

the Act, the term “reasonable compensation” does not include any compensation to a fiduciary who is already receiving full-time pay from an employer or association of employers (any of whose employees are participants in the plan) or from an employee organization (any of whose members are participants in the plan), except for the reimbursement of direct expenses properly and actually incurred and not otherwise reimbursed. The restrictions of this paragraph (b)(2) do not apply to a party in interest who is not a fiduciary.

(3) *Certain expenses not direct expenses.* An expense is not a direct expense to the extent it would have been sustained had the service not been provided or if it represents an allocable portion of overhead costs.

(4) *Expense advances.* Under sections 408(b)(2) and 408(c)(2) of the Act, the term “reasonable compensation,” as applied to a fiduciary or an employee of a plan, includes an advance to such a fiduciary or employee by the plan to cover direct expenses to be properly and actually incurred by such person in the performance of such person’s duties with the plan if:

(i) The amount of such advance is reasonable with respect to the amount of the direct expense which is likely to be properly and actually incurred in the immediate future (such as during the next month); and

(ii) The fiduciary or employee accounts to the plan at the end of the period covered by the advance for the expenses properly and actually incurred.

(5) *Excessive compensation.* Under sections 408(b)(2) and 408(c)(2) of the Act, any compensation which would be considered excessive under 26 CFR 1.162-7 (Income Tax Regulations relating to compensation for personal services which constitutes an ordinary and necessary trade or business expense) will not be “reasonable compensation.” Depending upon the facts and circumstances of the particular situation, compensation which is not excessive under 26 CFR 1.162-7 may, nevertheless, not be “reasonable compensation” within the meaning of sections 408(b)(2) and 408(c)(2) of the Act.

[42 FR 32393, June 24, 1977]

**§ 2550.408e Statutory exemption for acquisition or sale of qualifying employer securities and for acquisition, sale, or lease of qualifying employer real property.**

(a) *General.* Section 408(e) of the Employee Retirement Income Security Act of 1974 (the Act) exempts from the prohibitions of section 406(a) and 406(b)(1) and (2) of the Act any acquisition or sale by a plan of qualifying employer securities (as defined in section 407(d)(5) of the Act), or any acquisition, sale or lease by a plan of qualifying employer real property (as defined in section 407(d)(4) of the Act) if certain conditions are met. The conditions are that:

(1) The acquisition, sale or lease must be for adequate consideration (which is defined in paragraph (d) of this section);

(2) No commission may be charged directly or indirectly to the plan with respect to the transaction; and

(3) In the case of an acquisition or lease of qualifying employer real property, or an acquisition of qualifying employer securities, by a plan other than an eligible individual account plan (as defined in section 407(d)(3) of the Act), the acquisition or lease must comply with the requirements of section 407(a) of the Act.

(b) *Acquisition.* For purposes of section 408(e) and this section, an acquisition by a plan of qualifying employer securities or qualifying employer real property shall include, but not be limited to, an acquisition by purchase, by the exchange of plan assets, by the exercise of warrants or rights, by the conversion of a security, by default of a loan where the qualifying employer security or qualifying employer real property was security for the loan, or in connection with the contribution of such securities or real property to the plan. However, an acquisition of a security shall not be deemed to have occurred if a plan acquires the security as a result of a stock dividend or stock split.

(c) *Sale.* For purposes of section 408(e) and this section, a sale of qualifying employer real property or qualifying employer securities shall include any disposition for value.

(d) *Adequate consideration.* For purposes of section 408(e) and this section, adequate consideration means:

(1) In the case of a marketable obligation, a price not less favorable to the plan than the price determined under section 407(e)(1) of the Act; and

(2) In all other cases, a price not less favorable to the plan than the price determined under section 3(18) of the Act.

(e) *Commission.* For purposes of section 408(e) and this section, the term “commission” includes any fee, commission or similar charge paid in connection with a transaction, except that the term “commission” does not include a charge incurred for the purpose of enabling the appropriate plan fiduciaries to evaluate the desirability of entering into a transaction to which this section would apply, such as an appraisal or investment advisory fee.

[45 FR 51197, Aug. 1, 1980]

**§ 2550.412-1 Temporary bonding requirements.**

(a) Pending the issuance of permanent regulations with respect to the bonding provisions under section 412 of the Employee Retirement Income Security Act of 1974 (the Act), any plan official, as defined in section 412(a) of the Act, shall be deemed to be in compliance with the bonding requirements of the Act if he or she is bonded under a bond which would have been in compliance with section 13 of the Welfare and Pension Plans Disclosure Act, as amended (the WPPDA), and with the basic bonding requirements of subparts A through E of part 2580, title 29 CFR, and with the prohibition against bonding by parties interested in the plan contained in subpart G of part 2580 of such title, or would be exempt from such bonding requirements because bonding would not be required under the exemption provisions contained in subpart F of part 2580 of such title. Part 2580 of this title incorporates material previously designated as subparts A through E of part 464, subpart B of part 465 and part 485 of this title of the CFR. The requirements which are set forth in the temporary regulations hereby adopted shall be applicable to all employee benefit plans covered by the Act, including those plans which were not covered by the WPPDA.

Thus, for example, the regulations so adopted are applicable to plans containing fewer than 26 participants, although such plans were not covered by the WPPDA.

(b) For the purpose of this temporary regulation, any bond or rider thereto obtained by a plan official which contains a reference to the WPPDA will be construed by the Secretary to refer to the Act: *Provided*, That the surety company so agrees.

(c) For the purpose of this regulation,

(1) Any reference to section 13 of the WPPDA or any subsection thereof in the regulations issued under the WPPDA and which are incorporated by reference by this temporary regulation shall be deemed to refer to section 412 of the Act, or the corresponding subsection thereof,

(2) Where the particular phrases set forth in the Act are not identical to the phrases in the WPPDA and the regulations issued pursuant thereto, the phrases appearing in the Act shall be substituted by operation of law, and

(3) Where the phrases are identical but the meaning is different, the meaning given such phrases by the Act shall govern. For example, the phrase “administrators, officers, and employees of any employee welfare benefit plan or of any employee pension benefit plan subject to this Act who handle funds or other property of such plan” which appears in section 13 of the WPPDA and the regulations issued thereunder shall be construed to mean, for purposes of this regulation, “plan officials”, which is the term appearing in section 412 of the Act, and the terms “employee welfare benefit plan” and “employee pension benefit plan” shall be given the meaning assigned to them by the Act, and not the meaning set forth in the WPPDA.

(d) The requirements of this temporary regulation, as set forth in paragraphs (a) through (c) of this section, shall remain in effect pending the issuance of permanent regulations by the Secretary.

[40 FR 2203, Jan. 10, 1975. Redesignated at 40 FR 20629, May 12, 1975, as amended at 50 FR 26706, June 28, 1985]