

the balance sheet) of the different accounting treatment being followed.
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17 CFR Parts 229, 239, and 240

[Rel. Nos. 33-6715; 34-24514; 35-24397; IC-15753; File No. S7-29-86]

Proxy Rules; Conformation to Comprehensive Proxy Revisions, Provision for Modified or Superseded Documents

AGENCY: Securities and Exchange Commission.

ACTION: Final rules.

SUMMARY: The Securities and Exchange Commission ("Commission") today announced the adoption of amendments to its proxy rules and certain other rules. The amendments will conform further the proxy disclosure for mergers and similar transactions to that required for registration of securities in certain business combinations and will clarify the timing requirements for such transactions where incorporation by reference is used. The Commission also is adopting a rule concerning modified or superseded statements in documents incorporated by reference into a proxy statement.

DATES: Effective Date: These amendments are effective July 10, 1987, for proxy statements filed on or after that date.

Compliance Date: Registrants are permitted, however, to comply with the amendments immediately upon publication of this Release in the *Federal Register*. Such compliance must be with the amended rules as a whole.

FOR FURTHER INFORMATION CONTACT: Prior to the effective date, Caroline W. Dixon or Barbara J. Green, (202) 272-2589, Office of Disclosure Policy, Division of Corporation Finance, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549. After the effective date, contract Cecilia D. Blye, (202) 272-2573, Office of Chief Counsel, Division of Corporation Finance.

SUPPLEMENTARY INFORMATION: The Commission today announced the adoption of revisions to the proxy and information statement rules¹ under the Securities Exchange Act of 1934 ("Exchange Act").² The Commission is

adopting revisions to Regulation 14A,³ including Schedule 14A.⁴ In addition, the Commission is adopting a new rule, Rule 14a-14,⁵ which is part of Regulation 14A. Finally, corresponding amendments have been adopted to Forms S-4⁶ and F-4⁷ and to Item 304 of Regulation S-K.⁸

I. Discussion

A. Conforming Certain Disclosure Under Schedule 14A to Form S-4

The Commission is adopting as proposed⁹ amendments to Item 14 of Schedule 14A, Mergers, Consolidations, Acquisitions and Similar Matters, to conform the company-specific information requirements for Item 14 with those of Form S-4, the registration form for certain business combination transactions. As a result of this amendment, Item 14(b)(3), Information with Respect to Registrants Other than S-2 or S-3 Registrants, subparagraph (i) is amended to require registrants to furnish all the information required by Item 101, Description of Business,¹⁰ Item 102, Description of Property,¹¹ and Item 103, Legal Proceedings,¹² of Regulation S-K.

B. Description of Securities

Other Item 14 requirements for transaction information were conformed to the requirements of Form S-4 in the companion adopting release that accompanied the release proposing the changes now being adopted in this proposal.¹³ As noted in that release, if the transaction involves the issuance of securities exempt from registration, information concerning the new class or series of securities can be material to the transaction. In the proposing release, the Commission sought comment as to whether there should be a specific requirement to include in a proxy or information statement all of the information that would be required by Item 202 of Regulation S-K¹⁴ if

securities were being registered and, if so, whether such a requirement should apply to all issuances of securities exempt from registration.

The Commission is amending Item 14 specifically to require the information called for by Item 202 for any securities that are exempt from registration if the security holders whose proxies are being solicited will be receiving the new securities.¹⁵ If, however, a registrant solicits proxies from its security holders to authorize a transaction in which its securities are being issued to others, somewhat less extensive information concerning the new securities would be necessary. Such disclosure is currently required by Item 14(a)(3)(iii). Item 14(a)(3) requires a summary of the material features of the proposed transaction; subparagraph (iii) calls for an "explanation of any material differences in the rights of security holders of the registrant as a result of this transaction."

C. New Rule 14a-14, Modified or Superseded Documents

The Commission is adopting as proposed a new rule similar to Rule 412 under the Securities Act of 1933.¹⁶ The rule governs the treatment of a statement in a document incorporated by reference into a proxy statement which is subsequently modified or superseded by a statement in a later document also incorporated by reference.

The rule provides that, for purposes of the proxy statement, a statement in a document incorporated by reference is deemed to be modified or superseded by a statement in the proxy statement or in any other subsequently filed document(s) incorporated by reference. The rule also provides (1) that the making of a modifying or superseding statement is not deemed an admission that the first statement was false or misleading and (2) that the prior form of any statement so modified or superseded is not deemed to constitute a part of the proxy statement.

¹ 17 CFR 240.14a-1 through 240.14b-1.

² 17 CFR 240.14a-101.

³ 17 CFR 240.14a-14.

⁴ 17 CFR 239.25.

⁵ 17 CFR 239.34.

⁶ 17 CFR 229.304. In addition, a reference to an obsolete form is being deleted from Item 512 of Regulation S-K (17 CFR 229.512).

⁷ Release No. 33-6675 (November 20, 1986) [51 FR 42073]. The two comment letters that were received are available for public inspection and copying at the Commission's Public Reference Room [File No. S7-29-86].

⁸ 17 CFR 229.101.

⁹ 17 CFR 229.102.

¹⁰ 17 CFR 229.103.

¹¹ Release No. 33-6676 (November 20, 1986) [51 FR 42048].

¹² 17 CFR 229.202, Description of Registrant's Securities.

¹³ This information may be incorporated by reference if the issuer of the securities is eligible to use Form S-3 and information about the issuer is incorporated by reference into the proxy or information statement pursuant to the specific provisions for Form S-3 companies. Related technical changes are being made to Forms S-4 and F-4.

¹⁴ 17 CFR 230.412.

¹⁵ 17 CFR 240.14a-1 through 240.14c 101.

¹⁶ 15 U.S.C. 78a-78kk (1982).

D. Other Amendments¹⁷

1. Changes in and Disagreements with Accountants

The Commission also is adopting proposed amendments to clarify a potential ambiguity between Item 304 of Regular S-K¹⁸ and Item 14 of Schedule 14A with regard to the required disclosure concerning changes in and disagreements with accountants for non-reporting companies being acquired by the registrant. The potential ambiguity existed because Instruction 3 to Item 304 provided that the information required by Item 304 need not be provided for non-reporting companies being acquired by the registrant, whereas Item 14 specified that Item 304 information was required for such persons. Item 14 controls with respect to disclosure of the financial statement effect of subsequently accounting for similar transactions in a manner different from that preferred by the former accountant as required by paragraph (b) of Item 304. The Commission has specified in the amendments that it is not necessary to provide the information called for by paragraph (a) of Item 304 with respect to such acquired company.¹⁹

2. Filing Requirements

Rule 14a-6²⁰ has been revised to delete language in paragraph (j) stating that a transaction involving an application or declaration under the Public Utility Holding Company Act of 1935 ("PUHCA")²¹ is exempt from the proxy solicitation filing fee, because the language is redundant. Rule 14a-2²² provides that Rules 14a-3²³ to 14a-12²⁴ do not apply to "any solicitation which is subject to Rule 62 under the Public Utility Holding Company Act."²⁵ It also

should be noted that, as a PUHCA Rule 62 transaction is exempt from the Exchange Act proxy rules, an application or declaration under PUHCA also would be exempt from the filing fee requirements of Rule 14a-6(j).²⁶

3. Mailing Where Incorporation by Reference is Used

Note D.3 to Schedule 14A requires that proxy material must be sent 20 business days prior to specified dates if documents or portions of documents are incorporated by reference as permitted by Items 13, Financial and Other Information, and 14, Mergers, Consolidations, Acquisitions and Similar Matters. As amended, the note clarifies that, where no meeting is held, the date by which material must be sent is 20 business days prior to the date the votes, consents or authorizations may be used to effect corporate action. The amended language conforms to language used elsewhere in the proxy rules to address similar circumstances.²⁷

Similar revisions to instructions to Forms S-4 and F-4 have been made. Unlike revised Note D.3, these instructions retain the reference to the date the transaction is consummated because certain transactions involving the registration of securities pursuant to Forms S-4 or F-4 (such as a tender offer or short-form merger) need not involve the use of votes, consents or authorizations to effect corporate action.²⁸

4. Clarifying Amendments as to Compensation Plans

The Commission has made technical revisions to Item 10 of Schedule 14A to clarify that, with respect to the exercise or realization of options or stock appreciation rights held in tandem with options, information concerning the net value of securities (market value less any exercise price) or cash realized need not be provided for employees as a group. In addition, language has been added to clarify that (1) references to

directors who are not executive officers in Item 10(a)(2)(iii), Item 10(a)(3)(iii) and Item 10(b)(2)(ii)(C) refer to those currently in office and that these items also require disclosure with regard to all officers who are not executive officers; (2) Item 10(a) covers both the plan being voted upon and, in the case of Item 10(a)(3), all compensation plans currently in effect or in effect during the last three years; and (3) Item 10(b)(2) (options, warrants or rights submitted for security holders' action) applies to both individual grants of options, warrants or rights and to compensation plans that utilize options, warrants or rights.

5. Clarifying Instruction With Regard to Disclosure of Pro Forma Financial Information for Business Combinations

Among the Item 14 requirements for transaction information that were conformed to Form S-4 are items that call for material information required by Item 301 of Regulation S-K,²⁹ Selected Financial Data, with regard to the registrant or the other person on a pro forma basis, giving effect to the transaction, and pro forma and equivalent pro forma per share data for (1) book value, (2) cash dividends declared, and (3) income (loss) per share from continuing operations. These items and an accompanying instruction have been clarified in accordance with existing staff interpretations of Form S-4. The revisions make clear that, for a business combination accounted for as a purchase, the financial information called for by paragraphs (a)(6) and (a)(7) is to be provided for the most recent fiscal year and interim period. For a business combination accounted for as a pooling, the financial information is to be provided for the three most recent fiscal years and interim period, with the exception of the information with regard to book value which is to be provided for the most recent fiscal year and interim period.³⁰

II. Cost-Benefit Analysis

To evaluate the benefits and costs associated with the amendments to Item 14 of Schedule 14A, Rule 14a-6, Item 304 of Regulation S-K, and Form S-4 and new Rule 14a-11, the Commission requested commentators to provide views and data as to the costs and benefits associated with these changes. No comments were received. As the Commission noted in the proposing release, however, the amendments will

¹⁷ In addition to the amendments discussed below, minor technical revisions necessitated by the comprehensive proxy revisions or by technical clarifications also have been made. Specifically, references have been corrected in Instructions 3, 4 and 6 to Item 14, and in Items 13, 14, 18 and 19 of Form S-4. Finally, a reference to an obsolete form, Form S-14, has been removed from Item 512 of Regulation S-K (17 CFR 229.512).

¹⁸ Changes in and Disagreements with Accountants.

¹⁹ A parallel amendment has been made to Item 17 of Form S-4 to require only the Item 304(b) information in the same circumstances. In addition, Items 18 and 19 of Form F-4 have been amended to delete the requirement to provide the information called for by Item 9 of Schedule 14A, making Form F-4 consistent with Forms F-1-2-3. Corresponding changes have been made to reflect the necessary redesignations.

²⁰ 17 CFR 240.14a-6.

²¹ 15 U.S.C. 79-79z-6.

²² 17 CFR 240.14a-2.

²³ 17 CFR 240.14a-3.

²⁴ 17 CFR 240.14a-12.

²⁵ 17 CFR 250.62. PUHCA Rule 62(a) covers reorganizations subject to Commission approval

and transactions that are the subject of an application or declaration filed with the Commission. Other public utility holding company solicitations are governed by PUHCA Rule 61, which provides that such solicitations are subject to Exchange Act section 14(a) (15 U.S.C. 78n(a)).

²⁶ 17 CFR 240.14a-6(j).

²⁷ The changes conform the language to that used in Rules 14a-3(b)(13) (17 CFR 240.14a-3(b)(13)), 14a-13(a)(2) (17 CFR 240.14a-13(a)(2)) and 14a-2(b) (17 CFR 240.14a-2(b)).

²⁸ Questions have been raised as to the meaning of "the date the transaction is consummated" in the context of an exchange offer filing using incorporation by reference. The prospectus should be furnished at least 20 business days before the scheduled termination of the exchange offer.

²⁹ 17 CFR 229.301.

³⁰ Parallel amendments have been made to Forms S-4 and F-4.

either not have an effect or have a minimal effect on costs.

III. Final Regulatory Flexibility Analysis

This final regulatory flexibility analysis, which relates to amendments to the proxy rules and certain conforming amendments to other rules, has been prepared in accordance with 5 U.S.C. 604. The corresponding Initial Regulatory Flexibility Analysis is continued in the proposing release.

The Need for, and Objectives of New Rule 14a-14 and Amendments to the Proxy and Other Rules

The current revisions result from comprehensive revisions to the proxy and other rules undertaken to clarify, to provide certainty by codifying staff interpretation, and to simplify the proxy and other rules. The principal purpose of the proxy rules, to ensure that information is made available to security holders being asked to vote on or consent to corporate action, is furthered by such clarification, codification and simplification. Certain of these amendments clarify existing rules and eliminate potential ambiguities in required disclosure. The amendments also include Rule 14a-14 which facilitates a registrant's ability to update information included in a document that is incorporated by reference in a proxy statement without requiring any additional action by the registrant and without imposing any additional reporting, recordkeeping or compliance requirements.

Public Comment

No commentators responded to the Commission's request for comments on the Initial Regulatory Flexibility Analysis.

Significant Alternatives

Pursuant to section 604 of the Regulatory Flexibility Act, the following types of alternatives were considered:

- (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
- (2) The clarification, consolidation or simplification of compliance and reporting requirements under the rules for such small entities;
- (3) The use of performance rather than design standards; and
- (4) An exemption from coverage of the rules, or any part thereof, for small entities.

The Commission does not believe, however, that it would be consistent with the Commission's statutory mandate to protect investors, to establish different compliance or

reporting requirements with respect to the amendments to Item 14 of Schedule 14A and to Item 304 of Regulation S-K that would take into account the resources available to small entities. The disclosure called for by the amendments would be useful to security holders of small entities as well as to security holders of large entities.

The clarifying amendments to Items 10 and 14 and to Note D.3 of Schedule 14A will provide needed clarification which will be beneficial to small entities as well as large entities; the Commission does not believe that further simplification for small entities is consistent with the Commission's statutory mandate. Nor does the Commission believe that use of performance rather than design standards is appropriate in the context of the revised rules given the Commission's statutory mandate. With regard to the amendments to Item 14 other than clarifying amendments, an alternative would have been to exempt small entities from these requirements. The Commission does not believe, however, that extending an exemption to or providing different compliance or reporting requirements for small entities for transactions requiring compliance with Item 14 of Schedule 14A that would not otherwise involve registration on Form S-4 would be warranted in light of the Commission's statutory mandate. The Commission also believes that it is appropriate to conform the requirements of Item 14 and Form S-4 as they involve substantially the same decision by security holders. Further, if a small entity files preliminary proxy material meeting the requirements of Item 14 and the filing of a Form S-4 is contemplated for the transaction, the requirements of Form S-4 must be satisfied. In addition, the information called for by Item 202 of Regulation S-K, Description of Registrant's Securities, should be provided in a transaction involving a business combination, notwithstanding that the issuance is exempt from registration, if security holders whose proxies are being solicited will be receiving the securities. Rule 14a-14 provides relief with regard to the updating of information that any other approach is unlikely to provide for small as well as large entities.

IV. Statutory Basis

The amendments to the proxy and information statement rules and to Items 304 and 512 of Regulation S-K, Form S-4, and Form F-4 are being adopted by the Commission pursuant to sections 6, 7, 10 and 19(a) of the Securities Act of 1933 and sections 14 and 23(a) of the Securities Exchange Act of 1934.

List of Subjects in 17 CFR Parts 229, 230 and 240

Reporting and recordkeeping requirements, Securities.

Text of Amendments

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for Part 240 continues to read in part as follows:

Authority: Sec. 23, 48 Stat. 901, as amended, 15 U.S.C. 78w. * * *

§ 240.14a-2 [Amended]

2. The section heading, introductory text, paragraph (a) introductory text, and (b) introductory text of § 240.14a-2 are amended by removing the references to "14a-13" and replacing them with references to "14a-14."

3. The introductory text of paragraph (j) of § 240.14a-6 is revised as follows:

§ 240.14a-6 Filing requirements.

* * * * *

(j) *Fees.* At the time of filing the preliminary proxy solicitation is material, the persons upon whose behalf the solicitation is made, other than companies registered under the Investment Company Act of 1940, shall pay to the Commission the following applicable fee: * * *

* * * * *

§ 240.14a-8 [Amended]

4. Section 240.14a-8 is amended by removing the word "issuer's" and replacing it with the word "registrant's" in paragraph (c)(1).

§ 240.14a-11 [Amended]

5. Section 240.14a-11 is amended by removing the word "issuer" and replacing it with the word "registrant" in paragraph (b)(5).

6. By adding § 240.14a-14 to read as follows:

§ 240.14a-14 Modified or superseded documents.

(a) Any statement contained in a document incorporated or deemed to be incorporated by reference shall be deemed to be modified or superseded, for purposes of the proxy statement, to the extent that a statement contained in the proxy statement or in any other subsequently filed document that also is or is deemed to be incorporated by

reference modifies or replaces such statement.

(b) The modifying or superseding statement may, but need not, state it has modified or superseded a prior statement or include any other information set forth in the document that is not so modified or superseded. The making of a modifying or superseding statement shall not be deemed an admission that the modified or superseded statement, when made, constituted an untrue statement of a material fact, an omission to state a material fact necessary to make a statement not misleading, or the employment of a manipulative, deceptive, or fraudulent device, contrivance, scheme, transaction, act, practice, course of business or artifice to defraud, as those terms are used in the Securities Act of 1933, the Securities Exchange Act of 1934 ("the Act"), the Public Utility Holding Company Act of 1935, the Investment Company Act of 1940, or the rules and regulations thereunder.

(c) Any statement so modified shall not be deemed in its unmodified form to constitute part of the proxy statement for purposes of the Act. Any statement so superseded shall not be deemed to constitute a part of the proxy statement for purposes of the Act.

7. Section 240.14a-101 is amended by removing the word "issuer" and replacing it with the word "registrant" in two places in Item 15(c) and by revising Note D.3, Item 10 introductory text, Item 10(a)(1) first phrase, (a)(2), (a)(3), (b)(2) introductory text, (b)(2)(ii) and (b)(2)(ii)(C). Item 14 is amended by revising the introductory text to Item 14(b)(1)(iii), Item 14(b)(3)(i) (A), (B), and (C) and (ii)(C), by adding Item 14(a)(3)(vi), Item 14(b)(1)(iii)(C) and Item 14(b)(3)(ii) (D) and (E) and by revising Instruction 3 introductory text and Instruction 4. Also, in Item 14, paragraph (a)(5) is revised, a new paragraph (a)(6) is added and current paragraphs (a)(6)-(a)(12) are renumbered sequentially. The "instructions to paragraph (a)(6)" is retitled "instructions to paragraphs (a)(6) and (a)(7)" and is amended by revising the first sentence and adding two new sentences following the first sentence. These instructions follow new paragraph (a)(7). The "instructions to paragraph (a)(7)" is retitled "instructions to paragraph (a)(8)." Instruction 6 to Item 14 is amended by adding a reference to paragraph (a)(6) following the reference to paragraph (a)(5).

§ 240.14a-101 Schedule 14A. Information required in proxy statement.

Notes—

D. . . .

3. If a document or portion of a document other than an annual report sent to security holders pursuant to the requirements of Rule 14a-3 (§ 240.14a-3 of this chapter) with respect to the same meeting or solicitation of consents or authorizations as that to which the proxy statement relates is incorporated by reference in the manner permitted by Item 13(b) or 14(b) of this schedule, the proxy statement must be sent to security holders no later than 20 business days prior to the date on which the meeting of such security holders is held or, if no meeting is held, at least 20 business days prior to the date the votes, consents or authorizations may be used to effect the corporate action.

Item 10. Compensation Plans. If action is to be taken with respect to any plan pursuant to which cash or non-cash compensation may be paid, furnish the following information:

(a) *All Plans.* (1) Describe briefly the material features of the plan being acted upon, identify each class of persons . . .

(2) State the benefits or amounts which will be received by or allocated to each of the following under the plan being acted upon, if such benefits or amounts are determinable: (i) Each person (stating name and position) specified in paragraph (a)(1)(i) of Item 402 of Regulation S-K (§ 229.402 of this chapter); (ii) all current executive officers as a group; (iii) all other current officers and directors who are not executive officers as a group; and (iv) all employees as a group. If such benefits or amounts are not determinable, state the benefits or amounts which would have been received by or allocated to each of the following for the last fiscal year if the plan had been in effect, if such benefits or amounts may be determined: (i) Each person (stating name and position) specified in paragraph (a)(1)(i) of Item 402 of Regulation S-K (§ 229.402 of this chapter); (ii) all current executive officers as a group; (iii) all other current officers and directors who are not executive officers as a group; and (iv) all employees as a group.

(3) Furnish the information called for by Item 402(b) of Regulation S-K (§ 229.402 of this chapter) with respect to all compensation plans now in effect or in effect during the last three years except that information called for in paragraphs (b)(1) (vi) and (vii) and (b)(4) of Item 402(b) of Regulation S-K (§ 229.402 of this chapter) should be furnished with respect to the last three fiscal years for the following: (i) Each person (stating name and position) specified in Item 402(a)(1)(i) of Regulation S-K (§ 229.402 of this chapter); (ii) all current executive officers as a group; (iii) all other current officers and directors who are not executive officers as a group, if such persons may participate in the plan; and (iv) all employees as a group, if such persons may participate in the plan. The information called for by paragraph (b)(4)(ii) of Item 402 of Regulation S-K (§ 229.402 of this chapter) need not be provided for all employees as a group. The information required by this paragraph (a)(3) is in lieu of the information otherwise called for by Item 402(b) of Regulation S-K (§ 229.402 of this chapter) in connection with the disclosure required by Item 8 of this schedule.

(b) . . .

(2) With respect to any specific grant of or any plan containing options, warrants or rights submitted for security holder action, . . . (ii) state separately the amount of such options received or to be received by the following persons if such benefits or amounts are determinable: . . . (C) all other current officers and directors who are not executive officers as a group: . . .

Item 14. Mergers, Consolidations, Acquisitions and Similar Matters.

(a) *Information about the transaction.*

(3) . . .

(vi) The information required by Item 202 of Regulation S-K (§ 229.202 of this chapter), description of registrant's securities, for any securities that are exempt from registration and are being issued in connection with the transaction if the security holders entitled to vote or give an authorization or consent with regard to the transaction will receive such securities, unless: (i) The issuer of the securities would meet the requirements for use of Form S-3 and elects to furnish information in accordance with the provisions of paragraph (b)(1), (ii) capital stock is to be issued and (iii) securities of the same class are registered under Section 12 of the Exchange Act and either (a) are listed for trading or admitted to unlisted trading privileges on a national securities exchange; or (b) are securities for which bid and offer quotations are reported in an automated quotations system operated by a national securities association;

(5) The information required by Item 301 of Regulation S-K (§ 229.301 of this chapter), selected financial data, for the registrant and the other person.

(6) If material, the information required by Item 301 of Regulation S-K for the registrant or the other person on a pro forma basis, giving effect to the transaction.

Instruction to paragraphs (a)(6) and (a)(7)

For a business combination accounted for as a purchase, the financial information required by paragraphs (a)(6) and (a)(7) shall be presented only for the most recent fiscal year and interim period. For a business combination accounted for as a pooling, the financial information required by paragraphs (a)(6) and (a)(7) (except for information with regard to book value) shall be presented for the most recent three fiscal years and interim period. For a business combination accounted for as a pooling, information with regard to book value shall be presented as of the end of the most recent fiscal year and interim period. . . .

(b) *Information about the registrant and the other person.*

(1) Information with respect to S-3 registrants.

(iii) Incorporate by reference into the proxy statement the documents listed in paragraphs (A), (B) and, if applicable, (C) below:

(C) If capital stock is to be issued to security holders entitled to vote or give an authorization or consent and securities of the same class are registered under Section 12 of the Exchange Act and: (i) are listed for trading or admitted to unlisted trading privileges on a national securities exchange; or (ii) are securities for which bid and offer quotations are reported on an automated quotations system operated by a national securities association, the description of such class of securities which is contained in a registration statement filed under the Exchange Act, including any amendment or reports filed for the purpose of updating such description.

(3) Information with respect to registrants other than S-2 or S-3 registrants.

(i) * * *

(A) Information required by Item 101 of Regulation S-K (§ 229.101 of this chapter), description of business.

(B) Information required by Item 102 of Regulation S-K (§ 229.102 of this chapter), description of property.

(C) Information required by Item 103 of Regulation S-K (§ 229.103 of this chapter), legal proceedings.

(ii) * * *

(C) A brief description of the business done by the company which indicates the general nature and scope of the business;

(D) The information required by paragraphs (b)(3)(i)(D) and (F)-(H) of this Item and the information required by Item 304(b) of Regulation S-K (§ 229.304 of this chapter).

(E) Schedules required by Rules 12-15, 28 and 29 of Regulation S-X.

(c) Additional method of incorporation by reference. * * *

Instructions to Item 14

3. If the registrant or any of its securities or assets is to be acquired by the other person, the information regarding the other person that is required by this Item, other than information required by paragraphs (a)(1)-(3) and (a)(9)-(11) of this Item, need be provided only to the extent that: * * *

4. If the plan being voted on involves only the registrant and one or more of its totally held subsidiaries and does not involve a liquidation of the registrant or a spin-off, the information required by this Item, other than information required by paragraphs (a)(1)-(4) and (a)(9)-(12) of this Item, may be omitted.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

8. The authority citation for Part 239 continues to read, in part, as follows:

Authority: The Securities Act of 1933, 15 U.S.C. 77a, et seq., * * *

9. Form S-4 (§ 239.25) is amended by revising the first sentence of Instruction A.2. In Item 3, paragraph (d) is divided into paragraphs (d) and (e) and subsequent paragraphs are relettered sequentially; the "instruction to paragraph (e)" is retitled "instruction to paragraphs (e) and (f)" and amended by revising the first sentence and adding two new sentences following the first sentence. This instruction follows paragraph (f). Item 4(a)(3) introductory text and item 4(a)(3)(i) are revised. In Item 13(a)(3)(vi) and Item 14(i), references to Item 304 of Regulation S-K are changed from "disagreements with accountants on accounting and financial disclosure" to "changes in and disagreements with accountants on accounting and financial disclosure." Form S-4 also is amended by revising Item 17(b)(6), by, in Item 18(b), removing the reference to paragraph "(a)(4)(ii)" and replacing it with a reference to paragraph "(a)(5)(ii)." The section also is amended by, in Item 19(b), removing the reference to paragraph "(a)(6)," removing the reference to paragraph "(a)(8)" and replacing it with a reference to paragraph "(a)(7)," and, in Item 19(c), removing the reference to paragraph "(a)(18)" and replacing it with a reference to paragraph "(a)(7)."

The text of Form S-4 does not appear in Code of Federal Regulations.

§ 239.25 Form S-4, for the registration of securities issued in business combination transactions.

Form S-4

General Instructions

A. Rule as to Use of Form S-4.

1. * * *

2. If the registrant meets the requirements of and elects to comply with the provisions in any item of this Form of Form F-4 (§ 239.34 of this chapter) that provides for incorporation by reference of information about the registrant or the company being acquired, the prospectus must be sent to the security holders no later than 20 business days prior to the date on which the meeting of such security holders is held or, if no meeting is held, at least 20 business days prior to either (1) the date the votes, consents or authorizations may be used to effect the corporate action or, (2) if votes, consents or authorizations are not used, the date the transaction is consummated. * * *

Item 3. Risk Factors, Ratio of Earnings to Fixed Charges and Other Information. * * *

(d) The information required by Item 301 of Regulation S-K (§ 229.301 of this chapter) (selected financial data) for the registrant and the company being acquired. To the extent the information is required to be presented in the prospectus pursuant to Items 12, 14, 16 or 17, it need not be repeated pursuant to this Item.

(e) If material, the information required by Item 301 of Regulation S-K for the registrant on a pro forma basis, giving effect to the transaction. To the extent the information is required to be presented in the prospectus pursuant to Items 12 or 14, it need not be repeated pursuant to this Item.

Instruction to paragraphs (e) and (f)

For a business combination accounted for as a purchase, the financial information required by paragraphs (e) and (f) shall be presented only for the most recent fiscal year and interim period. For a business combination accounted for as a pooling, the financial information required by paragraphs (e) and (f) (except for information with regard to book value) shall be presented for the most recent three fiscal years and interim period. For a business combination accounted for as a pooling, information with regard to book value shall be presented as of the end of the most recent fiscal year and interim period. * * *

Item 4. Terms of the Transaction.

(a) * * *

(2) * * *

(3) The information required by Item 202 of Regulation S-K (§ 229.202 of this chapter), description of registrant's securities, unless: (i) The registrant would meet the requirements for use of Form S-3 and elects to furnish information pursuant to Item 10, * * *

Item 17. Information With Respect to Companies Other than S-2 or S-3 Companies.

(b) * * *

(6) Item 304(b) of Regulation S-K (§ 229.304 of this chapter), changes in and disagreements with accountants on accounting and financial disclosure.

10. Form F-4 (§ 239.34) is amended by, revising the first sentence of General Instruction A.2, in Item 3, dividing paragraph (d) into paragraphs (d) and (e) and relettering subsequent paragraphs sequentially. The "instructions" to paragraph (e) is retitled "instructions to paragraphs (e) and (f)" and is amended by revising the first sentence in paragraph 1 and adding two new sentences following the first sentence in paragraph 1. These instructions follow paragraph (f). Form F-4 also is amended by revising Item 4 paragraph (a)(3) introductory text and paragraph (a)(3)(i), in Item 18, removing

paragraph (a)(6), renumbering subsequent paragraphs and adding new paragraph (a)(7); in Item 18(b), removing the reference to paragraph (a)(4)(ii) and replacing it with a reference to (a)(5)(ii); in Item 19, removing paragraph (a)(6) and renumbering subsequent paragraphs; in Item 19(b), removing the reference to paragraph (a)(6) and removing the reference to paragraph (a)(8) and replacing it with a reference to paragraph (a)(7); and, in Item 19(c), removing a reference to paragraph (a)(8) and replacing it with a reference to paragraph (a)(7).

The text of Form F-4 does not appear in the Code of Federal Regulations. § 239.34 Form F-4, for registration of securities of certain foreign private issuers issued in certain business combination transactions.

Form F-4

General Instructions

A. Rule as to Use of Form F-4.

1. * * *
2. If the registrant meets the requirements of and elects to comply with the provisions in any item of this Form or Form S-4 (§ 239.25) that provides for incorporation by reference of information about the registrant or the company being acquired, the prospectus must be sent to the security holders no later than 20 business days prior to the date on which the meeting of such security holders is held or, if no meeting is held, the earlier of 20 business days prior to either (1) the date the votes, consents or authorizations may be used to effect the corporate action or (2) if votes, consents or authorizations are not used, the date the transaction is consummated. * * *

Item 3. Risk Factors, Ratio of Earnings to Fixed Charges and Other Information.

(d) The information required by Item 8 of Form 20-F (selected financial data) for the registrant and the company being acquired. If the information is required to be presented in the prospectus pursuant to Items 12, 14, 16 or 17, it need not be presented pursuant to this Item.

(e) If material, the information required by Item 8 of Form 20-F for the registrant on a pro forma basis, giving effect to the transaction. If the information is required to be presented in the prospectus pursuant to Items 12 or 14, it need not be presented pursuant to this Item.

Instructions to paragraphs (e) and (f)

1. For a business combination accounted for as a purchase, the financial information required by paragraphs (e) and (f) shall be presented only for the most recent fiscal year and interim period. For a business combination accounted for as a pooling, the financial information required by paragraphs (e) and (f) (except for information with regard to book value) shall be presented for the most recent three fiscal years and interim period. For a business combination accounted for as a pooling, information with regard to book value shall be presented as of the end of the most recent fiscal year and interim period. * * *

2. * * *

Item 4. Terms of the Transaction.

- (a) * * *
- (3) The information required by Item 202 of Regulation S-K (§ 229.202 of this chapter), description of registrant's securities, unless:
 - (i) The registrant would meet the requirements for use of Form F-3 and elects to furnish information pursuant to Item 10,
 - (ii) * * *

Item 18. Information if Proxies, Consents or Authorizations Are To Be Solicited.

(a) * * *

Instruction * * *

(6) The information required by Item 21 of Schedule 14A, vote required for approval;

(7) With respect to each person who will serve as a director or an executive officer of the surviving or acquiring company, the information required by:

- (i) Item 10 of Form 20-F, directors and officers of registrant;
- (ii) Items 11 and 12 of Form 20-F, remuneration and options; and
- (iii) Item 13 of Form 20-F, interest of management in certain transactions.

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY CONSERVATION ACT OF 1975—REGULATION S-K

11. The authority citation for Part 229 continues to read, in part, as follows:

Authority: Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 12, 13, 14, 15(d), 23(a), 48 Stat. 892, 894, 901; secs. 205, 209, 48 Stat. 906, 908; sec. 203(a), 49 Stat. 704; secs. 1, 3, 8, 49 Stat. 1375, 1377, 1379; sec. 301, 54 Stat. 857; secs. 8, 202, 68 Stat. 685, 686; secs. 3, 4, 5, 6, 78 Stat. 565-568, 569, 570-574; sec. 1, 79 Stat. 1051; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 1, 2, 3-5, 28 (c), 84 Stat. 1435, 1497; sec. 105(b), 68 Stat. 1503; secs. 8, 9, 10, 11, 18, 69 Stat. 117, 118, 119, 155; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78l, 78m, 78n, 78l(d), 78w(a). * * *

12. Instruction 3 of § 229.304 is revised as follows.

§ 229.304 (Item 304) Changes in and disagreements with accountants on accounting and financial disclosure.

Instructions to Item 304:

3. The information required by Item 304(a) need not be provided for a company being acquired by the registrant that is not subject to the reporting requirements of either section 13(a) or 15(d) of the Exchange Act, or, because of section 12(i) of the Exchange Act, has not furnished an annual report to security holders pursuant to Rule 14a-3 or Rule 14c-3 for its latest fiscal year.

§ 229.512 [Amended]

13. Paragraph (h), heading and introductory text, of § 229.512 is amended by removing the references to "S-14."

By the Commission.

Jonathan G. Katz,

Secretary.

May 27, 1987.

[FR Doc. 87-12573 Filed 6-9-87; 8:45 am]

BILLING CODE 8010-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Part 416

[Reg. No. 16]

Supplemental Security Income for the Aged, Blind, and Disabled; Residence and Citizenship

AGENCY: Social Security Administration, HHS.

ACTION: Final rules.

SUMMARY: These final rules implement the order of the United States Court of Appeals for the Second Circuit in the case of *Berger v. Heckler*, 771 F.2d 1556 (1985). The court order substantially affirms the order of the District Court in *Berger v. Schweiker*, No. CV-76-1420 (E.D.N.Y. July 31, 1984) which sets out criteria for determining whether an alien is permanently residing in the United States (U.S.) under color of law and lists specific categories of aliens who meet the criteria and thus may be eligible for Supplemental Security Income (SSI) benefits. These final regulations provide that aliens residing in the U.S. with the knowledge and permission of the Immigration and Naturalization Service (INS) and whose departure INS does not contemplate enforcing are permanently residing in the U.S. under color of law. The rules set out specific categories of aliens who meet these criteria along with the most common documents INS provides to aliens in these categories. The rules were published as a Notice of Proposed Rulemaking in the *Federal Register* on March 19, 1986 (51 FR 9462) with a 60-day comment period. A number of comments were received and are discussed under the heading titled *Discussion of Comments*.

EFFECTIVE DATE: These rules are effective June 10, 1987.

FOR FURTHER INFORMATION CONTACT: Dave Smith, Office of Regulations, Social Security Administration, 6401 Security Boulevard, Baltimore,

Maryland 21235, Telephone 301-594-7460.

SUPPLEMENTARY INFORMATION: Section 1614(a)(1)(B) of the Social Security Act requires that an individual must be a citizen, or an alien either lawfully admitted for permanent residence or permanently residing in the U.S. under color of law, to be eligible for SSI benefits. The current regulations at 20 CFR 416.1618 do not define "permanently residing in the U.S. under color of law" but rather set out what evidence an individual must provide to prove he or she is permanently residing in the U.S. under color of law. Our policies regarding this requirement under the SSI program were the subject of litigation in *Berger v. Secretary*, No. 76C 1420 (E.D.N.Y. June 13, 1978). Under the final judgment entered June 13, 1978, aliens who were residing in the U.S. with the knowledge and permission of INS and whose departure INS did not contemplate enforcing were permanently residing in the U.S. under color of law and thus were potentially eligible for SSI benefits. The final judgment contained language to that effect.

After further litigation, the District Court in *Berger v. Schweiker*, CV-76-1420 (E.D.N.Y. July 31, 1984) set out more specific criteria for determining if an alien is permanently residing in the U.S. under color of law. The court order again provided that aliens residing in the U.S. with the knowledge and permission of INS and whose departure INS does not contemplate enforcing are aliens permanently residing in the U.S. under color of law for SSI purposes. Under the terms of the court order, INS will not be considered as contemplating enforcing an alien's departure if it is the policy or practice of INS not to enforce the departure of aliens in the same category or if from all the facts and circumstances in a particular case it appears that INS is permitting the alien to reside in the U.S. indefinitely. The court order also listed certain categories of aliens as examples of categories which meet the PRUCOL requirement. The court order required that our regulations and operating instructions contain its criteria for color of law determinations and the specified categories of aliens who are considered as PRUCOL. On appeal the United States Court of Appeals for the Second Circuit in *Berger v. Heckler*, 771 F. 2d 1556 (1985), affirmed the district court order, except that it did not require the Secretary to use the exact language specified by the district court. However, we have decided to adopt much of the language provided by the district court

as it gives the most specific guidance on how the court's holding is to be interpreted. Because under the courts' orders more aliens will meet the definition of color of law than under our current regulations, more aliens may now be eligible for SSI benefits if they meet all other requirements for eligibility.

These final regulations apply only to the SSI program under title XVI of the Social Security Act. The regulations do not apply to permanently residing in the U.S. under color of law determinations under other Federal statutes. The regulations do not apply to applicants for an Immigration and Naturalization status other than applicants specifically listed in *Berger v. Heckler*, 771 F. 2d 1556 (1985). In addition, the regulations do not apply to nonimmigrants as listed in section 1101(a)(15) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15).

Provisions of the Regulations

These final regulations amend § 416.1618 to provide that aliens residing in the U.S. with the knowledge and permission of INS and whose departure INS does not contemplate enforcing are permanently residing in the U.S. under color of law. The final regulations list the categories of aliens specified in the *Berger* district court order as aliens permanently residing in the U.S. under color of law (PRUCOL). The court order requires us to determine PRUCOL based on whether INS contemplates enforcing the alien's departure for aliens in some of these categories. Other categories, specified by the court, do not require us to consider whether INS contemplates enforcing departure since, by their nature, these categories imply that INS does not contemplate enforcing the alien's departure. Also listed are the most common documents INS provides to aliens in all of these categories.

The regulations require the alien to provide proof that he or she is in one of the categories by presenting one of the documents listed or any other information he or she has. We will contact INS in every case to verify the alien's current status and, in the required cases, to obtain information from INS as to whether an alien is PRUCOL based on whether INS contemplates enforcing the alien's departure.

Under the regulations, if an alien gives us proof that he or she is in a category that does not require us to consider whether INS contemplates enforcing departure, we will begin benefit payments if all other eligibility factors are met. We will then verify the alien's status with INS.

If an alien gives us proof that he or she is in a category that requires us to find out whether INS contemplates enforcing the alien's departure, the regulations provide as follows:

If an alien has a document currently valid for either an indefinite period of time or for at least 1 year, we will assume that INS does not contemplate enforcing the alien's departure. We will apply the same assumption for an alien who shows us a letter from INS that specifically indicates that INS is allowing the alien to remain in the U.S. for a specified period of time because of conditions in the alien's home country. If all other factors of eligibility are met, we will begin payment immediately. If, based on the information we receive from our contact with INS, we learn that INS does not contemplate enforcing the alien's departure, benefits will continue. However, if we learn that INS does contemplate enforcing the departure of the individual, we will suspend benefits. For aliens with documents valid for an indefinite period, INS verification of that document as currently valid is sufficient proof that INS does not contemplate enforcing the alien's departure. For aliens with documents valid for at least 1 year, we need INS verification of the document as currently valid as well as other INS information as to whether INS contemplates enforcing the alien's departure.

With the exception of aliens allowed to stay in the U.S. because of conditions in the alien's home country, if an individual presents a document valid for less than 1 year or a document with no expiration date or has no document, we will not pay benefits until we get information from INS as to whether INS contemplates enforcing the alien's departure. If INS does not contemplate enforcing the alien's departure, we will pay benefits if all other eligibility factors are met.

These policies were developed based on our experience in processing such claims and on information obtained from INS. Our experience with INS practices indicates that INS generally grants 1-year statuses for humanitarian reasons and usually continues to renew these statuses. In addition, we have been advised by INS that it continuously renews the status of aliens for whom a special determination was made to allow them to remain in the U.S. for a specified period due to conditions in their home country. INS, therefore, does not contemplate enforcing departure of individuals with these statuses. By contrast, it has been our experience that INS generally does not renew statuses that are valid for less than a year. These policies will enable us to pay benefits as promptly as possible to those individuals whose departure INS most likely does not contemplate enforcing.

In addition, we are deleting from § 416.1618 the provision in paragraph (a)(3) that provides for certain aliens to be considered as PRUCOL as a result of a March 10, 1977 court order. That court

order in *Silva v. Levi*, No. 76 C 4268 (N.D.Ill. 1977), enjoined INS from deporting certain aliens and required INS to notify those aliens that they were authorized to remain in the U.S. for an indefinite period of time. Since the aliens could reside in the U.S. indefinitely, we considered them to be PRUCOL for SSI purposes. The *Silva* injunction was dissolved as of November 1, 1981. Since *Silva* aliens who did not have their alien status adjusted during the pendency of the injunction are no longer protected from deportation they are no longer being allowed to reside in the U.S. for an indefinite period of time. Therefore, we no longer consider these aliens to be PRUCOL for SSI purposes.

There has been recent litigation, *Flores v. Bowen*, 790 F.2d 740 (9th Cir. 1986) in which the Ninth Circuit Court of Appeals found a *Silva* alien to be PRUCOL for SSI purposes because paragraph (a)(3) of § 416.1618 was still in the regulation. However, the court noted our Notice of Proposed Rulemaking and stated that the government was free to revoke the existing regulation which provides that *Silva* aliens are PRUCOL. Therefore, we have deleted this provision from the final regulations. *Silva* aliens may, of course, establish that they are PRUCOL if they can show that they meet any of the categories specified in the regulations.

Recent legislation, the Immigration Reform and Control Act of 1986, provides that aliens who have continuously resided in the U.S. illegally since before January 1, 1982 can apply for and be granted temporary legal residence status. After 18 months, the aliens can apply for and be granted permanent legal residence. While the new law generally prohibits newly legalized aliens from receiving Federal assistance, it excepts SSI. The legislative history of the law indicates that aliens granted temporary legal residence status would be residing in the U.S. under color of law. In addition, aliens granted such status would meet the definition of PRUCOL as specified in the *Berger* court orders and set out in § 416.1618(a) of these final regulations. Therefore, we will consider aliens granted temporary legal residence status to be PRUCOL for SSI purposes. The law also provides that certain seasonal agricultural workers can also apply for and be granted temporary legal residence status and after a specified period, permanent legal residence. Under the new legislation, these aliens are considered permanent residents and thus eligible for SSI. The statute also

changes the registry date in section 249 of the Immigration and Nationality Act (8 U.S.C. 1259) from June 30, 1948 to January 1, 1972. While we have changed § 416.1618(b)(13) to include the new registry date we have not changed the regulations at this time to add a specific category for aliens who will be legalized under the new law. Since our categories generally refer to INS documents and procedures, we will revise these regulations as necessary after INS has developed regulations, procedures and documentation to implement the new legalization process.

Discussion of Comments

As previously indicated, we received a number of comments on the Notice of Proposed Rulemaking published in the *Federal Register* on March 19, 1986 (51 FR 9462). A summary of the comments and our responses follow.

Comment: Two commenters suggested that we delete the documents listed in § 416.1618(b) of the proposed regulation because the list was not exclusive. The commenters offered an alternative if the list of documents is to be retained. They suggested including language that makes it clear that these are the most common documents, but not the only ones.

Response: We believe it is helpful to mention the most common documents held by aliens; however, we did not intend this list to be exclusive. Therefore, we have not deleted the list but have revised § 416.1618(b) to make it clear that the listed documents are the most common ones aliens will have.

Comment: Two commenters suggested that the aliens included as PRUCOL under § 416.1618(d) of the proposed regulation be included as a category in the list in § 416.1618(b).

Response: We have adopted this suggestion and have added a new subparagraph (16) to § 416.1618(b) to cover this group.

Comment: Two commenters suggested that the regulation make clear that the term "does not contemplate enforcing departure" applies to only some of the categories listed in the proposed regulation.

Response: We have revised the regulation to make it clear that, under the court's order, a determination that INS does not contemplate enforcing departure must be made only for aliens in categories specified in § 416.1618(b) (5), (6), (7), (10), (14), and (16).

Comment: Two commenters stated that the proposed regulation at § 416.1618(c) would give SSA the authority to deny benefits to aliens with a status valid for an indefinite time period.

Response: We did not intend for the regulation to give the impression that an alien with a currently valid indefinite status would not be found to be PRUCOL. We have revised § 416.1618(d) to make it clear that aliens in categories specified in § 416.1618(b) (1), (2), (3), (4), (8), (9), (11), (12), (13), or (15) are PRUCOL as long as the document presented as evidence of that category is currently valid. However, as stated in our previous response, under the district court's order, we must make a determination of PRUCOL based on whether INS contemplates enforcing the departure of aliens in categories in § 416.1618(b) (5), (6), (7), (10), (14), and (16). Therefore, if an alien presents a document as evidence of one of these categories and the document indicates the status is indefinite, we will assume that INS does not contemplate enforcing departure. We will verify with INS that the indefinite status is currently valid. If INS verifies that the indefinite status is current and valid, this is sufficient proof that INS does not contemplate enforcing the alien's departure. Therefore, the individual will be considered to PRUCOL.

Comment: Two commenters suggested that an alien with a document valid for 1 year, 6 months, or for any period less than a year but with renewals totaling 1 year, be considered as one whose departure INS does not contemplate enforcing. This finding would be based on INS' policy and practice of not enforcing departure during the time allowed by the status.

Response: The district court's order requires us to determine PRUCOL based on whether INS contemplates enforcing the departure of aliens in categories in § 416.1618(b) (5), (6), (7), (10), (14), and (16). However, the order does not address at what point INS contemplates enforcing departure. We have interpreted the order as meaning "does not contemplate enforcing departure" at the expiration of a definite status; otherwise, the requirement of a determination of "does not contemplate enforcing departure" would be redundant. If INS has granted a definite status, it clearly will not deport during the pendency of that status.

Comment: Three commenters suggested that we pay aliens (if all other SSI eligibility factors are met) with a status valid for less than 1 year if we do not receive a response from INS within either 21 or 30 days. When we receive an answer from INS, we should follow normal overpayment procedures, if necessary. In a similar comment, it was suggested that we not verify alien status with INS at all. The commenters are

concerned that alien SSI applicants will lack funds to sustain themselves while their applications are being processed.

Response: We are not accepting these comments. INS has informed us and our experience has confirmed that INS does not renew indefinitely statuses valid for less than 1 year. Therefore, we cannot assume that INS does not contemplate enforcing the departure of these aliens. Accordingly, we will not begin payments until we receive verification from INS. As indicated earlier, under the courts' orders, SSA determines that an alien is PRUCOL based on INS intentions. We do not have any basis for assessing INS intentions without consulting with INS. In addition, we have worked with INS Central Office in the past and are currently doing so to assure timely responses to SSA verification requests.

Comment: One commenter believed that it is unnecessary to address suspension and overpayment rules in this regulation.

Response: We believe the references are necessary for clarity.

Comment: One commenter believed that the regulation implies that INS will make the determination as to whether it contemplates enforcing an alien's departure. The commenter stated that this determination should be made by SSA.

Response: We did not intend for the regulation to give the impression that INS will make the PRUCOL determination. That determination is part of the SSI eligibility determination made by SSA. SSA will make the PRUCOL determination based on information from INS as to its intent regarding enforcing the departure of an alien. Our operating instructions provide for us to send a form to INS that asks a series of specific questions as to INS' knowledge about the alien, the alien's status and INS' intentions regarding the alien. We specifically ask the questions: "Is it INS policy or practice to enforce the departure of aliens in this category?" and "Based on the facts in this individual's case, will INS permit this individual to reside in the United States indefinitely?". Based on INS' responses to the questions as to whether it contemplates enforcing departure, we will determine whether an alien is PRUCOL. We have revised § 416.1618(d) to make this clear.

Comment: Two commenters suggested that we further define the term "does not contemplate enforcing departure" as INS "... has no current plans to enforce your departure and will not do so as long as the factors bearing upon your status remain unchanged."

Response: We are not accepting the commenters' definition. As noted in an earlier response, we interpret the court order to mean "does not contemplate enforcing departure" at the expiration of a status for a definite time. To adopt the commenters' definition would result in a "does not contemplate enforcing departure" determination for all aliens during the pendency of a status for a definite time. We believe this result exceeds the scope of the court order.

Comment: One commenter suggested that unless INS has taken an actual step toward enforcing the departure of an alien within 2 weeks of his or her application for SSI, SSA should determine that the alien is PRUCOL.

Response: We are not adopting this comment because we believe it exceeds the scope of the court's order. This order does not require that INS take an actual step to enforce departure. Rather, it requires only that INS is not contemplating the enforcement of the alien's departure to find that the alien is PRUCOL.

Comment: One commenter suggested that we add to the list of categories aliens from specific countries, such as Uganda, Ethiopia, or nationals from Poland for whom INS has made a special determination that allows them to remain in the U.S.

Response: The district court's order requires SSA to "regularly request from INS information concerning other categories of aliens whose departure from the United States INS does not contemplate enforcing" and to "periodically revise the Program Operations Manual and regulations to reflect such categories." As the court's order demonstrates, the court considers "category" to mean a specific status. In implementing the court's order, we have followed the court's approach, but at the suggestion of commenters, have added an additional paragraph designed to cover aliens who do not come within the specified categories, but still meet the general definition of permanent residence under color of law under the court's order. The INS policies to which the commenter refers appear to be based on the changing political conditions in particular countries. Since those conditions, and therefore INS policies, can change quickly, we do not believe it is appropriate to codify those policies in regulations, which must be changed pursuant to Administrative Procedure Act notice and comment rulemaking procedures. We will consult with INS regularly to request information on other categories of aliens whose departure INS does not contemplate enforcing.

Since some of these aliens for whom INS makes a special determination that allows them to remain in the U.S. will have dated documents, under the rules in § 416.1618(d)(3), payments would not be made in all cases until after INS confirmed the current status and provided information which indicates that it did not contemplate enforcing departure. Since we know that INS renews the status of aliens from countries for whom INS has made a special determination that allows them to remain in the U.S. due to conditions in their country, we are revising § 416.1618(d)(3)(ii) to allow payment to these aliens prior to INS verification.

Comment: Two commenters suggested that the regulation make it clear that neither applicants for INS status nor nonimmigrants are PRUCOL.

Response: We agree and have clarified § 416.1618(b) accordingly.

Comment: One commenter suggested that aliens described in § 416.1618(b)(5) "... aliens on whose behalf an immediate relative petition has been approved ..." should be excluded since this status does not mean the aliens are PRUCOL.

Response: We are required by the court's order to include this category.

Comment: One commenter suggested deleting § 416.1618(b)(6) (aliens who have filed applications for adjustment of status under section 245 of the Immigration and Nationality Act) and § 416.1618(b)(14) (aliens granted a suspension of deportation under section 244 of the Immigration and Nationality Act) as they are lawful permanent residents and, therefore, not subject to this regulation.

Response: We have not deleted § 416.1618(b)(14). Section 244 of the Immigration and Nationality Act allows for an immigration judge to issue an order to suspend deportation. This order does not confer lawful permanent resident status. If Congress takes no action on the alien's case in two legislative sessions, the alien is granted lawful permanent resident status. We agree with the comment regarding section 245 of the Immigration and Nationality Act in part and have deleted reference only to the granting of adjustment of status in § 416.1618(b)(6) since this does confer lawful permanent resident status. We had included this category in the NPRM because it was contained in the district court's order. We have added this category to § 416.1615, which sets out the rules for lawful permanent residence. We have left the remainder of § 416.1618(b)(6) intact, i.e., applicants for adjustment of status are still included in this category.

Comment: One commenter requested that the preamble be clarified to explain that this regulation applies only to the SSI program.

Response: We have revised the preamble accordingly.

Comment: One commenter suggested that proof of an indefinite status include a document with no expiration date, as well as a document annotated "indefinite."

Response: We are not adopting this suggestion since a document with no expiration date is not always evidence of an indefinite status. There are some documents with no expiration date which are provided for short periods of time and others which are provided to applicants for a status. INS does not intend these documents to be indicative of an indefinite status. The document is given to an alien, in some cases, until a decision is made on a permanent status. It would, therefore, be inappropriate for us to assume that INS does not contemplate enforcing the departure of an alien with a document with no expiration date. Since we have no proof, prior to INS contact, as to whether INS contemplates enforcing these aliens' departure, we will treat these aliens under § 416.1618(d)(3)(iii).

Comment: One commenter pointed out two technical citation errors. Section 416.1618(b)(6) of the proposed rules cited 8 CFR 242.5 (a) or (b) rather than 8 CFR 245.2(a) (1) or (2) and § 416.1618(b)(12) of the proposed rules cited 8 U.S.C. 252(d) rather than 8 U.S.C. 1252(d).

Response: We have made these technical corrections. We have also corrected the citation in § 416.1618(b)(7) dealing with stays of deportation from 8 U.S.C. 1253(a) to 8 U.S.C. 1105a.

Comment: One commenter suggested that we retain as a category of aliens PRUCOL, aliens who hold a *Silva* letter.

Response: We are not adopting this comment. The prior regulation was promulgated solely to implement the *Silva v. Levi* injunction by recognizing that those protected by it were to be deemed "permanently residing" so long as the injunction indefinitely prevented such aliens' removal. On December 18, 1981, the district court dissolved the injunction effective November 1, 1981.

As the Ninth Circuit Court of Appeals held in *Flores v. Bowen*, 790 F.2d 740 (9th Cir. 1986), the government is free to repeal the existing regulation that provides that *Silva* aliens are PRUCOL. Therefore, this category of alien is deleted and the *Silva* letter is not sufficient documentation that an alien is PRUCOL. However, if the alien has evidence of a status other than that of a *Silva* alien, that status will be evaluated under this final regulation.

Comment: One commenter suggested that we delete the reference in § 416.1618(c)(3) of the proposed regulation to whether INS "will continue to renew your status" and therefore does not contemplate enforcing your departure because often INS will not renew the alien's current status, but will instead grant a change in status.

Response: We agree and have deleted the reference.

Comment: One commenter provided a redraft of the regulation.

Response: Since there was no supporting rationale received within the comment period, we are unable to respond to this comment.

Regulatory Procedures

Executive Order 12291

The Secretary in consultation with the Office of Management and Budget, has determined that this rule is not a major rule under the terms of Executive Order 12291, therefore a regulatory impact analysis is not required. In addition, the Secretary has determined that these final regulations would not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

These final rules contain information collection requirements. As required by section 3507 of the Paperwork Reduction Act of 1980, we submitted a copy of the rules to the Office of Management and Budget (OMB) for its review of these information collection requirements. The reporting requirements contained in §§ 416.1615 and 416.1618 have been cleared by OMB under control number 0960-0451. Other organizations and individuals desiring to submit comments on the information collection requirements were requested in the Notice of Proposed Rulemaking to send them to us and to the Office of Information and Regulatory Affairs, OMB, New Executive Office Building, Room 3208, Washington, DC 20503, Attention: Desk Officer for Health and Human Services. No comments were received on the information collection requirements.

Regulatory Flexibility Act

We certify that these regulations will not have a significant economic impact on a substantial number of small entities since they will affect only individuals and States. Therefore, a regulatory flexibility analysis as provided in Pub. L. 96-354, the Regulatory Flexibility Act, is not required.

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

List of Subjects in 20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Supplemental Security Income.

Dated: November 4, 1986.

Dorcas R. Hardy,

Commissioner of Social Security.

Approved: December 24, 1986.

Otis R. Bowen,

Secretary of Health and Human Services.

PART 416—[AMENDED]

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

1. The authority citation for Subpart P of Part 416 is revised to read as follows:

Authority: Secs. 1102, 1614, and 1631, of the Social Security Act, as amended; 42 U.S.C. 1302, 1382c, and 1383.

2. In § 416.1615, paragraph (a) is amended by revising (a) (2) and (3) and by adding (a)(4) to read as follows:

§ 416.1615 How to prove you are lawfully admitted for permanent residence in the United States.

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- (2) A reentry permit;
- (3) An alien identification card issued by the government of the Northern Mariana Islands showing that you are admitted to the Northern Mariana Islands for permanent residence; or
- (4) Any document which shows that you have been granted lawful permanent resident status under section 245 of the Immigration and Nationality Act.
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(Approved by the Office of Management and Budget under control number 0960-0451)

3. Section 416.1618 is revised to read as follows:

§ 416.1618 When you are considered permanently residing in the United States under color of law.

(a) *General.* We will consider you to be permanently residing in the United States under color of law and you may be eligible for SSI benefits if you are an alien residing in the United States with the knowledge and permission of the Immigration and Naturalization Service and that agency does not contemplate enforcing your departure. The Immigration and Naturalization Service does not contemplate enforcing your departure if it is the policy or practice of that agency not to enforce the departure of aliens in the same category or if from all the facts and circumstances in your case it appears that the Immigration and Naturalization Service is otherwise

permitting you to reside in the United States indefinitely.

(b) *Categories of aliens who are permanently residing in the United States under color of law.* Aliens who are permanently residing in the United States under color of law are listed below. None of the categories include applicants for an Immigration and Naturalization Service status other than those applicants listed. None of the categories allows SSI eligibility for nonimmigrants; for example, students or visitors. Also listed are the most common documents that the Immigration and Naturalization Service provides to aliens in these categories:

(1) Aliens admitted to the United States pursuant to 8 U.S.C. 1153(a)(7), (section 203(a)(7) of the Immigration and Nationality Act). We ask for INS Form I-94 endorsed "Refugee-Conditional Entry";

(2) Aliens paroled into the United States pursuant to 8 U.S.C. 1182(d)(5) (section 212(d)(5) of the Immigration and Nationality Act) including Cuban/Haitian Entrants. We ask for INS Form I-94 with the notation that the alien was paroled pursuant to section 212(d)(5) of the Immigration and Nationality Act. For Cuban/Haitian Entrants, we ask for INS Form I-94 stamped "Cuban/Haitian Entrant (Status Pending) reviewable January 15, 1981. Employment authorized until January 15, 1981." (Although the forms bear this notation, Cuban/Haitian Entrants are admitted under section 212(d)(5) of the Immigration and Nationality Act.);

(3) Aliens residing in the United States pursuant to an indefinite stay of deportation. We ask for an Immigration and Naturalization Service letter with this information or INS Form I-94 with such a notation;

(4) Aliens residing in the United States pursuant to an indefinite voluntary departure. We ask for an Immigration and Naturalization Service letter or INS Form I-94 showing that a voluntary departure has been granted for an indefinite time period;

(5) Aliens on whose behalf an immediate relative petition has been approved and their families covered by the petition, who are entitled to voluntary departure (under 8 CFR 242.5(a)(2)(vi)) and whose departure the Immigration and Naturalization Service does not contemplate enforcing. We ask for a copy of INS Form I-94 or I-210 letter showing that status;

(6) Aliens who have filed applications for adjustment of status pursuant to section 245 of the Immigration and Nationality Act (8 U.S.C. 1255) that the Immigration and Naturalization Service has accepted as "properly filed" (within

the meaning of 8 CFR 245.2(a) (1) or (2)) and whose departure the Immigration and Naturalization Service does not contemplate enforcing. We ask for INS Form I-181 or a passport properly endorsed;

(7) Aliens granted stays of deportation by court order, statute or regulation, or by individual determination of the Immigration and Naturalization Service pursuant to section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a) or relevant Immigration and Naturalization Service instructions, whose departure that agency does not contemplate enforcing. We ask for INS Form I-94 or a letter from the Immigration and Naturalization Service, or copy of a court order establishing the alien's status;

(8) Aliens granted asylum pursuant to section 208 of the Immigration and Nationality Act (8 U.S.C. 1158). We ask for INS Form I-94 and a letter establishing this status;

(9) Aliens admitted as refugees pursuant to section 207 of the Immigration and Nationality Act (8 U.S.C. 1157) or section 203(a)(7) of the Immigration and Nationality Act (8 U.S.C. 1153(a)(7)). We ask for INS Form I-94 properly endorsed;

(10) Aliens granted voluntary departure pursuant to section 242(b) of the Immigration and Nationality Act (8 U.S.C. 1252(b)) or 8 CFR 242.5 whose departure the Immigration and Naturalization Service does not contemplate enforcing. We ask for INS Form I-94 or I-210 bearing a departure date;

(11) Aliens granted deferred action status pursuant to Immigration and Naturalization Service Operations Instruction 103.1(a)(ii) prior to June 15, 1984 or 242.1(a)(22) issued June 15, 1984 and later. We ask for INS Form I-210 or a letter showing that departure has been deferred;

(12) Aliens residing in the United States under orders of supervision pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252(d)). We ask for INS Form I-220B;

(13) Aliens who have entered and continuously resided in the United States since before January 1, 1972 (or any date established by section 249 of the Immigration and Nationality Act, 8 U.S.C. 1259). We ask for any proof establishing this entry and continuous residence;

(14) Aliens granted suspension of deportation pursuant to section 244 of the Immigration and Nationality Act (8 U.S.C. 1254) and whose departure the Immigration and Naturalization Service

does not contemplate enforcing. We ask for an order from the immigration judge;

(15) Aliens whose deportation has been withheld pursuant to section 243(h) of the Immigration and Nationality Act (8 U.S.C. 1253(h)). We ask for an order from an immigration judge showing that deportation has been withheld; or

(16) Any other aliens living in the United States with the knowledge and permission of the Immigration and Naturalization Service and whose departure that agency does not contemplate enforcing.

(c) *How to prove you are in a category listed in paragraph (b) of this section.*

You must give us proof that you are in one of the categories in paragraph (b) of this section. You may give us—

(1) Any of the documents listed in paragraph (b) of this section; or

(2) Other information which shows that you are in one of the categories listed in paragraph (b) of this section.

(d) *We must contact the Immigration and Naturalization Service.* (1) We must contact the Immigration and Naturalization Service to verify the information you give us to prove you are permanently residing in the United States under color of law.

(2) If you give us any of the documents listed in paragraphs (b) (1), (2), (3), (4), (8), (9), (11), (12), (13), or (15) of this section, we will pay you benefits if you meet all other eligibility requirements. We will then contact the Immigration and Naturalization Service to verify that the document you give us is currently valid.

(3) If you give us any of the documents listed in paragraphs (b) (5), (6), (7), (10) or (14) of this section, or documents that indicate that you meet category (16), or any other information to prove you are permanently residing in the United States under color of law, we will contact the Immigration and Naturalization Service to verify that the document or other information is currently valid. We must also get information from the Immigration and Naturalization Service as to whether that agency contemplates enforcing your departure. We will apply the following rules:

(i) If you have a document that shows that you have an Immigration and Naturalization Service status that is valid for an indefinite period we will assume that the Immigration and Naturalization Service does not contemplate enforcing your departure. Therefore, we will pay you benefits if you meet all other eligibility requirements. If, based on the information we get from the Immigration and Naturalization Service, we find that

your document is currently valid, we will consider this sufficient proof that the Immigration and Naturalization Service does not contemplate enforcing your departure. We will continue your benefits. However, if we find that your document is not currently valid, we will suspend your benefits under § 416.1321.

(ii) If you have a document that appears currently valid and shows you have an Immigration and Naturalization Service status for at least 1 year, or that shows the Immigration and Naturalization Service is allowing you to remain in the United States for a specified period due to conditions in your home country, we will assume that the Immigration and Naturalization Service does not contemplate enforcing your departure. Therefore, we will pay you benefits if you meet all other eligibility requirements. If, based on the information we get from the Immigration and Naturalization Service, we learn that your document is currently valid and that agency does not contemplate enforcing your departure, we will continue your benefits. However, if we learn that your document is not currently valid or that the Immigration and Naturalization Service does contemplate enforcing your departure, we will suspend your benefits under § 416.1321.

(iii) If you have a document that shows you have an Immigration and Naturalization Service status valid for less than 1 year, or if your document has no expiration date, or if you have no document, we will not pay you benefits until the Immigration and Naturalization Service confirms that your document is currently valid and we get information from that agency that indicates whether it contemplates enforcing your departure. If that agency does not contemplate enforcing your departure, we will pay you benefits if you meet all other eligibility requirements.

(iv) If at any time after you begin receiving benefits we receive information from the Immigration and Naturalization Service which indicates that the Immigration and Naturalization Service contemplates enforcing your departure, we will suspend your benefits under § 416.1321 and any benefits you have received after the date that the Immigration and Naturalization Service began contemplating enforcing your departure will be overpayments under Subpart E of this Part.

(e) *What "United States" means.* We use the term "United States" in this section to mean the 50 States, the District of Columbia, and the Northern Mariana Islands.

(Approved by the Office of Management and Budget under control number 0960-0451)

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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 668

Emergency Relief

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: The FHWA is revising its regulation on Emergency Relief (ER). Emergency Relief is a program established by Congress to assist the States in the repair of highways seriously damaged as the result of natural disasters or catastrophic failures. The regulation specifies procedures for program and project administration and provides guidance on eligibility of work. The final rule brings the existing regulation up to date considering recent legislative and administrative changes in the program, including the Federal-Aid Highway Act of 1987.

EFFECTIVE DATE: June 10, 1987.

FOR FURTHER INFORMATION CONTACT: Mr. James A. Carney, Railroads, Utilities and Programs Branch, Office of Engineering (202) 426-0450, or Mr. Michael J. Laska, Office of the Chief Counsel (202) 366-1383, Federal Highway Administration, 400 7th Street SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m. ET, Monday through Friday, except legal holidays.

SUPPLEMENTARY INFORMATION:

Background:

On September 17, 1985 (50 FR 37688) the FHWA published Docket No. 85-5, a notice of proposed rulemaking for Emergency Relief. The clear purpose of the ER program is to assist State and local authorities in unusually heavy expenses associated with an emergency involving Federal-aid highways. In carrying out the requirements of 23 U.S.C. 125 to provide funds to pay for the repair or reconstruction of Federal-aid highways, which are found to have suffered serious damage by natural disasters over a wide area or catastrophic failures, the Secretary of Transportation is authorized by 23 U.S.C. 315 to prescribe and promulgate rules and regulations. This authority is

delegated to the Federal Highway Administrator by 49 CFR 1.48. The regulation, 23 CFR 668, establishes the authority and responsibility of the Federal Highway Administrator to approve funds on the basis of an occurrence qualifies as a disastrous situation with regard to serious highway damage and which work may be included as necessary to repair such damage.

Upon submission of an application by the SHA, FHWA reviews the submitted information and approves or disapproves the application according to the information provided.

The FHWA allocates ER funds to the States on the basis of estimates made by FHWA in conjunction with the SHA. Since eligible projects are on Federal-aid systems, appropriate classes of regular Federal-aid funds are available for major repair or relocation work which permits greater flexibility in the development of repair projects. It is not the purpose of this program to provide funds for instances of isolated damage to road facilities which as a matter of normal road operations should be routinely budgeted and provided for by the States; nor is it the intent of this program to compensate for a lack of State assistance to local agencies within the State. States and local authorities (through the States) should not seek ER funding for routine repairs or correction of normally expected road damage. This type of road damage should be funded through regular road fund contingency planning. The ER program should be considered as a "last resort" to be used when an emergency situation goes beyond that which could and should reasonably be accommodated by a State's maintenance, emergency or contingency programs. Therefore, the inability of State or local authorities to pay is not in itself a warranting criterion to justify the approval of ER funds.

There can be no nationwide definitive break point between routine and extraordinary repair expenses. However, as a general rule, FHWA considers situations where a State's total estimated cost of work necessary to correct potential ER eligible sites is less than \$500,000 per disaster to be of a nature which could be handled under its routine procedures. This is not an absolute threshold, but it is a reasonable point where FHWA must more critically review proposals for lesser amounts and consider whether the situation meets the intent of the ER program.