

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

to meet, and in fact does meet, such requirements at any of the following times:

- (i) 12 months after the date on which the plan is designated as an ESOP;
- (ii) 90 days after a determination letter is issued with respect to the qualification of the plan as an ESOP under this section, but only if the determination is requested by the date in paragraph (a)(3)(i) of this section; or
- (iii) A later date approved by the Internal Revenue Service district director.

(4) *Addition to other plan.* An ESOP may form a portion of a plan the balance of which includes a qualified pension, profit-sharing, or stock bonus plan which is not an ESOP. A reference to an ESOP includes an ESOP that forms a portion of another plan.

(5) *Conversion of existing plan to an ESOP.* If an existing pension, profit-sharing, or stock bonus plan is converted into an ESOP, the requirements of section 404 of the Act, relating to fiduciary duties, and section 401(a) of the Internal Revenue Code (the Code), relating to requirements for plans established for the exclusive benefit of employees, apply to such conversion. A conversion may constitute a termination of an existing plan. For definition of a termination, see the regulations under section 411(d)(3) of the Code and section 4041(f) of the Act.

(6) *Certain arrangements barred—(i) Buy-sell agreements.* An arrangement involving an ESOP that creates a put option must not provide for the issuance of put options other than as provided under § 2550.408b-3 (j), (k) and (l). Also, an ESOP must not otherwise obligate itself to acquire securities from a particular security holder at an indefinite time determined upon the happening of an event such as the death of the holder.

(b) *Plan designed to invest primarily in qualifying employer securities.* A plan constitutes an ESOP only if the plan specifically states that it is designed to invest primarily in qualifying employer securities. Thus, a stock bonus plan or a money purchase pension plan constituting an ESOP may invest part of its assets in other than qualifying employer securities. Such plan will be treated the same as other stock bonus

plans or money purchase pension plans qualified under section 401(a) of the Code with respect to those investments.

(c) *Regulations of the Secretary of the Treasury.* A plan constitutes an ESOP for a plan year only if it meets such other requirements as the Secretary of the Treasury may prescribe by regulation under section 4975(e)(7) of the Code. (See 26 CFR 54.4975-11).

[42 FR 44388, Sept. 2, 1977]

§ 2550.408b-1 General statutory exemption for loans to plan participants and beneficiaries who are parties in interest with respect to the plan.

(a)(1) *In general.* Section 408(b)(1) of the Employee Retirement Income Security Act of 1974 (the Act or ERISA) exempts from the prohibitions of section 406(a), 406(b)(1) and 406(b)(2) loans by a plan to parties in interest who are participants or beneficiaries of the plan, provided that such loans:

- (i) Are available to all such participants and beneficiaries on a reasonably equivalent basis;
- (ii) Are not made available to highly compensated employees, officers or shareholders in an amount greater than the amount made available to other employees;
- (iii) Are made in accordance with specific provisions regarding such loans set forth in the plan;
- (iv) Bear a reasonable rate of interest; and
- (v) Are adequately secured.

The Internal Revenue Code (the Code) contains parallel provisions to section 408(b)(1) of the Act. Effective, December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to promulgate regulations of the type published herein to the Secretary of Labor. Therefore, all references herein to section 408(b)(1) of the Act should be read to include reference to the parallel provisions of section 4975(d)(1) of the Code.

Section 1114(b)(15)(B) of the Tax Reform Act of 1986 amended section 408(b)(1)(B) of ERISA by deleting the