

U.S. DEPARTMENT OF LABOR
Pension and Welfare Benefit Programs

Washington, D.C. 20216



OPINION 80-9A
403(d)(1)

FEB 7 1980

J.M. Klancnik, Esq.
McDermott, Will & Emery
111 West Monroe Street
Chicago, Illinois 60603

Dear Mr. Klancnik:

This is in response to your letter of February 8, 1978, and subsequent submissions, concerning the provisions of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you request an advisory opinion regarding the applicability of section 403(d)(1) of ERISA to distribution of the assets of the Sall Brothers Company Pension Trust (the Plan).

The following representations are made in your submissions. The Plan is a defined benefit pension plan which was established by the Sall Brothers Company on March 30, 1966. On September 13, 1972, the stock of Sall Brothers was acquired by Eclipse, Inc. and Eclipse continued to maintain the Plan. By a notice dated February 23, 1973, employees of Sall Brothers were informed that effective February 28, 1973, Sall Brothers would be merged into Eclipse, and that vesting and accrual of benefits under, and contributions to, the Plan would cease as of that date. The February 23 notice also stated that "upon termination of the Plan the funds will be distributed according to provisions in the Trust Agreement."¹ The assets of the Plan have not yet

¹ You represent that the Trust Agreement provides, in relevant part, that "Upon the termination of the plan and trust and after payment of all expenses, the funds shall be applied in the following order to the extent of their sufficiency:

- (1) To provide retirement incomes for those already retired;
- (2) To provide retirement incomes for those who have attained age sixty (60) but have not retired;
- (3) To provide retirement incomes for all other participants.

In the event that such funds are insufficient to provide the retirement incomes for all of the persons in any one of the above groups, after having provided such incomes in full for all persons in the preceding group, the funds shall be allocated among the persons in such next

been distributed and continue to be held by a corporate trustee. Your submissions indicate that as of February 28, 1973, Plan assets totalled approximately \$111,000. You have provided a schedule of the benefits to which Plan participants would be entitled under the Plan's allocation provisions, which indicates that Plan assets would not be sufficient to provide full benefits to all participants. You have also submitted a letter dated January 27, 1978, from the Pension Benefit Guaranty Corporation (PBGC), which suggests the PBGC's view that February 28, 1973, was the Plan's termination date for purposes of Title IV of ERISA and which concludes that "the Plan terminated prior to the effective date of ERISA and is not covered by Title IV. Accordingly, Eclipse, Inc. does not need the approval of the PBGC to distribute Plan assets"

You propose to proceed with distribution of the Plan's assets and have requested an opinion whether section 403(d)(1) would require that the Plan make the distribution pursuant to section 4044 of ERISA rather than pursuant to the above described Plan provisions.

Section 403(d)(1) provides that

Upon termination of a pension plan to which section 4021 does not apply at the time of termination and to which [Part 4 of Title I of ERISA] applies (other than a plan to which no employer contributions have been made) the assets of the Plan shall be allocated in accordance with the provisions of section 4044 of [ERISA] except as otherwise provided in regulations of the Secretary [of Labor].

On the basis of your representations, and in view of the determination by the PBGC that the Plan "terminated," it appears that for purposes of section 403(d)(1) the Plan "terminated" prior to January 1, 1975, which (pursuant to section 414(a) of ERISA) is the date upon which Part 4 generally became effective. Accordingly, it is the opinion of the Department that section 403(d)(1) does not require the Plan to distribute its assets pursuant to section 4044. It should be noted however, that this interpretation is limited to the applicability of section 403(d)(1) in this case, and that in the Department's view Part 4 of Title I of ERISA generally governs the conduct of Plan fiduciaries during the period beginning on the effective date of that Part.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of the Procedure, including section 10, relating to the effect of advisory opinions.

Sincerely,

Alan D. Lebowitz
Assistant Administrator for Fiduciary Standards

group proportionately on the basis of the actuarial reserves required to provide such incomes in full for each such person."