Subject to certain forfeiture provisions, the participant or his or her beneficiary will receive benefit payments under the Plan equal to the balance in the bookkeeping accounts. The amount of benefit to which a participant may be entitled under the Plan is unrelated to any amounts held under the Trust or the earnings on such amounts.

The Plan provides that all benefits thereunder are to be paid in cash from the general assets of Walgreen. The Plan also provides that the interests of participants and their beneficiaries are no greater than those of other unsecured creditors and are not subject to assignment, attachment, transfer, or encumbrance.

Walgreen established the Trust for the purpose of accumulating assets which may be used to satisfy obligations of Walgreen to its general creditors, including participants and beneficiaries of the Plan. The Trust is to become irrevocable 30 days after Walgreen receives rulings requested from the Internal Revenue Service (the Service), the Securities and Exchange Commission, and the Department of Labor (the Department). The Trust provides that when it becomes irrevocable, Walgreen will have no right or interest in any trust assets and no trust assets will revert or be repaid to Walgreen other than to satisfy its obligations to creditors. Walgreen may amend the Trust, except to provide for the return or repayment of trust assets to Walgreen or for the distribution of trust assets for any purpose other than payment of Walgreen's obligations to its creditors. Walgreen may in its discretion direct the trustee to use trust assets for paying benefits to participants and their beneficiaries under the Plan.

Under the Trust, if Walgreen becomes insolvent or becomes the subject of a reorganization or liquidation proceeding under federal bankruptcy laws, the trustee will hold trust assets for the benefit of Walgreen's general creditors and will transfer trust assets to satisfy the claims of such creditors as directed by a court of competent jurisdiction. Walgreen has the duty of informing the trustee in the event it becomes insolvent or the subject of such bankruptcy proceedings. The Trust also provides that Plan participants and beneficiaries are to be granted no greater rights to trust assets than are other general creditors of Walgren Co. in the event of Walgreen's insolvency or commencement of a reorganization or liquidation proceeding. The Trust provides further that creditors of Walgreen may not alienate or transfer, etc., any of the benefits or rights they may expect to receive under the Trust.

You request an advisory opinion to the effect that the establishment and operation of the Trust will not cause the Plan to be other than "unfunded" within the meaning of section 4(b)(5) of ERISA.

Section 4(b)(5) of ERISA exempts from the coverage of all of title I of ERISA a plan which is both "unfunded" and an "excess benefit plan" as defined in section 3(36) of ERISA. Section 3(36) defines an excess benefit plan as "a plan maintained by an employer solely for the purpose of providing benefits for certain employees in excess of the limitations on contributions and benefits imposed by section 415 of the Internal Revenue Code of 1954 on plans to which that section applies, without regard to whether the plan is funded."

The Department is generally of the view that any determination of the "funded" or "unfunded" status of a plan of deferred compensation requires an examination of the surrounding facts and circumstances, including the status of the plan under relevant non-ERISA law. In the absence of pertinent legislative history defining "unfunded" for purposes of title I of ERISA, the Department believes that in the case of excess benefit plans the positions adopted by the Service regarding the tax consequences to trust beneficiaries of the creation of, or contributions to, a trust such as that described herein should be accorded significant weight under title I. (See the enclosed Department's letter to the Service on that subject dated December 13, 1985.) It has thus been the working premise of the Department that an excess benefit plan would not fail to be "unfunded" solely because there is maintained in connection with such plan a "rabbi trust" of the kind described in the December 13, 1985 letter to the Service.[1]

Subsequent to your advisory opinion request, you submitted a copy of a private letter ruling Walgreen received from the Service in this matter. The conclusions reached by the Service on tax issues indicate that contributions to the Trust will not result in current taxation to Plan participants.

Based on the facts and representations submitted, and consistent with the Department's general views described above, it is the opinion of the Department that the Plan will not fail to be "unfunded," within the meaning of section 4(b)(5) of ERISA, solely because of the establishment and operation of the Trust described herein.

We note that you have not asked us to rule, and we provide no opinion in this letter, concerning whether the Plan constitutes an excess benefit plan within the meaning of section 3(36) of ERISA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Section 10 of the procedure explains the effect of advisory opinions.

[1] The "rabbi trusts" upon which the 1985 letter to the Service is based are those described in General Counsel Memorandum 39230 and Private Letter Rulings 8418105, 8113107, 8325100, 8329070, and 8502023.

Sincerely,

Robert J. Doyle
Director of Regulations and Interpretations

Enclosure