

[6720-01]

**CHAPTER V—FEDERAL HOME LOAN BANK BOARD**

**SUBCHAPTER B—FEDERAL HOME LOAN BANK SYSTEM**

**PART 523—MEMBERS OF BANKS**

**Reduction of Liquidity Requirement**

APRIL 11, 1978.

AGENCY: Federal Home Loan Bank Board.

ACTION: Final rule.

**SUMMARY:** This amendment reduces the overall liquidity requirement of each Federal Home Loan Bank member from 7 to 6½ percent of its liquidity base and reduces each member's short-term liquidity requirement from 3 to 2½ percent of such base. This action is taken because savings flows into members have continued at a reduced pace, increasing pressure on the supply of mortgage funds as indicated by increases in interest rates charged on mortgage loans. The new requirement unfreezes funds for mortgage lending that were previously required to be held in liquid assets.

**EFFECTIVE DATE:** May 1, 1978.

**FOR FURTHER INFORMATION CONTACT:**

Harry W. Quillian, Associate General Counsel, telephone 202-377-6440.

**SUPPLEMENTARY INFORMATION:** This action will free up about \$2 billion in funds that are presently required to be held in liquid assets and which will now be available for mortgage lending. Increased pressure on the supply of mortgage funds has been indicated by increases in interest rates charged on mortgage loans, and this action should ease those pressures, although the mortgage market reflects the influence of general economic and financial developments and the impact of monetary policy. Further reductions in liquidity requirements will be considered if they appear needed.

The Bank Board finds that (1) notice and public procedure are unnecessary under 5 U.S.C. § 553(b) and 12 CFR 508.11, because this amendment relieves restriction, and (2) publication of this amendment for the 30-day notice specified in 5 U.S.C. § 553(d) and 12 CFR 508.14 prior to effective date is unnecessary for the same reason.

Accordingly, the Bank Board hereby revises section 523.11(a) of the Regulations for the Federal Home Loan Bank System (12 CFR 523.11(a)) to read as set forth below, effective May 1, 1978.

§ 523.11 Liquidity requirements.

(a) *General.* For each calendar month, each member, other than a

mutual savings bank as to which there is in effect the election provided for in paragraph (e) of this section, shall maintain an average daily balance of liquid assets in an amount not less than 6½ percent of the average daily balance of the member's liquidity base during the preceding calendar month, except as otherwise provided in paragraphs (b) and (d) of this section. For each calendar month, each member, other than a mutual savings bank or an insurance company, shall maintain an average daily balance of short-term liquid assets in an amount not less than 2½ percent of the average daily balance of the member's liquidity base during the preceding calendar month, except as otherwise provided in paragraphs (b) and (d) of this section.

(Sec. 5A, 47 Stat. 727, as added by sec. 1, 64 Stat. 252, as amended, sec. 17, 47 Stat. 736, as amended; 12 U.S.C. 1425a, 1437. Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943-48 Comp., p. 1071.)

By the Federal Home Loan Bank Board.

RONALD A. SNIDER,  
Assistant Secretary.

[FR Doc. 78-11596 Filed 4-27-78; 8:45 am]

[8010-01]

**Title 17—Commodity and Securities Exchanges**

**CHAPTER II—SECURITIES AND EXCHANGE COMMISSION**

[Release Nos. 33-5927; 34-14699]

**PART 231—INTERPRETATIVE RELEASES RELATING TO THE SECURITIES ACT OF 1933 AND GENERAL RULES AND REGULATIONS THEREUNDER**

**PART 241—INTERPRETATIVE RELEASES RELATING TO THE SECURITIES EXCHANGE ACT OF 1934 AND GENERAL RULES AND REGULATIONS THEREUNDER**

**Interpretations Concerning the Application of Registration Requirements to Certain Tender Offers and the Application of Tender Offer Provisions to Certain Cash-Option Mergers**

AGENCY: Securities and Exchange Commission.

ACTION: Publication of staff interpretations.

**SUMMARY:** The Securities and Exchange Commission today authorized

the issuance of this release reflecting the views of the Division of Corporation Finance with respect to two issues arising under the Williams Act: (1) Whether disclosure by a bidder in certain cash tender offers about previous negotiations or agreements for a merger with and/or future intentions to merge with the subject company involves "gun jumping" and thus violates section 5 of the Securities Act of 1933; and (2) whether the cash option features of certain statutory mergers involve a tender offer by the acquiring company. With respect to the first issue, the Division of Corporation Finance has withdrawn a position taken in a previous letter and has expressed its view in this release that disclosure by a bidder in a tender offer required by the Williams Act about previous negotiations or agreements with the subject company regarding a merger or future intentions to merge with the subject company does not involve "gun jumping." With respect to the second issue, the Division has expressed the view in this release that, while the issue is not free from doubt, the division will not suggest a Williams Act filing on Schedule 14D-1 in connection with certain statutory mergers involving a cash option feature.

**FOR FURTHER INFORMATION CONTACT:**

John Huber, Office of Disclosure Policy and Proceedings, Division of Corporation Finance, Securities and Exchange Commission, 500 North Capitol Street, Washington, D.C. 20549, 202-755-1750.

**SUPPLEMENTARY INFORMATION:** This release presents the views of the Division of Corporation Finance (the "Division") with respect to two issues which concern tender offers and statutory mergers. The first relates to the application of certain provisions of the Securities Act of 1933 (the "1933 Act") (17 U.S.C. 77a et seq.)<sup>1</sup> and rules promulgated thereunder<sup>2</sup> to certain dis-

<sup>1</sup>Section 2(3) of the 1933 Act provides in pertinent part:

The term "offer to sell," "offer for sale," or "offer" shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value.

Section 5(c) of the 1933 Act provides in pertinent part:

It should be unlawful for any person . . . to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security . . .

It is clear from sections 2(3) and 5 of the 1933 Act that no offer or sale of a security to be registered can be made before the filing of a registration statement. The issue arising prior to the filing of a registration statement is determining what constitutes an offer.

<sup>2</sup>Rule 135, 17 CFR 230.135, sets forth communications to investors which shall not be

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closure required to be made by bidders in cash tender offers. The second concerns the application of the tender offer provisions of the Securities Exchange Act of 1934 (the "1934 Act") (15 U.S.C. 78a et seq., as amended by Pub. L. 94-29 (June 24, 1975)), commonly known as the Williams Act.<sup>3</sup>

Footnotes continued from last page  
deemed offerings of securities. Rule 145(a)(2), 17 CFR 240.145(a)(2), promulgated under the 1933 Act provides in pertinent part:

An "offer," "offer to sell," offer for sale or "sale" shall be deemed to be involved within the meaning of section 2(3) of the Act, so far as the security holders of a corporation \* \* \* are concerned where, pursuant to statutory provisions of the jurisdiction under which such corporation \* \* \* is organized, or pursuant to provisions contained in its certificate of incorporation or similar controlling instruments, or otherwise there is submitted for the vote or consent of such security holders a plan or agreement for \* \* \* [A] statutory merger or consolidation \* \* \* in which securities of such corporation \* \* \* held by such security holders will become or be exchanged for securities of any other person, \* \* \*.

The effect of Rule 145(a) is to require registration for the securities to be issued in connection with the transaction specified unless an exemption from registration is available. See release No. 33-5316, 37 FR 23631 (November 7, 1972).

<sup>3</sup>The Williams Act Amendments to the 1934 Act enacted in 1968, Pub. L. 90-439, 82 Stat. 454 (July 29, 1968), and amended in 1970, Pub. L. 91-567, 84 Stat. 1497 (December 22, 1970), provided, as among other things, for Federal regulation of tender offers. Section 14(d) of the 1934 Act is applicable to a class of equity securities which is registered pursuant to section 12 of the 1934 Act or which would have been required to be registered pursuant to that section except for a specific statutory exemption for insurance companies or which has been issued by a closed-end investment company registered under the Investment Company Act of 1940. Generally, section 14(d) makes it unlawful for any person (or group of persons) to make a tender offer for or request or invitation for tenders of such securities which, upon consummation, would result in that person being the direct or indirect beneficial owner of more than 5 percent of such class of securities unless at the time the tender offer is first published, sent or given to security holders that person has filed with the Commission a statement containing such of the information specified in section 13(d) of the 1934 Act and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. Among other things, section 14(d) also contains regulatory provisions relating to shareholders' withdrawal rights and their pro rata acceptance rights, as well as the bidder's obligation to treat all tendering shareholders equally with respect to the consideration offered. Section 14(d)(4) requires that any solicitation or recommendation to security holders to accept or reject the tender offer be made in accordance with rules adopted by the Commission. Section 14(e), which is applicable to all tender offers and to any solicitation or recommendation related there-

and Rule 14d-1, 17 CFR 240.14d-1 and Schedule 14D-1, 17 CFR 240.14d-100, promulgated thereunder<sup>4</sup> to certain statutory mergers.

In order to inform the public of the Division's views on these matters, this release contains a general discussion of the issues, describes the fact situations involved and with respect to the first issue publishes a "no-action" letter recently issued by the Division which withdraws a much criticized position taken in a previous letter.

#### "GUN JUMPING" IN THE CONTEXT OF A CASH TENDER OFFER

The first issue is whether compliance with the Williams Act may involve "gun jumping" in violation of the 1933 Act in the context of a cash tender offer. This issue arises in the following fact pattern ("Situation A"):

The acquiring company and the acquired company discuss or agree in principle to a merger or enter into a plan of merger. After these discussions or after the negotiations of the material terms of the agreement of merger have been concluded, the acquiring company makes a cash tender offer for less than all of the equity securities of the acquired company. This tender offer may either have been the subject of discussions between the parties or may constitute a condition to the merger agreement. The shareholder vote on the merger agreement occurs subsequent to the tender offer. If the tender offer did not result in the purchase by the acquiring company of the requisite percentage of the outstanding shares of the acquired company, the merger agreement which is voted upon by the shareholders may include a provision for cash election rights. Under this provision, shareholders of the acquired company may elect to receive cash in lieu of the securities of the acquiring company: *Provided*, That the total number of shares for which cash is paid (including those shares acquired pursuant to the tender offer) does not exceed a specified percentage of the outstanding shares of the acquired company. In the event the cash option is exercised with respect to more than the specified percentage, cash is paid on a pro rata basis. The cash election option may be exercised by the shareholders during the time between the notice for the meeting and the vote on the merger. Shareholders who elect to receive cash are typically required to submit a Form of Election to the acquiring company's agent. The stock certificates or a guarantee of delivery of such certificates accompany the Form of Election. As with the proxy on the merger, the election to receive cash in lieu of the acquiring company's securities may be withdrawn by an electing shareholder until shortly before the shareholders' meeting. If

to, makes it unlawful for any person to make any untrue statement of a material fact or to omit any material fact necessary to make the statements made not misleading or to engage in any fraudulent, deceptive, or manipulative acts or practices in connection with any tender offer or any solicitation or recommendation related thereto.

<sup>4</sup>Release No. 34-13787, 42 FR 38341 (July 21, 1977).

the acquiring company is able to purchase the requisite percentage of the outstanding shares of the acquired company pursuant to the tender offer, the cash election rights alternative is normally not included in the merger.

The issue here is whether the acquiring company's disclosure in its tender offer materials of the negotiations with the acquired company and/or the merger agreement, including the material terms of the statutory merger contemplated subsequent to the tender offer, constitutes an "offer to sell" the securities of the acquiring company to be received by the acquired company's shareholders pursuant to the merger within the meaning of section 2(3) of the 1933 Act and Rule 145(a) promulgated thereunder. A finding that such disclosure constitutes an "offer to sell" leads to the conclusion that the bidder's tender offer violates section 5(c) of the 1933 Act if at the time of the tender offer a registration statement for the acquiring company's securities to be exchanged in the merger has not been filed with the Commission.

This issue was addressed in a letter to the Bendix Corp. ("Bendix") from the Division (available November 30, 1976). That letter concerned a proposed merger of Ex-Cell-O Corp. ("Ex-Cell-O") into Bendix. After the agreement in principle was signed but before the distribution of proxy statements and the vote by shareholders on the merger, Bendix proposed to make a tender offer for up to 40 percent of the outstanding shares of Ex-Cell-O common stock at \$30 per share. The tender offer materials to be delivered to the Ex-Cell-O shareholders would contain a brief description of the principal terms of the merger,<sup>5</sup> including the basis of exchange and a statement that after Bendix and Ex-Cell-O entered into a definitive merger agreement proxy statements concerning the merger would be distributed to the shareholders of both companies. In its letter to Bendix, the Division took the position that the Ex-Cell-O shareholder when confronted with the Bendix tender offer would be making an investment decision to accept either the cash offered in the tender offer or to take the Bendix stock later. On this basis, the Division was unable to conclude that the tender offer did

<sup>5</sup>The terms of the proposed merger contemplated: the conversion of each share of Ex-Cell-O common stock into three-fourths of a share of Bendix common stock; and a cash option to the Ex-Cell-O shareholders. The cash option would be included in the merger agreement only if Bendix acquired less than 40 percent of the outstanding common stock of Ex-Cell-O pursuant to its tender offer and would be limited to the acquisition for cash of 40 percent (including those shares acquired in the tender offer) of the outstanding common stock of Ex-Cell-O.

not constitute an "offer to sell" the Bendix common stock to be exchanged in the subsequent merger within the meaning of section 2(3) of the 1933 Act and Rule 145 thereunder. The implication from the Bendix letter is that, unless the bidder/acquiring company has filed a registration statement at the time the cash tender offer commences, the disclosure in the cash tender offer of the material terms of the subsequent merger violates section 5(c) of the 1933 Act.

On August 31, 1977, Schedule 14D-1 and the amendments to Rule 14d-1 implementing the filing and disclosure requirements of that Schedule became effective. The various items of Schedule 14D-1<sup>6</sup> highlighted the disclosure required to be made by a bidder with respect to Situation A in a tender offer subject to section 14(d)(1) of the 1933 Act and Rule 14d-1 thereunder.

One of the new disclosure requirements is Item 3(b) which requires a bidder to describe any contacts, negotiations or transactions which have occurred since the commencement of the subject company's third full fiscal year preceding the filing date of the Schedule between the bidder and the subject company concerning: A merger, consolidation or acquisition, a tender offer or other acquisition of securities; an election of directors; or a sale or other transfer of a material amount of assets. This requirement is intended to provide security holders with more meaningful disclosure concerning certain events occurring prior to the tender offer which can have a material effect on a shareholder's investment decision concerning the tender offer.

Item 5(a) of Schedule 14D-1 parallels the former requirement of Item 4 in Schedule 13D by requiring a bidder to describe any plan or proposal it has which relates to or would result in an extraordinary corporate transaction involving the subject company or any of its subsidiaries such as a merger, reorganization, or liquidation.<sup>7</sup> The disclosure required by item 5(a) of Schedule 14D-1 is consistent with and implements the legislative history<sup>8</sup> of the Williams Act. As one commentator has observed:

<sup>6</sup>Although Schedule 14D-1 retained much of the substance of Schedule 13D, 17 CFR §240.13d-100, which had previously been required for filings pursuant to Section 14(d)(1) of the 1933 Act, certain items were significantly modified and new items were included. See Release No. 34-13787, 42 FR 38341 (July 21, 1977).

<sup>7</sup>The examples contained in Item 5(a) are not intended to be exclusive but rather are intended to furnish guidance as to the type of extraordinary corporate transaction which requires disclosure. Id. at 38345.

<sup>8</sup>See generally Hearings on S.510 before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong. 1st Sess. 126-50 (1967).

Disclosure of plans and proposals was probably the most controversial part of the Williams Bill that passed, but it was diversely and severely opposed. For Congress to reject this nearly unanimous criticism, and to depart from a strong tradition (of nondisclosure), it must have been deeply convinced of the importance of disclosing plans.<sup>9</sup>

Thus, Items 3(b) and 5(a) of Schedule 14D-1 recognize that a tender offer may not be an isolated event in the corporate affairs of the bidder and the subject company and that a shareholder should be furnished with a continuum of disclosure with respect to certain past contacts, negotiations or transactions between the bidder and the subject company as well as the bidder's present intentions concerning its plans or proposals with respect to the subject company after the tender offer.

Additionally, Item 7 of Schedule 14D-1 which represents an expansion of a similar requirement in Schedule 13D requires the bidder to describe any contract, arrangement, understanding or relationship between the bidder and any person with respect to any securities of the subject company. The disclosure required by Item 7 includes a description of the material terms of any such contract, arrangement, understanding or relationship.

Not only does Rule 14d-1(a) require the information contained in Items 3(b), 5(a) and 7 to be filed with the Commission in Schedule 14D-1, but Rule 14d-1(c)(4) requires these items or a fair and adequate summary thereof to be included in the tender offer which is published, sent or given to the subject company's security holders. Accordingly, disclosure by a bidder of negotiations with the subject company, and/or an agreement in principle or plan of merger entered into with the subject company is required by section 14(d)(1) of the Exchange Act and the rules and Schedule 14D-1 promulgated thereunder. Indeed, the omission of such disclosure in the Schedule 14D-1 filed with the Commission or the tender offer materials communicated to security holders would constitute a violation of the provisions of the Williams Act.

The disclosure philosophy of the Williams Act is juxtaposed with the "gun jumping" doctrine under the 1933 Act. That doctrine was designed to prevent an issuer from conditioning the market by arousing investor interest before a registration statement covering the securities proposed to be offered has been filed.<sup>10</sup> In the Division's view, such a doctrine is inappropriate to apply to a cash tender offer subject to section 14(d) in which the bidder is seeking to buy the securities of the subject company's security holders. The bidder's concern is purchasing the subject company's securities for cash, not priming the market for a subsequent registered offering of securities. Regardless of the bidder's intent, Schedule 14D-1 for compelling policy reasons reflected by the Williams Act requires such information in order to provide full disclosure to investors confronted with an investment decision in the context of a tender offer. In the Division's opinion, to apply the "gun jumping" doctrine to Situation A would not further the policies underlying the 1933 Act and would be inconsistent with the intention of Schedule 14D-1 to require disclosure of information available to the bidder regarding its previous contacts, arrangements or agreements and future plans and proposals with respect to the subject company.<sup>11</sup>

In light of the above, the Division believes on reconsideration that the position it took in the Bendix letter was not necessary for the protection of investors and has withdrawn that letter. In the Division's view, the disclosure required by the Williams Act to be made by a bidder in a cash tender offer concerning the subsequent statutory merger in Situation A should not be deemed to constitute an "offer to sell" the bidder's securities to be exchanged in such merger and should not therefore require the filing of a registration statement pursuant to the 1933 Act with respect to such securities prior to the commencement of such tender offer. Such disclosure should be viewed under the 1933 Act as are other written communications or published statements permitted prior to the filing of a registration statement.<sup>12</sup>

<sup>11</sup>This position is consistent with a recent judicial opinion and the views expressed by the Commission in a letter *amicus curiae* concerning that litigation. *Humana Inc. v. American Mediacorp, Inc. Trans World Airlines, Inc. and Hilton International Co.*, 77 Civ. 4809 (S.D.N.Y. January 7, 1978) (Transcript of bench opinion at 162 et seq.) and Letter to Judge Lasker from the Commission, dated January 6, 1978, re: *Humana Inc. v. American Mediacorp, Inc., Trans World Airlines, Inc. and Hilton International Co.* 77 Civ. 4809 (M.E.L.).

<sup>12</sup>In the context of reclassifications, mergers, consolidations and transfers of assets, these statements are governed by Rule 145(b), 17 CFR 230.145(b), and in other situations by Rule 135. Rule 145(b) provides that written communications or other published statements which contain no more than the information specified in Rule 145(b) shall not be deemed a prospectus for purposes of Section 2(10) of the 1933 Act and shall not be deemed an "offer for sale" of the security involved for purposes of Section 5 of the 1933 Act. Specifically, statements made with respect to Situation A by

<sup>9</sup>Bromberg, *The Securities Law of Tender Offers*, 15 N.Y.L.F. 462, 501 (1969) (footnote omitted).

<sup>10</sup>See *Diskin v. Lomasney & Co.*, 452 F.2d 871 (2d Cir. 1971); *SEC v. Commercial Investment & Development Corp.* 373 F. Supp. 1153 (S.D. Fla. 1974); and *SEC v. Arvida Corp.*, 169 F. Supp. 211 (S.D.N.Y. 1958).

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The Division's position is, however, limited to the disclosure permitted by Rule 145(b) and to the disclosure required to be made by section 14(d)(1) of the 1934 Act, Schedule 14D-1 promulgated thereunder and section 14(e) of the 1934 Act. Depending upon the circumstances, statements which are not required by the Williams Act may constitute an "offer to sell" the securities to be exchanged in the subsequent merger and, in the absence of a registration statement filed with the Commission at the commencement of the tender offer, may constitute a violation of section 5 of the 1933 Act. For example, a bidder should not issue press releases or grant interviews to the press which discuss a possible merger under circumstances where it appears that the decisions of security holders who will be voting on the merger may be unduly influenced without the benefit of the disclosures in a registration statement.

In order to announce the Division's position in this matter, the Commission authorized the Division to issue the following letter:<sup>13</sup>

Dear Sirs:

This is in response to your letter of March 23, 1978 as supplemented by telephone conversations with the staff and your letter of April 3, 1978. The letter concerns the applicability of certain provisions of the Securities Act of 1933 (the "1933 Act") to the tender offers proposed to be made by Company X ("X") for the common stock of Company Y ("Y") and for the —% Convertible Bonds due 1983 (the "Y Bonds") of Company Z, a wholly-owned subsidiary of Y. Since your letter of April 3, 1978, you have advised the staff that X no longer contemplates making a tender offer for the Y Bonds.

We understand the material facts, as more fully set forth in your letters, to be as follows. On March 2, 1978, X and Y announced in a joint press release that they had agreed in principle to a merger transaction by which Y would become a wholly-owned subsidiary of X. In the merger, X will issue one share of X Preferred Stock having a liquidating value of \$— per share (the "X Preferred") for each outstanding share of common stock of Y ("Y Common").

The parties are presently negotiating a definitive agreement of merger (the "Agreement of Merger") which will be subject, among other things, to the approval of both boards of directors and to the approval of the shareholders of Y.

X and Y contemplate that the Agreement of Merger will contain provisions pursuant to which holders of outstanding Y Common may elect to receive at the completion of the merger \$— cash per share of Y Common, in lieu of X Preferred (the "Cash

Election Rights"). It is proposed that Y shareholders will be entitled until shortly before the Y shareholders' meeting to exercise their Cash Election Rights. The total number of Y Common for which cash is paid pursuant to the tender offer for Y Common, described below, and the exercise of Cash Election rights together with any shares of Y Common subject to the rights of dissenting shareholders under applicable state law shall not exceed 49 percent of the outstanding shares of Y Common.

If the Cash Election Rights are exercised with respect to more than 49 percent of the outstanding shares of Y Common (an "Oversubscription"), X's cash purchases of such shares will be made on a pro rata basis. Because of adverse tax consequences to Y shareholders exercising Cash Election Rights in an Oversubscription, the Agreement of Merger will also provide that a Y shareholder may make the exercise of Cash Election Rights conditional upon receipt of cash payment for all shares held by such shareholder as to which Cash Election Rights are exercised rather than only part (a "Conditional Election").

In the event of an Oversubscription, all Conditional Elections will be deemed to be withdrawn and proration will be among the shares covered by the remaining Cash Election Rights. If the withdrawal of Conditional Elections reduces the number of shares as to which Cash Election Rights have been exercised unconditionally below the 49 percent limitation which may be acquired for cash, X's exchange agent, to the extent feasible, may accept all, but not less than all, of the Y Common from each person making a Conditional Election up to such maximum number of shares, by selecting by lot from among all persons making such Conditional Elections until such number is reached.

After negotiations on the material terms of the Agreement of Merger but before the meeting of X shareholders for the purpose of voting on the merger, X contemplates making a tender offer, either directly or through a wholly-owned subsidiary for approximately 45 percent of the outstanding shares of Y Common at \$— per share net to the selling shareholder in cash (the "Tender Offer"). If the Tender Offer results in X's acquisition of the number of shares of Y Common sought therein, the Cash Election Rights alternative will not be included in the merger. If X is unable to purchase the number of shares of Y Common sought pursuant to the Tender Offer, the Cash Election Rights alternative might be included in the merger.

The Schedule 14D-1, 17 CFR 240.14d-100, filed with the Commission and the Offer to Purchase published, sent or given to X shareholders pursuant to Rule 14d-1, 17 CFR 240.14d-1, promulgated under section 14(d)(1) of the Securities Exchange Act of 1934 (the "1934 Act") would contain disclosure designed to permit Y Common shareholders to make an informed investment decision regarding X's tender offer for Y Common. The Schedule 14D-1 and the Offer to Purchase would include only the information required by Schedule 14D-1 and such other material information concerning X, Y or the merger which would be necessary to permit an informed decision by a shareholder to accept or reject the invitation to tender.

You represent that X's purpose in making the Tender Offer is not to arouse investor interest in the X Preferred prior to the filing of a registration statement pertaining

thereto or to induce Y Common shareholders to await the offer and sale of such securities; but rather, X's purpose would be to solicit Y Common shareholders to accept the offer of cash pursuant to the Tender Offer and not to await the possible offer of X Preferred in the future.

It is your belief that should X make the Tender Offer, Y Common shareholders would be faced with the same considerations facing any shareholder contemplating a tender offer, viz. whether to tender, sell in the marketplace or await future developments.

After consideration of the facts presented, as more fully set forth in your letters, but without necessarily agreeing with all the reasoning contained therein, the Division concurs in your view that the proposed Tender Offer would not constitute an "offer to sell" X Preferred within the meaning of sections 2(3) and 5 of the 1933 Act; *Provided, however*, That information disclosed in the Schedule 14D-1, the Offer to Purchase and any amendments or changes thereto in connection with the Tender Offer complies with the disclosure requirements of sections 14(d) of the 1934 Act, Rule 14d-1 and Schedule 14D-1 promulgated thereunder, and section 14(e) of the 1934 Act. Consequently, the division will not recommend enforcement action with respect to section 5 of the 1934 Act or Rule 145, 17 CFR 230.145, promulgated thereunder in connection with the Tender Offer if at the time the Tender Offer is first published, sent or given to security holders by X, a registration statement has not been filed with the Commission by X with respect to the X Preferred.

Because this position is based upon representations made to the Division in your letters, it should be noted that any different facts or conditions might require a different conclusion. Furthermore, this letter only expresses the division's position on enforcement action and does not purport to express any legal conclusion on the questions presented.

Sincerely,

#### TENDER OFFERS IN THE CONTEXT OF CERTAIN CASH OPTION MERGERS

The second issue involves the relationship between tender offers and statutory mergers which contain a cash option election. The issue arises in the following fact pattern ("Situation B"):

The acquiring company and the acquired company enter into an agreement of merger or a plan of merger which is approved by the respective boards of directors and submitted to the acquired company's shareholders for a vote. One of the provisions of the merger agreement is a cash election rights alternative under which a shareholder may elect to receive cash in lieu of the securities of the acquiring company. This alternative is conditioned upon a specified percentage of the outstanding securities of the acquired company. If the cash option is exercised with respect to a greater percentage than that specified, cash is paid on a pro rata basis. The cash election option may be exercised by the shareholders during the time between the notice for the meeting and the vote on the merger. As with the proxy on the merger, the election to receive cash in lieu of the acquiring company's securities may be withdrawn by the

Footnotes continued from last page or on behalf of the acquiring company prior to the filing of the Schedule 14D-1 and the time the tender offer is first published, sent or given to security holders must be limited to the provisions of Rule 145(b).

<sup>13</sup>The text of the letter has been edited to delete identifying data and other information not germane to the publication of the Division position.

electing shareholder until shortly before the shareholders' meeting. Shareholders who elect to receive cash are typically required to submit a Form of Election to the acquiring company's agent. The stock certificates or a guarantee of delivery of such certificates accompany the Form of Election.

The specific issue is whether the cash option feature which is provided to a shareholder of the acquired company during the time provided for the vote on the merger agreement constitutes a tender offer within the meaning of sections 14(d) and 14(e) of the 1934 Act.<sup>14</sup> While the matter is not free from doubt, when a statutory merger contains a cash option feature as described in Situation B, the Division will not take the position that a tender offer is involved and will not suggest that a Williams Act filing on Schedule 14D-1 be made. This position is predicated, in part, on the Division's view that the shareholder's election to receive cash or securities of the acquiring company as consideration for the shares to be surrendered is part of the shareholder's investment decision whether to vote for or against the merger proposal, since the election occurs during the same time period that the shareholder votes on the merger proposal. It should be noted that the Division's position is limited to Situation B and to the cash option feature of Situation A to the extent it comports with Situation B. The Division has expressed no view with respect to the application of the Williams Act to cash option statutory mergers consisting of different facts including those in which the timing of the cash election feature varies in any degree to that set forth in Situation B.

By the Commission.

GEORGE A. FITZSIMMONS,  
Secretary.

APRIL 24, 1978.

[FR Doc. 78-11544 Filed 4-27-78; 8:45 am]

<sup>14</sup>A related issue arises under Rule 10b-13 (17 CFR 240.10b-13) under the 1934 Act. In a number of letters concerning cash option mergers of the type presented in Situation B, the Division of Market Regulation has stated:

This Division is of the view that whether the grant of the Cash Election Rights should be considered a discrete transaction, separate from the [related merger], and therefore a tender offer within the contemplation of Rule 10b-13, is not free from doubt.

However, because it has been of the view that the consummation of such cash option mergers does not appear to result in the type of abuses at which Rule 10b-13 is directed, the Division of Market Regulation has stated in these letters that it would not recommend that the Commission take enforcement action under Rule 10b-13 with respect to the consummation of such mergers. See, e.g., Letter to Thomas A. Burton, Esq. from the Division of Market Regulation, re: National Distillers Corp. (January 3, 1978).

## [4110-07]

### Title 20—Employees Benefits

[Reg. No. 16]

## CHAPTER III—SOCIAL SECURITY ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

### PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED (1974—)

#### Subpart M—Suspensions and Terminations

AGENCY: Social Security Administration, HEW.

ACTION: Final rule.

SUMMARY: These amendments concerning exceptions to the requirement for advance notice before reduction, suspension, or termination of benefits implement the decision of the U.S. District Court in *Cardinale v. Matthews*, 399 F. Supp. 1163, and a subsequent court order resulting from a negotiated agreement by the parties in that case. Accordingly, the amendments deal with two types of exceptions. They eliminate three of the four existing exceptions to the requirement for advance notice of intent prior to reduction, suspension, or termination of supplemental security income benefits, and provide two limited exceptions to the requirement for continuation of payments at the previously established payment level.

EFFECTIVE DATE: July 27, 1978.

FOR FURTHER INFORMATION CONTACT:

Mr. Eric Happel, Office of Policy and Regulations, 6401 Security Boulevard, Baltimore, Md. 21135, telephone 301-594-6784.

SUPPLEMENTARY INFORMATION: On January 10, 1977, a Notice of Proposed Rule Making and proposed amendments to Subpart M of Regulations No. 16 was published in the FEDERAL REGISTER (42 FR 2079).

#### PRIOR POLICY

Prior to the *Cardinale* decision, the Social Security Administration gave advance written notice of its intent to discontinue or reduce supplemental security income payments because of an event requiring suspension, reduction, or termination of payments in all cases except where (1) the Social Security Administration had factual information confirming the death of the recipient, (2) amendments to a Federal law or an increase in other Federal benefits required an automatic suspension, reduction, or termination, (3) a

clerical or mechanical error had been made in effectuating the determination, or (4) the facts prompting the suspension, reduction, or termination were supplied by the recipient, were not subject to conflicting interpretations, and were complete. In these four situations, neither advance notice nor opportunity for continuation of payment was given to the recipient.

#### DISTRICT COURT'S DECISION IN THE CARDINALE CASE

In the *Cardinale* decision the district court, citing the U.S. Supreme Court decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970), and the requirements of due process, struck down all of the existing exceptions to the requirement for advance written notice of intent and the opportunity for continuation of payment other than where the action to be taken is due to the death of the recipient. However, the court afforded the Social Security Administration an opportunity to evolve procedures, consistent with due process, to meet program needs.

Subsequently, the court ordered, as stipulated by the parties, that the Social Security Administration be permitted to use two limited exceptions to the requirement for continuation of payment at the previously established level pending the publication of proposed rules concerning those limited exceptions, and for 90 days from the date on which final regulations are published in the FEDERAL REGISTER. The limited exceptions pertain to the "multiple check" and "dollar maximum" payments which are described in detail later. It was contemplated by the court and by the parties to the litigation that these limited exceptions would be reviewed and evaluated on the basis of comments received after publication in the FEDERAL REGISTER. The preamble of the Notice of Proposed Rule Making, however, did not specifically indicate that the order of the court was supplemental to the final decision of the court and would remain in effect only for a specified period of time pending public comment and issuance of final regulations. Despite this lack of specificity, comments pertaining to the two limited exceptions were received and are discussed below. These comments concerned peripheral issues and did not raise any questions about the essence of the proposed rules. Therefore, we are putting the rules into effect (ninety days from date of publication) and will periodically review these rules in light of experience and will take into account any further comments that are received.

#### CHANGES IN THE REGULATIONS TO IMPLEMENT THE CARDINALE DECISION AND SUBSEQUENT COURT ORDER

Under the amended regulations no reduction, suspension, or termination

action (unless due to the death of the recipient) can be taken unless the recipient has been given prior written notice and the opportunity to appeal and have payments continued pending a decision on such initial appeal. This is in accord with the *Cardinale* decision.

When the recipient appeals the initial determination within 10 days and does not specifically waive continuation of payment, the payments will continue to be made at the previously established rate except where multiple checks had been issued or the payment had exceeded the dollar maximums. These two limited exceptions, as provided by the subsequent order of the court, will remain in effect for 90 days following the date of publication of these final regulations. Further, after consideration of the public comments received in response to the Notice of Proposed Rule Making, the two exceptions have been adopted in the final regulations as ongoing policy.

The advance written notice of intent to discontinue or reduce payment allows the recipient 60 days after the date of receipt of the notice to request the appropriate level of administrative review (i.e., reconsideration or hearing). Where the request for review is filed within 10 days after the date the notice is received, payment will be continued at the previously established payment level (subject to the two exceptions discussed below) until a decision on the appeal is issued.

The date of receipt of the notice shall be presumed to be 5 days after the date on the face of the notice. While the amended rules (and the *Cardinale* order) do not permit any waiver of advance notice by the recipient, they do permit waiver of the right to continuation of payment at the previously established level to avoid overpayment. Such a waiver can be made only if initiated by the recipient and put in writing.

While the rights of the recipient must be protected, the Social Security Administration is also under an obligation to limit the number of incorrect payments that might be issued. To continue to pay amounts which are incorrect on their face would be to disregard this obligation. A new section is, therefore, added to the regulations providing for two limited exceptions to the requirement that payment be continued pending appeal at the previously established rate. These exceptions cover only situations in which there is no doubt that the payment amount is incorrect. When the exceptions are applicable, no action will be taken to suspend, reduce, or terminate payment before advance written notice of intent is given to the recipient with an opportunity to request the appropriate appellate review within 60 days. If an appeal is filed within 10 days after

the individual's receipt of the notice, payment will be continued (except where an individual's benefits have been otherwise correctly suspended) but not at the obviously incorrect level. The date of receipt of such notice shall be presumed to be 5 days after the date shown on the face of the notice.

The first exception covers instances of two or more payments in one month to the same person. Where it is determined that a recipient has received two or more regular monthly payments in one month, payment will be made at the correct amount for the next month as provided in § 416.1337(a), after sending a notice of planned action to the beneficiary. If the recipient believes he is entitled to a higher amount of benefits, and appeals the determination within 10 days, he will be paid the highest of the two or more monthly payment amounts (or the correct amount if higher) until a decision on the appeal is issued.

The second exception involves amounts which exceed defined dollar limits above which payment is not possible. Where a payment exceeds these defined dollar limitations, a notice of planned action will be sent to the recipient and payment for the next month will be in the correct amount as reflected in the notice. If the individual appeals the action within 10 days, and the appeal cannot be disposed of prior to the first of the next month, the amount of the payment will be determined as set out in § 416.1337(b)(3)(i) and § 416.1337(b)(3)(ii).

#### COMMENTS ON NOTICE OF PROPOSED RULE MAKING

Interested parties were given the opportunity to submit within 45 days data, comments, or discussion with regard to the proposed amendments. Seven commenters submitted a number of comments which have been fully considered. Four commenters endorsed the proposed changes or suggested only minor revisions. Three disagreed with one or more premises of law or policy and suggested changes in the regulations and in operating instructions.

One commenter stated that there had been an inordinate delay in promulgating these regulations and that such delay has disadvantaged claimants and misled the public. The commenter requested that the proposed regulations, after suitable changes, be republished as a Notice of Proposed Rule Making (NPRM) in the *FEDERAL REGISTER*, utilizing the interim procedure so these changes would be effective upon publication. Claimants should not have been disadvantaged since the rules were effective beginning with the date of the court order. These final amendments are in es-

sence the same as the proposed rules. They carry out the mandate of the court, most issues raised by comments from the public have been resolved and operating instructions have been issued. However, as indicated above, the rules will be periodically reviewed and consideration will be given to any comments on the final regulation. Accordingly, the interim procedure is unwarranted.

Another commenter strongly supported the proposed regulations but also suggested republication as an NPRM after amending to more accurately reflect the court order in *Cardinale*. That order directed the Social Security Administration to use the agreed upon "multiple check" and "dollar maximum" exceptions to the requirement for continuation of payment at the previously established payment level for 90 days after promulgation of these regulations. The commenter felt that some interested parties may have been dissuaded from commenting in the belief that the provisions in the proposed regulations were already mandated by court order. This suggestion was not adopted since public comment, for the most part favorable, has already been received. Moreover, the other provisions of the court order have been adopted as ongoing Social Security Administration policy, subject to periodic review, to ensure the adequacy of these exceptions and dollar limitations. Another suggestion made by the commenter to revise the language in § 416.1336(c) was adopted. The commenter felt that the original language implied that a recipient must choose between continued payment at the previous level or no payment at all pending appeal. The language was intended, however, to express the fact that a recipient can accept the proposed reduced level of payment while appealing the reduction.

Two commenters felt that benefit payments which are continued at the previous level through a hearing, following a timely appeal, should not be considered "overpayments." One commenter felt that such payments are made pursuant to substantive and procedural requirements which protect the recipient from a reduction, suspension, or termination until a hearing, and therefore, since the benefits are correctly paid they are not "overpayments." This commenter cited regulation 45 CFR 205.40(a)(2), issued by the Social and Rehabilitation Service (now abolished) as precedent for this view. If the policy and regulations are not changed this commenter felt that at least, a presumption of "nonfault" should be established with respect to such overpayment.

These suggestions were not adopted. A change in policy and regulations to exclude from the definition of over-

payments, benefits paid after an event which causes a reduction, suspension, or termination of payments, and through a hearing in response to a timely appeal, could reward a recipient simply for being litigious and penalize those who, for convincing reasons, did not timely appeal. Moreover, program costs would in all likelihood, increase substantially.

With respect to the regulation cited as precedent by the commenter, this regulation defines "case error" in a quality control system. This system was established at the Federal level to monitor on a sample basis, assistance payments made by State agencies administering grants-in-aid programs. These same regulations include an independent definition of overpayments.

Two commenters urged cessation of the practice of orally informing claimants in local district social security offices as to their right to waive or forego continuation of payments during the first level of an appeal. They also advocated that no oral information be given the claimant to the effect that continuation of payment could result in an overpayment if the initial determination is upheld upon appeal, indicating that the written notices provide sufficient information. Since a recipient has a right under the law and regulations to waive continuation of payments pending appeal, the recipient is entitled to have such right explained (including, in appropriate situations, an oral explanation). Current Claims Manual instructions to district offices make clear that a decision regarding continuation of payments must stem from the recipient's own initiative. Thus, no coercion is intended or sanctioned.

One comment related to the matter of "fault" and the possibility of "waiver" when there has been a continuation of payment. It was recommended that consideration be given to these factors before reducing any future benefits to recover the prior overpayment. Current regulations require that consideration be given to these factors. 20 CFR 416.552 states that "Whether an individual is 'without fault' depends on all the pertinent circumstances surrounding the overpayment in the particular case." Thus, the decision by the claimant to let payments continue through the first level of an appeal, is considered along with all other factors before deciding to recover the overpayment.

Three commenters suggested that the policy of extending to a claimant the right to waive continuation of payments should cease. They contend that such policy has a high potential for abuse and may tend to coerce the claimant. To adopt this policy could work a severe hardship on those claimants who, for whatever reason, decide to appeal but do not wish to have con-

tinuation of payments. Not only would this be unfair to this category of claimants but it could also be counterproductive by inducing or coercing some claimants to appeal when in fact, they themselves feel they have no basis for an appeal.

Three comments were to the effect that the 10-day period in which to request continuation of payment is too short and should be extended. It was felt that such a limitation results in administrative abuses and that procedures for handling these claims, particularly with respect to notices, are deficient. While the 10-day limitation was reconsidered, the suggestions for extension were not adopted. The limitation is a compromise between conflicting factors. On one hand it provides a claimant a reasonable period of time in which to decide on his course of action but also provides controls on the payment systems to ensure against premature adjustment. A longer period would further burden these systems. Moreover, to allow a greater period would likely result in a proportionate increase in the number of overpayments and further burden program costs and systems capabilities. The 10-day period fits appropriately into administrative requirements for efficient administration of the program.

One commenter suggested more safeguards with respect to the term "factual information" as used in § 416.1336(a). Specifically, the proposal was made that standards be established as to quantum and type of evidence of death, before an exception can be triggered to prevent abuses and errors in systems and to ensure immediate correction and reinstatement if an error does occur. This suggestion has been adopted. In addition, Claims Manual instructions and increased effort via control programs, training, and management awareness should ensure against errors and abuses.

A suggestion was made that instructions in the Claims Manual for handling "multiple payments" and "dollar limitation" cases be substantially improved. The commenter also urged that all references in the Claims Manual to the former policy which permitted "waiver of prior written notice" be eliminated. Instructional issuances, such as the Claims Manual, are continuously improved in the light of program experiences or to meet special needs. Thus, if further program experiences indicates an inadequacy in the cited instructions, improvements will be made. With respect to eliminating all references to the prior policy, we believe that this has been accomplished; however, we will be alert for any needed deletions.

A commenter suggested that § 416.1337(a)(2)(i) be revised to provide that the notice include a statement as to the amount of payments in ques-

tion and the actual months in which the payments were made. It was further suggested (1) that § 416.1337(b)(2)(i) should be more specific in order to satisfy due process and include the months for which incorrect payments were made and, (2) that "correctly suspended" be defined in § 416.1337(b)(3)(ii) by referring to §§ 416.1321-30 and 416.1336(a). These suggestions have been partially adopted. However, the latter citation is not appropriate since it pertains to death terminations.

A commenter suggested that §§ 416.1336(b) and 416.1337(a)(3) show clearly that the unreduced checks continue to be paid only until a decision is made at the initial level of appeal. This suggestion has been adopted.

Another commenter recommended that clarification be made as to the relationship between "administrative suspensions" of payment and the continuation of payment rights required by *Goldberg v. Kelly*, 397 U.S. 254. It was also suggested that an additional exception be sought in the *Cardinale* agreement to exclude advance notice and the right to continuation of payment when a recipient becomes an inmate of a public institution. The basis for such revision was the belief that continuation of payment in the latter case was a clear violation of the statute and contrary to Congressional intent. The commenter's reference to administrative suspensions pertains to administrative stop payment situations, i.e., where payments are temporarily stopped (but not suspended). There are two situations where this may occur: (1) a check is returned because the recipient has moved and left no forwarding address, and (2) a representative payee dies and development must be made for a new payee. Since these situations do not involve a suspension of benefits, they are not included in the subject of these regulations. These situations will, however, be further clarified in the appropriate section of the regulations. No exception to the *Cardinale* agreement will be sought with respect to inmates of public institutions. This situation, among others, was previously considered in negotiating the terms of the agreement. An exception would be discriminatory with respect to recipients affected by this factor of entitlement as opposed to recipients affected by other factors causing a reduction in benefits.

Accordingly, the proposed amendments are adopted as revised and are set forth below.

(Secs. 1102, 1601, and 1631 of the Social Security Act, as amended; 49 Stat. 647, as amended, 86 Stat. 1465, as amended, 86 Stat. 1475, as amended, 42 U.S.C. 1302, 1381, and 1383.)

(Catalog of Federal Domestic Assistance Program No. 13.807, Supplemental Security Income Program.)

NOTE.—The Social Security Administration has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11821, as amended by Executive Order 11949, and OMB Circular A-107.

Dated: February 27, 1978.

DON WORTMAN,  
Acting Commissioner of  
Social Security.

Approved: April 24, 1978.

JOSEPH A. CALIFANO, Jr.,  
Secretary of Health,  
Education, and Welfare.

Part 416 of Chapter III of Title 20 of the Code of Federal Regulations is amended as follows:

1. Section 416.1336 is revised to read as follows:

§416.1336 Notice of intended action affecting recipient's payment status.

(a) *Advance written notice requirement.* Advance written notice of intent to discontinue payment because of an event requiring suspension, reduction (see Subpart D of this part), or termination of payments shall be given in all cases, prior to effectuation of the action, except where the Social Security Administration has factual information confirming the death of the recipient, e.g., as enumerated in §404.704(b) of this chapter, or a report by a surviving spouse, a legal guardian, a parent or other close relative, or a landlord.

(b) *Continuation of payment pending an appeal.* The written notice of intent to suspend, reduce, or terminate payments shall allow 60 days after the date of receipt of the notice for the recipient to request the appropriate appellate review (see Subpart N of this part). If appeal is filed within 10 days after the individual's receipt of the notice, the payment shall be continued or reinstated at the previously established payment level (subject to the effects of intervening events on the payment which are not appealed within 10 days of receipt of a required advance notice or which do not require advance notice, e.g., an increase in the benefit amount) until a decision on such initial appeal is issued, unless the individual specifically waives in writing his right to continuation of payment at the previously established level in accordance with paragraph (c) of this section. (See §416.1337 for exceptions to the continuation of payment level.) Where the request for the appropriate appellate review is filed more than 10 days after the notice is received but within the 60-day period specified in §416.1410 or §416.1426, there shall be no right to continuation or reinstatement of payment at the previously established level unless good cause is established under the criteria specified in §416.1474 for fail-

ure to appeal within 10 days after receipt of the notice. For purposes of this paragraph, the date of receipt of the notice of intent to suspend, reduce, or terminate payments shall be presumed to be 5 days after the date on the face of such notice, unless there is a reasonable showing to the contrary.

(c) *Waiver of right to continued payment.* Notwithstanding any other provisions of this section, the recipient, in order to avoid the possibility of an overpayment of benefits, may waive continuation of payment at the previously established level (subject to intervening events which would have increased the benefit for the month in which the incorrect payment was made, in which case the higher amount shall be paid), after having received a full explanation of his rights. The request for waiver of continuation of payment shall be in writing, state that waiver action is being initiated solely at the recipient's request, and state that the recipient understands his right to receive continued payment at the previously established level.

2. Section 416.1337 is added to read as follows:

§416.1337 Exceptions to the continuation of previously established payment level.

(a) *Multiple payments exception.* (1) Where it is determined that a recipient is receiving two or more regular monthly payments in one month, the Social Security Administration shall determine the correct payment amount and, as soon as practicable thereafter, send the recipient and advance written notice of intent to make subsequent payment in that amount. Payment for the following month shall be made in the correct amount, except as provided in paragraph (a)(3) of this section.

(2) The advance notice shall explain: (i) That multiple payments were made in the one or more months identified in the notice;

(ii) The correct amount of monthly benefits that the recipient is eligible to receive; and

(iii) The recipient's appeal rights.

(3) If an appeal is filed within 10 days after receipt of the written notice of intent, the highest of the two or more check amounts, or the correct amount if higher (subject to the dollar limitation provisions), shall be continued until a decision on such initial level of appeal is issued. See §416.1474 for criteria as to good cause for failure to file a timely appeal. For purposes of this paragraph, the date of receipt of the notice of intent shall be presumed to be 5 days after the date on the face of such notice, unless there is a reasonable showing to the contrary.

(4) The fact that a recipient is receiving multiple payments is estab-

lished if the records of the Social Security Administration show that:

(i) Two or more checks are being sent to an individual under the same name or a common logical spelling variation of the name;

(ii) The social security number is the same or a pseudo number appears;

(iii) The checks are being sent to the same address;

(iv) The sex code for such individual is the same; and

(v) The date of birth for such individual is the same.

(b) *Dollar limitation exception.* (1) Where it is determined that a recipient is receiving an erroneous monthly payment which exceeds the dollar limitation applicable to the recipient's payment category, as set forth in paragraph (b)(4) of this section, the Social Security Administration shall determine the correct payment amount and, as soon as practicable thereafter, send the recipient an advance written notice of intent to make subsequent payment in that amount. Payment for the following month shall be made in the correct amount, except as provided in paragraph (b)(3) of this section.

(2) The advance notice shall explain:

(i) That an erroneous monthly payment which exceeds the dollar limitation applicable to the recipient's payment category was made in the one or more months identified in the notice;

(ii) The correct amount of monthly benefits that the recipient is eligible to receive; and

(iii) The recipient's appeal rights.

(3) If an appeal is filed within 10 days after receipt of the written notice of the intent (see §416.1474 for criteria as to good cause for failure to file a timely appeal), the amount of payment to be continued, pending decision on appeal, shall be determined as follows:

(i) *Recipient in payment status.* Where the recipient is in payment status, the payment shall be in the amount the recipient received in the month immediately preceding the month the dollar limitation was first exceeded (subject to intervening events which would have increased the benefit for the month in which the incorrect payment was made, in which case the higher amount shall be paid).

(ii) *Recipient in nonpayment status.* If the recipient's benefits were suspended in the month immediately preceding the month the dollar limitation was first exceeded, the payment shall be based on that amount which should have been paid in the month in which the incorrect payment was made. However, if the individual's benefits had been correctly suspended as provided in §§416.1321-1330 and they should have remained suspended but a benefit that exceeded the dollar limitation was paid, no further payment shall be made to him at this time and notice of

the planned action shall not contain any provision regarding continuation of payment pending appeal.

NOTE: For purposes of this paragraph, the date of receipt of the notice of planned action shall be presumed to be 5 days after the date on the face of such notice, unless there is a reasonable showing to the contrary.

(4) The payment categories and dollar limitations are as follows:

**PAYMENT CATEGORY AND DOLLAR LIMITATION**

*Federal supplemental security income benefit only.—\$200.*

Recipients whose records indicate eligibility for Federal supplemental security income benefits for the month before the month the dollar limitation was first exceeded.

(ii) *Federal supplemental security income benefit and optional supplementation, or optional supplementation only.—\$700*

Recipients whose records indicate they were eligible for Federal supplemental security income benefits plus Federally-administered optional supplementation, or eligible for Federally-administered optional supplementation only, for the month before the month the dollar limitation was first exceeded.

(iii) *Federal supplemental security income benefit and mandatory or other supplementation, or mandatory supplementation only.—\$2,000*

Recipients whose records show eligibility for Federal supplemental security income benefits and Federally-administered mandatory supplementation or essential person increment for the month before the month the dollar limitation was first exceeded. This category also includes those eligible for Federally-administered mandatory supplementation only and those eligible for Federal supplemental security income benefits plus an essential person increment and Federally-administered optional supplementation.

[FR Doc. 78-11593 Filed 4-27-78; 8:45 am]

[4110-03]

**Title 21—Food and Drugs**

**CHAPTER I—FOOD AND DRUG ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE**

**SUBCHAPTER 2—ANIMAL DRUGS, FEEDS, AND RELATED PRODUCTS**

**PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS NOT SUBJECT TO CERTIFICATION**

**Levamisole Resinate**

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The animal drug regulations are amended to reflect approval of a new animal drug application (NADA) submitted by Cyanamid Agricultural de Puerto Rico, Inc., for use

of levamisole resinate in the feed of swine for treating nematode infections.

EFFECTIVE DATE: April 28, 1978.

**FOR FURTHER INFORMATION CONTACT:**

William D. Price, Bureau of Veterinary Medicine (HFV-123), Food and Drug Administration, Department of Health, Education, and Welfare, 5600 Fishers Lane, Rockville, Md. 20857 (301-443-3442).

**SUPPLEMENTARY INFORMATION:** Cyanamid Agricultural de Puerto Rico, Inc., P.O. Box 243, Manati, P.R. 00701, filed NADA 101-079V providing for use of levamisole resinate as an anthelmintic in swine feed for treating certain nematode infections.

The basic data to support approval of this NADA is contained in NADA 45-455V, and incorporated herein by reference. This action does not constitute reevaluation of the parent NADA, nor does it constitute reaffirmation of the underlying data in the parent NADA.

In accordance with the freedom of information regulations and §514.11 (e)(2)(ii) (21 CFR 514.11(e)(2)(ii)) of the animal drug regulations, a summary of safety and effectiveness data and information submitted to support approval of this application is released publicly. The summary is available for public examination at the office of the Hearing Clerk (HFC-20), Food and Drug Administration, Rm. 4-65, 5600 Fishers Lane, Rockville, Md. 20857, from 9 a.m. to 4 p.m., Monday through Friday, except on Federal holidays.

Therefore, under the Federal Food, Drug, and Cosmetic Act (sec. 512(i), 82 Stat. 347 (21 U.S.C. 360b(i))) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.1), Part 520 is amended by adding new §520.1242d to read as follows:

§520.1242d Levamisole resinate.

(a) *Specifications.* The drug is levamisole adsorbed on a resin, in a concentration equivalent to 10 percent levamisole hydrochloride. Each 2.05-ounce (58.1 gram) packet contains levamisole equivalent to 5.806 grams of levamisole hydrochloride.

(b) *Sponsor.* See No. 043781 in §510.600(c) of this chapter.

(c) *Conditions of use.* In swine it is used as follows:

(1) *Amount.* The equivalent of 8 milligrams per kilogram of body weight, as a single dose, mixed in the animal's ration.

(2) *Indications for use.* A swine anthelmintic effective for the treatment of the following nematode infections: large roundworms (*Ascaris suum*), nodular worms (*Oesophagostomum spp.*), lungworms (*Metastrongylus spp.*), and intestinal threadworms (*Strongyloides ransomi*).

(3) *Limitations.* For pigs from weaning to market weight, mix one 58.1-gram packet of levamisole resinate containing the equivalent of 10-percent levamisole hydrochloride in 40 pounds of feed and administer 1 pound of medicated feed per 40 pounds of body weight as sole ration. For breeding swine, mix 1 packet of the 10-percent resinate in 16 pounds of feed and administer 1 pound of medicated feed per 100 pounds of body weight as sole ration. Administer as single doses. Withhold regular feed overnight and administer medicated feed the following morning. Do not withhold water during fasting. Do not treat within 72 hours of slaughter. Salivation or muzzle foam may be observed. The reaction will disappear a short time after feeding. If pigs are infected with mature lungworms, coughing and vomiting may be observed. Consult your veterinarian for assistance in the diagnosis, treatment, and control of parasitism.

Effective date: April 28, 1978.

(Sec. 512(i), 82 Stat. 347 (21 U.S.C. 360b(i)).)

Dated: April 24, 1978.

C. D. VAN HOUWELING,  
Director, Bureau of  
Veterinary Medicine.

[FR Doc. 78-11547 Filed 4-27-78; 8:45 am]

[4110-03]

**PART 524—OPHTHALMIC AND TOPICAL DOSAGE FORM NEW ANIMAL DRUGS NOT SUBJECT TO CERTIFICATION**

**Change of Generic Drug Name**

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The animal drug regulations are amended to reflect a change in generic name of one of the active ingredients in two of The Upjohn Co.'s combination drug products. The change in generic name will make the regulations' nomenclature consistent with that currently used by The Upjohn Co. and that specified by "United States Adopted Names" (1977 Ed.).

EFFECTIVE DATE: April 28, 1978.

**FOR FURTHER INFORMATION CONTACT:**

Henry C. Hewitt, Bureau of Veterinary Medicine (HFV-112), Food and Drug Administration, Department of Health, Education, and Welfare, 5600 Fishers Lane, Rockville, Md. 20857, 301-443-3430.

**SUPPLEMENTARY INFORMATION:** The Upjohn Co., Kalamazoo, Mich.