U.S. Department of Labor

Labor-Management Services Administration
Washington, D.C. 20216

Reply to the Attention of:

OPINION 80-31A
3(2), 3(1)

MAY 22 1980

Abraham M. Stanger, Esq.
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375 Park Avenue
New York, New York 10022

Dear Mr. Stanger:

This is in response to your letters of March 4, 1977, and June 7, 1978, in which you requested an advisory opinion concerning the coverage under title I of the Employment Retirement Income Security Act of 1974 (ERISA) of five bond purchase plans currently maintained by Alexander's, Inc., and certain of its subsidiaries (the Existing Plans),[1] as well as a proposed bond purchase plan (the Consolidated Plan) in which these corporations contemplate consolidating the Existing Plans.

The following is a summary of the material facts and representations contained in your letters and of relevant provisions of the documents enclosed therewith. Each of the Existing Plans provides for the purchase of bonds issued by the employer maintaining the applicable plan by employees of that employer through a system of payroll deductions and employer contributions. The Consolidated Plan, which would be maintained by all of the employers currently maintaining the Existing Plans, would provide for a similar arrangement for the purchase by employees of bonds issued by Alexander's, Inc. (the successor by merger to Alexander's

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[1] The Existing Plans are:

Alexander's Department Stores, Inc., Employees' Profit-Sharing and Bond Purchase Plan;

Alexander's Department Stores of Lexington Avenue, Inc. Employees' Profit-Sharing and Bond Purchase Plan;

Alexander's Department Stores of Valley Stream, Inc. Employees' Profit-Sharing and Bond Purchase Plan;

Alexander's Department Stores of New Jersey, Inc. Employees' Profit-Sharing and Bond Purchase Plan; and

Alexander's Department Stores of Connecticut, Inc. Employees' Profit-Sharing and Bond Purchase Plan.

Department Stores, Inc.). Each Existing Plan states that its purpose is to enable employees of the employer maintaining the plan to share in such employer's profits and to help such employees "accumulate a competence for their old age."

Participation in each of the Existing Plans is voluntary. Participation is limited to two classes of employees of the employer sponsoring the plan. These classes of employees are designated as "Employees" and "Junior Executives". Participation in the Existing Plans is unavailable to employees who are participants in the Alexander's, Inc. Profit-Sharing and Retirement Plan. Participation in the Consolidated Plan would be subject to similar restrictions.

Pursuant to the terms of each of the Existing Plans and the Consolidated Plan, a participant is required to pay, through payroll deductions, to the trustee of the plan for credit to the participant's "bond purchase account" an amount equal to 10 percent of his weekly pay, not to exceed $4.00. Under the Existing Plans the employer sponsoring the plan matches these weekly payments on a dollar-for-dollar basis. Amounts in participants' bond purchase accounts are held in trust and deposited in a bank.

Under each of the Existing Plans, when the total of the payments made by a participant in the "Employee" category and the contributions made by such participant's employer on the participant's behalf equal $100, the trustee of the plan purchases a bond from the employer for $100 and the employer delivers the bond to the participant. When a participant in the "Junior Executive" category has completed 2 years of continuous employment in "Junior Executive" status with such participant's employer or an affiliate of the employer, such participant may elect to receive from the trustee either bonds in a principal amount equal to his bond purchase account balance (plus cash to the extent that the account balance exceeds an integral multiple of $100) or cash equal to his account balance.

Arrangements for distributions to participants under the Consolidated Plan would be similar to those under the Existing Plans, except that no employer contributions would be made to the trustee; instead, it appears that bonds in a principal amount of $100 would be issued for each $50 in a participant's account and participants with "Junior Executive" status electing to receive cash instead of bonds would receive cash directly from Alexander's, Inc. in an amount in which bonds would otherwise have been issued to the participant.[2] In addition, under the Consolidated Plan a distribution to a participant with "Junior Executive" status would occur when the participant ceases to be a "Junior Executive" or meets the requirements for participation in the Alexander's, Inc. Profit-Sharing and Retirement Plan. Under both the Existing Plans and the Consolidated Plan arrangements would be made for withholding and other payroll taxes.

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[2] It appears that under the Consolidated Plan, whether a participant with "Junior Executive" status elects to receive bonds or cash, distributions of cash from the participant's account balance would be paid without matching employer payments to the extent such distributions represent the excess of the account balance over an integral multiple of $100.

Bonds issued under the Existing Plans and Consolidated Plan are interested-bearing obligations of the company issuing them. The rate of interest payable in respect of the bonds is variable and is adjusted semiannually. The bonds are issued in annual series and all bonds of each series mature on January 1 of the 26th year following the year of issuance. Pursuant to the terms of the Existing Plans and Consolidated Plan, a participant may not transfer, assign, pledge or otherwise encumber any bond unless the participant first tenders it to the issuer of the bond at a price equal to its principal amount and accrued interest on it. Historically, each issuer has exercised its right to purchase any bonds offered by a participant. If a participant disposes of more than one-fourth of the aggregate principal amount of his bonds, he will be excluded from participation in the plan for a period of 6 months.

Amounts held in bond purchase accounts of participants with "Junior Executive" status are credited with interest, but amounts held in accounts of participants with "Employee" status are not.

One of the Existing Plans, Alexander's Department Stores, Inc. Employees' Profit-Sharing and Bond Purchase Plan, provides for the purchase by participants, at their option, of "supplementary" bonds with a portion of the interest paid on bonds purchased in the manner described above. These "supplementary" bonds bear interest at a fixed rate of 5 percent.

A participant who elects to participate in one of the Existing Plans or in the Consolidated Plan may request a refund of amounts which he has contributed to his bond purchase account but which have not yet been applied to the purchase of bonds. If the participant so requests, these amounts are refunded without interest and the participant is suspended from participation in the plan for a period of 6 months. Under the Existing Plans, amounts contributed to the participant's account by the participant's employer are returned to the employer when the participant's contributions not yet applied to the purchase of bonds are refunded.

In your letters you request that we conclude, on the basis of the foregoing representations, that neither the Existing Plans nor the Consolidated Plan are (1) employee welfare benefit plans within the meaning of section 3(1) of ERISA, (2) employee pension benefit plans within the meaning of section 3(2) of ERISA, or (3) employee benefit plans within the meaning of section 3(3) of ERISA.

Section 3(1) of ERISA provides the following:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or

> unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

Because the Existing Plans and Consolidated Plan do not provide any of the benefits enumerated in section 3(1), they are not employee welfare benefit plans within the meaning of section 3(1) of ERISA.

Section 3(2) of ERISA provides as follows:

> The terms “employee pension benefit plan” and “pension plan” mean any plan, fund or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program --
> (A) provides retirement income to employees, or
> (B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

The Existing Plans, by their express terms, are designed to help employees accumulate a competence for their old age. Thus, we think that the Existing Plans are employee pension benefit plans within the meaning of section 3(2) by their express terms.

The Consolidated Plan, like the Existing Plans, contains an explicit statement to the effect that it is designed to help employees accumulate a competence for their old age. Even if the Consolidated Plan did not contain such a statement, it nevertheless might be an employee pension benefit plan as a result of surrounding circumstances.

In this regard, the fact that the Consolidated Plan would apparently be the successor to the Existing Plans, which, as we have noted, we believe to be pension plans, and the fact that participation in the Consolidated Plan would be limited to employees who are ineligible for participation in a plan which is qualified under section 401(a) of the Internal Revenue Code of 1954, in our view, are factors that tend to indicate that the Consolidated Plan may be a pension plan within the meaning of section 3(2). Further, when considered in conjunction with the bonds purchased pursuant to it, the Consolidated Plan represents a program that provides income to employees. To the extent that employees acquire bonds under the Plans within 25 years before their retirement and retain such bonds beyond retirement, the income provided through the program would continue beyond retirement.

Thus, we think that the Consolidated Plan, considered in conjunction with the bonds issued under it, might be a program that, as a result of surrounding circumstances, provides retirement income

to employees. Under such circumstances, the Consolidated Plan would be an employee pension benefit plan within the meaning of section 3(2) of ERISA. To the extent that these factors also apply to the Existing Plans, they, too, might be pension plans as a result of surrounding circumstances even in the absence of an explicit recognition that they are designed to provide retirement income to employees.

In your letters you suggest that the Plans might be characterized as payroll savings plans, citing 29 CFR 2510.3-1(a)(2), which provides as follows:

> … a system of payroll deductions by an employer for deposit in savings accounts owned by its employees is not an employee welfare benefit plan within the meaning of section 3(1) of [ERISA] because it does not provide benefits described in section 3(1)(A) of [ERISA] or section 302(c) of the [Labor Management Relations Act, 1947]. (In addition, if each employee has the right to withdraw the balance in his or her account at any time, such a payroll savings plan does not meet the requirements for a pension plan set forth in section 3(2) of [ERISA] and, therefore, is not an employee benefit plan within the meaning of section 3(3) of [ERISA]).

In our view, the Plans described in your letters are not payroll savings plans described in §2510.3-1(a)(2). Unlike ordinary savings accounts, the bond purchase accounts have been established for the specific purpose of accumulating funds with which to purchase bonds from the employers, and the matching employer contributions, which are generally forfeited to the extent that participants withdraw their contributions before purchasing bonds, represent a substantial incentive for participants to apply their account balances to the purchase of the bonds. Further, the bond purchase accounts are not owned by employees but instead are held in trust. In determining the character of the Plans for purposes of ERISA, moreover, we do not think that the bond purchase accounts can be considered apart from the bonds to which they are linked. These bonds are unavailable to persons other than employees of their issuers or affiliates of such issuers, and may only be acquired through employment with the issuers or affiliates. You indicate that historically the bonds have been disposed of only by a transfer to the issuing employers or affiliates. In these respects, obligations evidenced by the bonds, in our view, are not materially different from the obligations that employers assume in establishing other types of retirement income programs for their employees. Under the circumstances described in your submissions, therefore, we do not think that the Plans can be characterized as mere payroll savings plans. Instead, as noted above, it appears that under certain circumstances the Plans, in conjunction with the bonds, may represent programs that provide retirement income to employees.

Section 3(3) of ERISA defines the term "employee benefit plan" to mean an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan. In view of our conclusion that the Plans which are the subject of your inquiry may be employee pension benefit plans, it appears that they may be employee benefit plans within the meaning of section 3(3) of ERISA.

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 thereof relating to the effect of advisory opinions.

Sincerely,

Ian D. Lanoff
Administrator of Pension and Welfare Benefit Programs