

proposes to acquire qualifying employer securities with a fair market value of \$10,000 by paying \$1,000 in cash and borrowing \$9,000. The fair market value of plan assets would be \$100,000 (\$100,000 of plan assets less \$1,000 cash payment plus \$10,000 of employer securities less \$9,000 indebtedness), the fair market value of the qualifying employer securities would be \$10,000, which is 10 percent of the fair market value of plan assets. Accordingly, the acquisition would not contravene section 407(a).

(2) Plan assets have a fair market value of \$100,000. The plan has liabilities of \$20,000 which were incurred in connection with the acquisition of those assets, and does not own any employer securities or employer real property. The plan proposes to pay cash for qualifying employer securities with a fair market value of \$10,000. The fair market value of plan assets would be \$80,000 (\$100,000 of plan assets less \$10,000 cash payment plus \$10,000 of employer securities less \$20,000 indebtedness), the fair market value of the qualifying employer securities would be \$10,000, which is 12.5 percent of the fair market value of plan assets. Accordingly, the acquisition would contravene section 407(a).

[42 FR 47201, Sept. 20, 1977]

§ 2550.407d-5 Definition of the term “qualifying employer security”.

(a) *In general.* For purposes of this section and section 407(d)(5) of the Employee Retirement Income Security Act of 1974 (the Act), the term “qualifying employer security” means an employer security which is:

(1) Stock; or

(2) A marketable obligation, as defined in paragraph (b) of this section and section 407(e) of the Act.

(b) For purposes of paragraph (a)(2) of this section and section 407(d)(5) of the Act, the term “marketable obligation” means a bond, debenture, note, or certificate, or other evidence of indebtedness (hereinafter in this paragraph referred to as “obligation”) if:

(1) Such obligation is acquired—

(i) On the market, either—

(A) At the price of the obligation prevailing on a national securities ex-

change which is registered with the Securities and Exchange Commission, or

(B) If the obligation is not traded on such a national securities exchange, at a price not less favorable to the plan than the offering price for the obligation as established by current bid and asked prices quoted by persons independent of the issuer;

(ii) From an underwriter, at a price—

(A) Not in excess of the public offering price for the obligation as set forth in a prospectus or offering circular filed with the Securities and Exchange Commission, and

(B) At which a substantial portion of the same issue is acquired by persons independent of the issuer; or

(iii) Directly from the issuer at a price not less favorable to the plan than the price paid currently for a substantial portion of the same issue by persons independent of the issuer;

(2) Immediately following acquisition of such obligation,

(i) Not more than 25 percent of the aggregate amount of obligations issued in such issue and outstanding at the time of acquisition is held by the plan, and

(ii) At least 50 percent of the aggregate amount referred to in paragraph (A) is held by persons independent of the issuer; and

(3) Immediately following acquisition of the obligation, not more than 25 percent of the assets of the plan is invested in obligations of the employer or an affiliate of the employer.

[42 FR 44388, Sept. 2, 1977]

§ 2550.407d-6 Definition of the term “employee stock ownership plan”.

(a) *In general—*(1) *Type of plan.* To be an “ESOP” (employee stock ownership plan), a plan described in section 407(d)(6)(A) of the Employee Retirement Income Security Act of 1974 (the Act) must meet the requirements of this section. See section 407(d)(6)(B).

(2) *Designation as ESOP.* To be an ESOP, a plan must be formally designated as such in the plan document.

(3) *Retroactive amendment.* A plan meets the requirements of this section as of the date that it is designated as an ESOP if it is amended retroactively