

**TO:** U.S. Department of State  
CA/OCS/PRI  
Adoption Regulations Docket Room, SA-29  
2201 C Street NW.  
Washington, DC 20520

**FROM:** Ethica  
1116 W. 7<sup>th</sup> St.  
Columbia, TN 38401  
(931) 840-4565

**RE:** Comments on State Department Regulations on Intercountry  
Adoption  
**State/AR-01/96**

## **INTRODUCTION**

*Ethica* is a nonprofit education, assistance, and advocacy group, which seeks to be an independent voice for ethical adoption practices worldwide. In order to maintain our impartiality, *Ethica* does not accept monetary donations from agencies or other child-placing entities, nor are any of our managing Board of Directors currently affiliated with adoption agencies. *Ethica* strives to develop organizational policy and recommendations based solely on the basic ethical principles that underscore best practices in adoption and speak to the best interests of children.

*Ethica* believes that ethical adoption services must include family preservation efforts, birth family counseling and advocacy, adequate pre-adoption training for adoptive parents, ethical placement practices, post-adoption services that include disruption assistance, and the fulfillment of lifelong responsibilities to adoptees and their families. The 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (the Convention) is a landmark step forward in achieving these goals, and we welcome this opportunity to comment on the proposed U.S. regulations for its implementation.

A thorough review of the proposed regulations reveals that the Department of State (the Department) has responded to many of the concerns and suggestions voiced by the adoption community. Crafting a system that simultaneously balances the needs of children and creates a regulatory mechanism is difficult at best, and requires that a delicate balance be struck between the need for regulation and the need to create a workable system that will not be unduly burdensome. The Department's effort to show this balance is evident in many places throughout the proposed regulations, and we commend the Department for its effort in this regard.

We are especially pleased to see the increased consumer protections evident in the regulations, especially the creation of the Complaint Registry. Such a system will serve the important function of providing a non-biased vehicle for parents to lodge complaints and a significant public service with its ability to make such information available to parents seeking to adopt children.

In addition, we are pleased by the evident effort to enact regulations that take into consideration the role of market forces, which can often serve to shape policy and procedure without the addition of burdensome regulation. The acknowledgment of such forces is evident in several sections of the proposed regulations, including **§96.13** regarding exempt providers. We encourage the Department to retain this important recognition.

These are only a few of the many positive aspects of the regulations that *Ethica* has observed and we gratefully acknowledge the effort the Department has expended in this regard. There are a few areas of concern that remain, and we respectfully submit the following comments for your review.

*Ethica* has identified several main issues of concern. In light of the fact that many of these issues are reflected in various sections of the proposed regulations, we have opted to group our comments by subject rather than solely by section number. These subject areas are followed by comments on particular sections.

### **Child Buying and Protection**

One of the foremost purposes of the Convention is to “prevent the abduction, the sale of, or traffic in children.” As such, parties to the Convention have a responsibility to enact regulations that enable the fulfillment of this purpose. Contracting States are obligated to “eliminate any obstacles to its application” and to “deter all practices contrary to the objects of the Convention” (the Convention, Articles 7 and 8). The regulations, as written, fall seriously short of achieving this goal.

While we realize that this function is largely the responsibility of the country of origin under the Convention, the United States cannot fail to take into consideration its own responsibilities in the prevention of child trafficking. As the world's largest receiving nation, we must accept that the practices and policies of our adoption industry play a direct role in this problem.

While **§96.36** contains the required stipulation that an agency must have a policy to prohibit its employees or agents from giving money or other consideration as payment for a child or as an inducement to release a child for adoption, it lacks specific parameters and mechanisms for monitoring or enforcing such a prohibition.

In addition, **§96.36** expands on the types of expenses that can be paid in connection with adoption cases, leaving open the possibility that parents could receive significant amounts of cash for the payment of living expenses or prenatal costs. While we are aware of the difficult circumstances that birth parents face, and support the need for appropriate medical and counseling services for parents, the lack of specificity and regulation regarding the payment of expenses is very problematic. This expansion, coupled with the difficulty in proving that payments could serve as an inducement to release a child, could actually lead to an *increase* in

the trafficking of children. Therefore, Ethica would recommend that there be no expansion from current regulations in the type of expenses that can be paid.

### Enforcement

The language contained in **§96.36** is remarkably similar to the current regulatory language implementing the Immigration and Nationality Act concerning child buying. It, too, prohibits payment for the release of a child or as an inducement to release the child. In practice, however, this standard has proven virtually impossible to enforce without a confession from the birth parent. A report on the difficulty in proving child trafficking under the current standard is attached hereto and incorporated herein by reference. ([www.ethicanet.org/INSEvidence.pdf](http://www.ethicanet.org/INSEvidence.pdf))

Even when investigators prove that money has changed hands, they have great difficulty in proving where the money originated, which portion of it was for allowable expenses and whether the birth parent was coerced. Often all that is needed to thwart an investigation is for the birth parent to state that (s)he intended to place the child for adoption regardless of the payment received. Unfortunately, this statement is easily coached.

At the same time, there is an increase in solicitation activity in foreign countries. The increased demand from U.S. citizen parents for infants and young children and the growing competitive forces within the adoption community have led to unfortunate practices, which prey on parents living in difficult economic circumstances.

*Ethica* has heard numerous stories from adoptive parents in this regard. Families have recounted how they were picked up from the airport and driven through the countryside, where the facilitators stopped to ask people if they wanted to place their children for adoption. Other families tell of being asked to pay nannies a "gift" for caring for their children, only to later learn that the "nanny" was the child's mother.

Solicitation is also reportedly occurring on a larger scale. In one country, officials from the Immigration Service discovered that attorneys were using advertisements to offer assistance to pregnant women. The women who answered the advertisements were given prenatal care. However, if a mother later decided not to place her child for adoption, she was given a bill for the services rendered. In countries where women are living in impoverished conditions, such tactics can only be viewed as coercion.

It is vital that the Department carefully consider when, how, and by whom investigations will be done to "prevent the abduction, sale of, or traffic in children" and to ensure that the regulations provide the tools such investigators need to fulfill their responsibilities. These tools may include limitations on the way that birth parent services and expenses can be provided, a prohibition of payment of non-adoption-related expenses, a prohibition of solicitation activity, and a reasonable standard of evidence. Lacking such provisions, Section 96.36 simply applies a veneer of legality to one of the most troublesome aspects of intercountry adoption.

### Birth Parent Expenses and Solicitation

*Ethica* believes that birth parents living in other countries should be provided protections that are equal to those of birth parents in the United States. Given the

difficulties in enforcing protections in other countries, those protections may need to differ from those in the United States if they are to provide the same level of protection that is given to U.S. birth parents. Many have argued that the payment of prenatal and adoption expenses for birth parents overseas should be allowed because such expenses are allowed in domestic adoptions. However, there are serious concerns about some practices regarding the payments of expenses in the United States, too, and the Department should be careful not to perpetuate those same concerns abroad. Indeed, *Ethica* believes that the concerns are so serious that the better practice would be to prohibit payment of expenses that are not directly related to the adoption. If, however, the determination is made that other types of expenses are to be allowed, then *Ethica* believes that significantly greater controls should exist with regard to such expenses.

The lack of specificity in **§96.36** regarding the payment of expenses is troubling and invites abuse. This section contains none of the safeguards or requirements normally used in domestic adoption to regulate the payment of expenses. Such protections are particularly important in that payments that are considered small by U.S. standards may be large enough by the standards of a developing country to serve as an inducement to release a child for adoption.

According to the National Adoption Information Clearinghouse, approximately<sup>1</sup> 46 U.S. states have statutes specifying the type of birth parent expenses a prospective adoptive family is allowed to pay. Eight states stipulate expenses that families are not allowed to pay. Other states do not specify which expenses are not allowed, but their statutes contain regulatory language that precludes the payment of any expense not expressly stated. Some states allow nothing beyond the payment of legal and/or medical services (Maryland, Delaware), while others allow payments for prenatal living expenses, counseling, and medical and legal services.

Approximately 18 states specify that payments may not be made beyond a set time or may not exceed a stated amount. Thirty-seven states have statutes requiring that an accounting of all adoption-related expenses be made to the court having jurisdiction over the adoption proceedings. Many states require court approval of expenses prior to payment. In addition, some states require that expenses be paid to the agency or provider of services and not directly to the birth parent.

Only one state (Idaho) requires the repayment of expenses if a parent decides not to place her child for adoption. A majority of states have laws stipulating that the payment of expenses *cannot obligate the parent to place the child for adoption*. This is an important protection for birth parents, as it enables them to retain the choice over placement regardless of their economic circumstances at the time of birth.

Examples of such regulatory language:

Arizona: The court shall approve living expenses that the person has paid, unless found unreasonable. The person who wishes to pay the one thousand dollars in living expenses of a birth mother shall file an affidavit with the court signed by the birth mother verifying that the birth mother has been given written notice and that she understands that the payment of these expenses by any person does not obligate the birth mother to place the child for adoption and that a valid consent to the adoption can only be given

---

<sup>1</sup> The word approximately is used by NAIC to acknowledge that laws are constantly changing. Numbers were correct at the time of publication (2003).

after the child's birth without regard to any cost or expense paid by any person in connection with the adoption.

Illinois: (d) Payment of their reasonable living expenses, as provided in this Section, shall not obligate the biological parents to place the child for adoption. In the event the biological parents choose not to place the child for adoption, the petitioners shall have no right to seek reimbursement of moneys paid to the biological parents pursuant to a court order under this Section.

Many states have also enacted statutes to control the use of intermediaries or facilitators, often by allowing only licensed agencies to act in placing a child for adoption—a policy that is compatible with the Convention's stipulation that those who provide adoption services must be accredited. An important addition to this requirement is one that makes it illegal for persons to "locate" or solicit children for adoption. Such prohibitions, included in the laws of many states, are exemplified below.

Florida: The following fees, costs, and expenses are prohibited:

a. Any fee or expense that constitutes payment for locating a minor for adoption.

Oregon: (3) No person shall charge, accept or pay or offer to charge, accept or pay a fee for locating a minor child for adoption or for locating another person to adopt a minor child

Statutes that serve to protect parents from coercion and manipulation are obviously in common use in the United States today. Despite the regulatory framework that exists in various states in the United States, it is still common to hear of abuses in the payment of expenses. Regulation, while it may limit abuses, is not able to eliminate them even in the United States. It is even more difficult to limit abuses when dealing with activity occurring in another country. Therefore, it is essential that even greater protections be offered to parents abroad, especially in light of the tremendous economic disparity between countries of origin and receiving countries implementing the Hague Convention.

It is also imperative that such regulations be easily enforced if they are to be truly effective. The only way to reasonably assure such an outcome is to implement a system in which services, rather than cash payments, are offered to birth or expectant parents. Such a system would ensure that intermediaries cannot use cash as an incentive in "locating" a child for adoption, that agencies and attorneys cannot excuse cash payments as "expenses," and that investigators have a clear mandate to follow: If cash has been exchanged, the adoption is automatically illegal. To avoid coercive counseling tactics, additional safeguards should be employed to assure that the person providing such services does not benefit financially from the adoption.

In this vein, *Ethica* respectfully recommends that **§96.36** be modified to provide clear guidance on the payment of adoption expenses and to include provisions that protect birth parents from coercive practices. While *Ethica* believes that payment of non-adoption-related expenses should not be allowed, if such expenses are allowed, then this section should stipulate:

- That cash payments to birth parents for any reason are prohibited;

- That medical, counseling, legal, or child welfare services to birth parents must be delivered by third parties who do not benefit financially from the decision to place the child for adoption, and that such third-party providers may not rebate or provide anything of value to birth families or to adoption service providers;
- That the provision of services should not obligate a parent to place the child for adoption;
- That services should be provided to any birth parent who seeks such services without regard to whether the parent has a plan to place the child for adoption;
- That any third party who provides services to birth parents should do so in a transparent manner and that its operation should be open to inspection by \ local or international authorities;
- That adoptive parents should not be individually charged for such expenses.

The inclusion of such provisions would serve to prevent the sale of, or trafficking of, children and would provide investigative authorities with clear parameters by which to enforce such provisions.

### **Responsibility, Supervision, and Consumer Protection**

One of the purposes of both the Convention and the Intercountry Adoption Act (IAA) is to protect the rights of, and prevent abuses against, children, birth families and adoptive parents involved in adoptions (Vol. 68, Federal Register, 54068). Mechanisms intended to serve this purpose are evident throughout the proposed regulations, and touch on diverse areas such as insurance, liability, child buying, medical and social information, and the supervision of service providers. These areas are garnering much attention from all involved parties, and remain some of the most difficult to address.

*Ethica* welcomes the clarification of the role of a primary provider, which serves to ensure that one accredited agency take the primary responsibility in a case. Such a mechanism is vital for the consumer protection purposes of the regulations. On the other hand, many adoption service providers have expressed concerns about some of the attempts to provide a chain of responsibility, arguing that their ability to closely monitor foreign service providers is difficult at best, and expressing concerns about their ability to obtain insurance coverage. *Ethica* supports the concept of vicarious liability and appreciates the need for agencies to be responsible for the actions of those with whom they choose to work in foreign countries.

However, the regulations, as proposed, do not adequately address the need for consumer protection or provide a workable framework for agency responsibility. To place our suggestions and comments in context, we offer the following points for consideration.

#### **Consumer Protection**

Adoptive parents who utilize adoption services have demanded, and are entitled to, adequate consumer protection. Historically, these protections have been lacking.

Many have expressed concern over the lack of accountability for fees paid, the lack of medical and social information on referred children, the lack of adequate preparation of adoptive parents, and the willingness of agencies to continue to work with those whom they know or suspect to be engaged in illegal activity. The vast majority of such concerns implicate foreign service providers, and thus a mechanism is needed to ensure accountability for these entities.

The primary provider vehicle (**§96.44-§96.46**) provides a mechanism to address these needs by making one entity legally and financially responsible for the adoption process. The benefit of this provision in respect to foreign supervised providers, however, is vacated by **§96.14(d)(2)**, which exempts "entities accredited by other Convention countries," and §96.14(e), which also states that approved persons do not have to be supervised.

Article 9 of the Convention stipulates that adoption services (including all of the services performed in the foreign country which are included in the definition of "adoption services" in the regulations) be carried out by the Central Authority of the country, or by accredited or approved entities or persons. Therefore, *all* adoption service providers in a country that has ratified and implemented the Convention would be exempted from the supervision requirement. The exemption basically means that U.S. primary providers would be responsible only for support personnel who are not performing adoption services, such as drivers, translators, and couriers. This provision does not serve as adequate consumer protection and would do little to rectify the problems adoptive parents face in regard to accountability and responsibility.

In order to craft a mechanism that addresses the true concerns about consumer protection, it is imperative that the Department take into consideration what adoptive parents actually seek from their agencies. Adoptive families are not primarily looking for an entity that they can sue when things go wrong, as some have contended. Their goal is to avoid problems from the beginning. Many adoption service providers protest that it is unreasonable for them to be held responsible for all the activities of persons in foreign countries. However, when things go wrong as a result of the activities of persons performing services for U.S. agencies, the issue arises as to who should bear the risk of loss. Should it fall upon the adoptive family, who had no control over selecting or monitoring the behavior of the foreign person, or should it fall upon the adoption agency, who chose to work with that foreign person? Ethica believes that risk of loss should fall upon the adoption agency because that agency has greater control over the situation than does the family. Families are merely asking that adoption agencies not be able to use their lack of control over foreign providers as an excuse for poor professional conduct.

Take, for example, a parent who receives a referral of a young infant who is determined to be in reasonably good health by a qualified physician. There are no indications of developmental delay or serious health concerns. The parents accept the placement and adopt the child, only to find out some time later that the child has a genetic medical condition which was not apparent at the time of adoption. This situation is obviously not the fault of the agency or the medical provider overseas, and agencies correctly state that they should not be held unduly accountable for such a result. There is no actionable liability in this scenario, and most adoptive parents realize this. Imposing vicarious liability on agencies for the actions of their foreign service providers would not change this result: If the foreign service provider did nothing wrong and the agency did nothing wrong, there would be no liability.

However, adoption service providers often use examples like this to assert that it is unreasonable for families to want to hold agencies accountable for the actions of foreign service providers.

Consider a different scenario in which a family receives the referral of a child who appears to be developmentally delayed and whose head circumference is small for his age. The agency does not ask any questions of the physician who performed the exam and does not recommend that the parents seek the advice of a medical professional in the United States. Instead, the agency refers the child as a healthy infant and discounts the concerns the parents express, or perhaps even refuses additional tests requested by the parents. This agency has not exercised due diligence in the face of obvious concerns, and there should be a way to hold it legally liable for its actions.

Concerns about due diligence also arise when agencies are aware that serious accusations have been made about a foreign service provider. Perhaps an agency hears that its overseas provider is being investigated for child trafficking or has failed to complete adoptions for other clients, resulting in thousands of dollars of lost fees. Agencies should be held accountable if they ignore such concerns and continue to accept applications and fees in a situation that could result in significant financial or emotional risk to adoptive parents. Indeed, agencies should be both vicariously responsible for the wrongful actions of their foreign service providers and liable for exercising due diligence in protecting their client's interests and in choosing service providers.

Courts have supported this principle of due diligence; for example, in wrongful adoption suits. Adoption agencies are not held responsible simply because a child has an undiagnosed medical condition if no one has done anything wrongful. Rather, agencies would be held accountable in two situations: (1) when the foreign service provider they hired has committed wrongful actions (vicarious liability), and (2) when the agency failed to exercise ordinary care or due diligence (for example, in failing to disclose known information).

### Responsibility, Supervision, and the Imbalance of Power

In an effort to protect consumer interests, the Department has issued the proposed requirement that agencies assume liability for their supervised providers overseas. In response, agencies vehemently protest their inability to "control" the actions of foreign service providers. While providing a chain of responsibility is a valid goal, it is also vital that the Department consider whether the regulations provide a viable framework in which agencies can operate.

The Department would do well to consider the true issues that affect an agency's ability to supervise foreign service providers. There is, in many cases, a marked imbalance of power at play. Most U.S. agencies contract with a foreign provider to place children. However, that often means that the foreign entity controls the number of children assigned to a particular agency, obtains all the medical reports, and demands fees up front. Agencies who demand improved service or refuse to work under such a system often find themselves without a program. Often, such problems are not apparent until the agency has already placed many adoptive parents into the program, leaving the agency vulnerable to the demands of the foreign service provider.

A former agency employee related experiences in this regard. In one case, the adoptive parents received a referral which contained a detailed lab report—a relatively unusual occurrence for the particular program. The report showed the child to be markedly anemic, and the U.S. physician retained by the parents asked for an additional blood test to rule out a serious medical condition. The foreign service provider refused to perform the test, stating that it was the provider's belief that the child was not ill, even though none of its staff were medical doctors. The family was told to either accept the referral, or decline it and accept a new child. The family knew that if they declined the referral, the next referral would simply not have a detailed lab report attached. When the agency protested, the foreign provider threatened to remove the referrals of all the agency's clients and close the program. Well over a hundred thousand dollars in fees would have been jeopardized and the foreign provider had a waiting list of agencies wishing to work with it. In such a scenario, the agency has few, if any, good choices.

There are also significant market concerns at play. An agency that attempts to provide services that protect its clients may find itself with no overseas program. There are, unfortunately, always agencies willing to step into the void, and thus the foreign service providers have little reason to correct harmful practices. Prospective adoptive families continue to enter through the revolving door of agencies that send them straight into the hands of the persons who refused to correct service deficiencies for earlier families.

The proposed regulatory scheme does little to change this reality. There would still be no supervision of the entities that perpetuate these problems. With increased liability, agencies or persons that attempted to provide good service and advocate for consumer protection would likely withdraw from various situations, leaving the venues open for less experienced or less careful agencies to enter. This could well result in a "race to the bottom" scenario.

The only thing that would change this is the recognition of the imbalance of power and the addition of regulatory language that seeks to level the playing field. The Department should consider adding language that gives U.S. accredited providers the tools they need to effectively enact good practices. The Department should not underestimate the impact that a few carefully worded insertions could have on this problem.

For example, one of the most effective tools agencies could wield would be the timing of the disbursement of funds. In the current market reality, agencies that suggest a staggered fee schedule are severely disadvantaged because there are other agencies willing to forward full fees at the outset. While the Department is trying to rectify this by the addition of several clauses that ban contingency payments and that provide for the possibilities of refunds, the reality is that the foreign service provider is still likely to be the one who escapes responsibility for repayment of fees or lack of proper practices, while the U.S. agency is held liable.

The insertion of language stipulating that the U.S. agency cannot forward the entire fee *until the service is complete* could eliminate this problem. The agency would then have the tool it needs to encourage the foreign service provider to fulfill its responsibility, and the consumer would be afforded the intended protections. Such tools would also place the onus of due diligence on the U.S. agency, which would have fewer opportunities to deny responsibility for the actions of its foreign service providers.

Another significant and necessary addition to the regulations is a duty to report actions that are illegal under the IAA or these regulations. Substantiated reports should be made available to the public and other accredited agencies. Such an addition would protect *both* the adoptive parents and the U.S. primary provider. The addition of such language places the onus of responsibility on agencies that continue to work with foreign service providers who have previously violated laws or regulatory provisions. Agencies would no longer be able to shield themselves from this lack of due diligence, which would significantly increase consumer protection. On the other hand, such language would also provide U.S. accredited bodies with an important tool in their attempts to gain some control over the foreign service providers. The requirement would make agencies more careful and allow them to remind foreign providers of their responsibilities and the agency's responsibility to report activity contrary to the regulation. This would help eliminate the "race to the bottom" tendency, or at least make it one of shorter duration.

*Ethica* understands that the exemption of accredited entities from supervision is designed to place the burden of regulating foreign service providers on the sending country. We also appreciate the sensitivity of using language that creates a hierarchy of U.S. and foreign accredited providers. However, it is crucial that the Department implement a regulatory scheme that seeks to address both the consumer protection needs and the need for U.S. entities to take responsibility for their actions. Failure to do so will mean a lack of any real reform in this vital area. A scheme that gives primary providers the tools needed to effectively work with foreign service providers would also alleviate a considerable amount of the concern over the ability to obtain insurance coverage. To this end, we respectfully submit the following suggestions, which illustrate one way to speak to the concerns expressed above.

(1) **Amend §96.14(d)(2)** to read:

(2) Competent authorities and public authorities of other Convention countries.

**and**

(2) **Amend §96.14 (e)** to read:

(e) Public bodies, competent authorities, and public authorities are not required to operate under the supervision of the primary provider.

*These changes allow governmental entities to be exempted, but requires that accredited foreign service providers be supervised.*

(3) **Delete §96.46(c)** as written.

(4) **Add §96.46(c)** to read:

(c) The agency or person, when acting as the primary provider and using foreign supervised providers to provide adoption services in other Convention countries, is responsible:

(1) To report directly to the Secretary and the Department of Homeland Security any specific instances in which there is a reasonable suspicion of a violation of the provisions of the Intercountry Adoption Act that prohibit the sale, abduction, or trafficking of children, the inducement of consents to adoption by payment or

compensation of any kind, the receipt of improper financial or other gain, or the receipt of remuneration unreasonably high in relation to services rendered;

(2) To report directly to the Secretary and accrediting entity any specific instances in which foreign service providers fail to fulfill their responsibilities for providing services implicated in the IAA or these regulations, including but not limited to the provision of accurate medical and social information for the child, and the fulfillment of financial responsibilities.

(3) To exercise due diligence in determining whether to use, or continue to use, foreign services providers, and to refuse to use (or continue to use) such entities where the risks of violation of the Intercountry Adoption Act are unreasonably high; or where the risks of a supervised provider's failure to perform services is unreasonably high;

(4) To inform prospective adoptive parents, in writing, of developments in their adoption process triggering a duty to report under section (c)(1) and (2) above.

**5) Rename the current §96.46 (d) as §96.46 (e).**

**6) Add §96.46 (d) to read:**

(d) The agency or person, when acting as the primary provider and using foreign supervised providers to provide adoption services in other Convention countries, does the following in relation to risk management:

- (1) Assumes tort, contract, and other civil liability to the prospective adoptive parent(s) for (i) the foreign supervised provider's provision of the contracted adoption services and its compliance with the standards in this subpart F; (ii) the failure of the primary provider to fulfill its responsibilities for oversight as required in 96.46 (a) and (b); and (iii) the primary provider's failure to fulfill the reporting, due diligence, refusal to use, and assessment requirements of section (c), and (iv) the repayment of all fees expended either directly or indirectly to foreign service providers, and
- (2) Maintains a bond, escrow account, or liability insurance in an amount sufficient to cover the risks of liability arising from its work with foreign service providers;

**7) Add §96.40 (c) (1) to read:**

(1) The agency or person ensures that no more than 15 percent of the total amount of fees paid for services in a foreign country may be submitted as a case origination fee before the provision of contracted services. The remainder of the fees shall be paid only after the services are rendered.

In regard to the insurance provisions in **§96.33**, *Ethica* supports the requirement for insurance coverage. At the same time, serious questions have been raised about the viability of obtaining insurance coverage. The inability of agencies to obtain insurance could erect serious roadblocks to the successful implementation of the Convention. Therefore, we respectfully request that the Department take all steps necessary to ensure that the issue of insurance coverage not present obstacles to the implementation of the Convention. To that end, we would request that the Department explore, if necessary, alternative means of ensuring insurance coverage

through such vehicles as federal insurance or federally mandated and regulated insurance coverage.

### **Accrediting Entities**

*Ethica* commends the Department on the many positive aspects of the proposed designation of accrediting entities. We applaud the addition that allows entities to take into consideration the prior employment history of the main personnel of an agency, thus demanding accountability from those who lose their license under one name and then open another agency in another state under another name.

In addition, we were especially pleased to see that the Department has allowed itself the latitude to limit an entity's jurisdiction by geography, type of applicant, or other condition. We encourage the Department to make ample use of these types of controls to prevent setting up a system whereby accrediting entities may be placed in the position of having to compete with each other for the business of the very people they are supposed to be regulating. Such a scenario is a likely reality with a system that allows for multiple accrediting entities. Allowing only one accrediting entity or assigning agencies to accrediting entities without such entities having to compete would resolve this problem.

Accrediting entities are being placed in a position that creates heavy, and costly, responsibilities for them. Placing them in a competitive environment could lead to serious consequences as costs are lowered in order to become competitive. This might especially be true in the case of smaller accrediting entities, which don't have the advantage of having other accreditation roles with which to offset basic overhead costs.

In addition, we are particularly concerned about the heavy responsibilities for investigative activity that are being placed on accrediting entities, with stipulations that will simultaneously inhibit their ability to conduct such investigations adequately.

**§96.66** requires that accrediting entities "investigate complaints about accredited agencies and approved persons, as provided in subpart J of this part." As provided in subpart J, accrediting entities must investigate all complaints against an accredited entity. Failure to investigate properly can lead to sanctions against the accrediting entity, including removal of its designation as an approved accrediting entity.

However, **§96.8 (b)(2)** states that accrediting entities must stipulate a set total cost for providing all services during an accreditation cycle which can span three to five years. Included in that cost must be all costs necessary to cover "complaint review and investigation."

Under the proposed scheme, accrediting entities presented with a situation that required a large-scale investigation would have to cover all the fees for such investigation solely out of accreditation fees that had been collected previously.

*Ethica* understands the difficulties posed by allowing accrediting entities to assess fees for investigative activity. Under such a scenario, an agency could be required to pay significant costs for investigations for unsubstantiated complaints. However, prohibiting accrediting entities from charging for such services while simultaneously requiring that the accrediting entity be responsible for investigations ensures only

that investigations will not occur. In addition, the costs of obtaining liability coverage under this scheme would be prohibitively expensive for accrediting entities.

While a Central Authority is allowed, under the Convention, to delegate its *functions* to accrediting entities, it is not allowed to delegate the *responsibility* for ensuring that children are protected. However, this is exactly the result produced by proposing a regulatory scheme that makes the adequate investigation of accredited providers virtually impossible.

It is our understanding that the Department has answered requests for financial backing for investigations by replying that the IAA prohibits such a scenario. It should be noted, however, that what the IAA actually prohibits is the use of any appropriated funds for functions carried out by accrediting entities. Therefore, the IAA only prohibits funding investigations if the Department elects to make this a responsibility of the accrediting entity. This problem could be solved by removing the responsibility for investigations from accrediting entities.

We understand the necessity for accrediting entities to assist in the processing of complaints. At the same time, complaints for the most serious issues implicated in the Convention, the IAA and these regulations; i.e. child trafficking, abduction, and fraud, would likely require extensive field investigations both in the United States and abroad. It is unlikely that any accrediting entity could effectively perform such investigations.

Therefore, the Department may wish to consider dividing the investigative functions to alleviate all of these concerns. Accrediting entities could be responsible for administrative complaints or those that involve procedural issues within the United States. The Department could retain both the responsibility and the function, in cooperation with law enforcement personnel, to investigate serious allegations of illegal or fraudulent activity. The Department could then make use of appropriated funds, if necessary, to adequately investigate improprieties and thus not place unmanageable burdens on accrediting entities.

### **Additional comments on select sections**

#### **§96.35 Suitability of agencies and persons to provide adoption services consistent with the Convention**

**§96.35(b)(1)** should be altered to remove the word “permanently.” There have been cases recently where agencies reached a plea bargain which allowed them to forfeit their license for a period of several years in a given state for serious wrongdoing. In circumstances like these, the accrediting entity should be able to determine if the offenses should result in a similar loss of accreditation for a period of time.

In addition, we would recommend the addition of language that states that consideration of previous history also be allowed if an agency, or an employee of an agency, is served notice that they will be sanctioned and then takes steps to avoid the sanction. In such cases, the sanction should be considered as executed for accreditation purposes.

For example, in several cases in recent years, deportation orders have been issued against U.S. facilitators operating in foreign countries. In a typical case, after

receiving news of the impending order, the facilitator leaves the country before the order can be served. The facilitator then tells adoptive families that the deportation was a “rumor” and that s(he) left the country voluntarily—and often accompanies this story with a tale of how s(he) was victimized.

Additionally, we would ask that **§96.35 (c)(2)** be amended to include *any* employee who is convicted or being currently investigated for acts involving financial irregularities. As the regulations provide only that the information has to be produced and can be considered when accreditation concerns, it is not unreasonable that an accrediting entity be allowed to consider the behavior of all employees.

This is particularly important in the adoption industry because even those who are not in senior financial management positions often have the access and ability to engage in serious financial irregularities. For example, a program coordinator for a particular country may not be, and likely isn't, considered a senior financial manager. Yet, consumers should feel secure that if such a person committed major fraud while in the employ of the agency, or an agency in which he or she was previously employed, that that person would not be allowed to engage in similar activities again.

Likewise, **§96.35 (c)(3) and (4)** should be amended to require the same background checks on all employees. Even those who are not “working” directly with parents and children often have access to them in the office or through agency picnics or other events.

#### **96.38 (a) Training requirements for social services personnel**

Agencies should be required to train *current employees* as well as newly hired employees in these matters.

#### **96.39 (d) Blanket waivers of liability**

Many have raised objections to this language and have sought to imply that the Department is strictly forbidding the use of any type of informed risk waiver. It is our understanding that what is being sought is an assurance that agencies cannot make families sign informed risk waivers that waive their right to hold the agency liable for almost anything the agency chooses to do. We agree that such broad waivers do not protect children or consumers.

We encourage the Department to carefully consider any changes that it is asked to make. Language that takes into consideration informed consent must be carefully worded so as not to allow agencies to call almost anything an assumed risk. It is especially vital that the Department make it clear that agencies are not allowed to ask parents to waive any of the stipulations and requirements that are set forth in the IAA or these regulations.

#### **96.40 Fee Policies and procedures**

**§96.40 (b)** requires agencies and persons to itemize and disclose fees, but sections **(b)(2) and (3)** require only that *total* fees for adoption expenses in the United States be declared. This section does not provide that these lump sum fees be itemized and accounted for. Failure to do so may result in some agencies declaring, as we have personally heard, that the entire agency fee is for “adoption services” and thus once it is paid, it is completely non-refundable because the provision of any

service, including reviewing the application, constitutes "adoption services." This is obviously not the intent of this provision.

In addition, **§96.40 (f)** requires an itemized accounting of fees when extra fees are assessed, and **§96.46** requires that supervised providers provide detailed accounting for their fees. Therefore, one assumes that the intent is for the primary provider or any other accredited agency or person to also produce itemized and detailed accounting of its fees. Failure to clarify **§96.40 (b) (2)** and **(3)** could result in agencies operating on a contingency basis—i.e., one lump sum payment for services—rather than on a fee-for-service basis.

We respectfully suggest that **§96.40 (b) (1)** and **(2)** be amended to require the itemized disclosure of expenses and a provision for the refund of fees for services not rendered.

In addition, **§96.40 (c)** should be clarified to provide consumers the assurance that fees paid for services not rendered *will* be refunded. Under the current language, agencies or persons could retain the right to disclose up front that all fees paid are non-refundable service fees.

#### **§96.41 Procedures for responding to complaints**

We strongly recommend that the Department add provisions for severe penalties to be assessed against any agency violating **§96.41 (e)**.

#### **§96.42 Retention, preservation, and disclosure of adoption records**

*Ethica* encourages the Department to amend **§96.42 (a)** to require the retention of adoption records for the same period of time that Convention records are retained; i.e., 75 years. State law will still regulate the release of the information in those records. State laws do, however, change over time and the records should be available in the years to come if the laws change.

#### **§96.49 Provision of medical and social information in incoming cases**

**§96.49 (k)** should be amended to remove the exception for "extenuating circumstances involving the child's best interests." Similar uses of undefined "child's best interests" statements have led to agencies being able to conclude that almost anything they want is in the child's best interests. After all, isn't it better for a child not to wait one day longer than he or she must to join a new family? Therefore, the inclusion of this exception would basically render the requirement useless for its intended purpose.

#### **§96.54 Placement standards in outgoing cases**

We strongly recommend that **§96.54 (a)** be amended to accurately reflect the subsidiarity principle that is required in the Convention and the IAA. As written, article (a) could be manipulated to ensure that any child could be placed from the United States to a foreign country before having the opportunity to be placed with a family in this country.

While we support the right to an exception for family members, the broadness of “in the case in which the birth parent(s) have identified specific adoptive parents” makes it possible for any agency or attorney who is assisting a birth parent in finding an adoptive parent to identify that adoptive parent prior to placement and thus avoid the subsidiarity principle in violation of the intended purpose of the Convention and the IAA.

If the United States subscribes to the principles of the Convention and seeks to have them apply to all other countries of origin, then it is essential that the United States apply the same principles to itself.

Adult adoptees and others have spoken eloquently of the need for efforts to place children in their country of birth whenever possible. The Department should do everything necessary to ensure that those efforts are made for U.S. children who need adoptive families.

While we recognize that in rare cases the birth parent(s) may have personal friends living abroad that they wish to place their child with, this is an exceptional circumstance and would already be covered under the stipulation for special circumstances in paragraph (a). Therefore, we recommend that **§96.54(a)** be amended to read:

**§96.54 (a)** “Except in the case of adoption by relatives or in other special circumstances accepted by the State court with jurisdiction over the case, the agency or person makes reasonable efforts to find a timely adoptive placement for the child in the United States by:”

### **§96.69 Filing of complaints against accredited agencies and approved persons**

We strongly object to the requirement set forth in **§96.69 (a) (1)** that states that complaints must first be filed with the agency or person providing adoption services.

While we understand that the likely purpose of this statement was to ensure that the Complaint Registry would not be inundated with minor complaints, the Department must recognize that knowledge of serious criminal offenses should not have to be reported first to the agency or person committing the crime. In no other circumstance of which we are aware are criminals afforded the protected right to cover their tracks or destroy evidence prior to an investigation by an outside body! While we hope that such a scenario would not be a common one, it is inadvisable to mandate that all complaints first be filed with the provider. The Complaint Registry or accredited entity should have the discretion to decide if a complaint received directly involves an issue serious enough to launch an investigation.

Likewise, **§96.69 (b)** must be expanded to include others who may have knowledge of serious criminal or legal violations.

Ethica wishes to thank the Department of State for its consideration of these comments and hopes that they prove to be of some value as the Department drafts its final regulations.