

Comments on the Final Regulations Implementing the Hague Adoption Convention

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INTRODUCTION

Ethica welcomes the release of the U.S. regulations to implement the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the Convention). The release of the regulations is an important step in regulating the practice of Intercountry Adoption.¹

The regulations contain important provisions that will improve intercountry adoption services; we welcome these positive changes. Unfortunately, the regulations fail to address the vast majority of the most problematic features of current intercountry adoption practice. In several critical areas of child and family protection, the regulations may actually worsen current conditions. On the whole, the regulations are a bitter disappointment for those who had hoped that their release would signal meaningful and effective regulation of practices that so deeply affect the lives of children and families, both in the United States and abroad.

Many provisions are concessions to the well-organized and well-financed agency lobby.² It is troubling that the Department of State (the Department) chose to bow to pressure from the industry rather than working to fulfill the main objective of the Convention—child protection. It is equally disappointing that where the needs of adoptive parents and adoption agencies conflicted, the Department virtually always chose to grant concessions to the agencies. The rare exceptions to this pattern were almost always those provisions specifically mandated by the Intercountry Adoption Act itself (e.g. the insurance provisions). Indeed, the vast majority of the positive provisions in the regulations are specifically stipulated in the IAA, and thus the Department had no choice but to include them.

Contrary to the purposes of the IAA and the Convention, the Department often sought to make the regulations match current practice rather than to change practices to meet the purposes of the Convention. A note on page 8064 states, “where the Convention or the IAA speaks broadly, we have also sought to reflect current norms in adoption practices, as made known to us during the development of the rule.” In doing so, the Department catered to

¹ Unless otherwise indicated, all section numbers and page numbers refer to the 22 CFR Parts 96, 97, and 98 Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons and Intercountry Adoption—Preservation of Convention Records; Final Rules, Published in the Federal Register, February 15, 2006

² Throughout these comments, we refer to “agencies” in the collective. This is not to imply that there are no agencies that strive to act ethically and honestly. Indeed, some agencies have been outspoken advocates for regulatory reform of the industry. *Ethica* often refers to such [agencies] as the “fourth victims” of illegal and unethical adoption activity, as they lose, too, when less ethical providers engage in problematic practices. With the continued lack of adequate regulation, these agencies will once again become victims as unscrupulous providers hasten the “race to the bottom.”

placements, etc.), and the names of all supervised providers that the family will work with. (This provision, however, is seriously weakened by the exemption for facilitators/attorneys noted below). §96.39

- *Agencies will be required to have complaint policies and procedures, and must respond to complaints within 30 days. §96.41*
- *Adoption records have to be retained according to state law. §96.42*
- *Data must be collected, reported, and made available to the public on the number of cases completed, the ages of children, the number of disruptions, etc. §96.43*
- *The regulations establish a complaint registry that will be open to the public. The complaint registry will allow complaints by persons not party to the adoption. §§96.92, 96.69*

Significantly, however, the regulations contain numerous provisions that fail to protect children, birth families and adoptive families and which may result in an increase in illegal and unethical activity. *Ethica* is deeply disappointed and concerned about the following provisions:

- *The regulations make it legal for agencies to pay prenatal and living expenses to birth parents overseas, greatly increasing the potential for child buying. §96.36*
- *Although the regulations purport to make agencies responsible for their supervised providers overseas, many, if not most, facilitators/attorneys will be exempt from this requirement. §96.46*
- *The facilitator exemption will also mean that families will not receive the name of the facilitators/attorneys upon initial contact with the agency and that exempted facilitators/attorneys will not have to provide adequate medical information to parents. §96.32 and 96.49*
- *Regulations that purport to limit unreasonable compensation permit agencies to pay wages according to norms in the intercountry adoption community—meaning that agencies can pay their employees or agents as much as they want, provided that all other agencies do the same. §96.34*
- *The regulations contain an empty distinction between “contingency payments,” which are forbidden, and “fee for service” payments, which are not. The Department also failed to prohibit active solicitation of children. The net effect of these provisions is that the regulations do nothing to diminish incentives to recruit children for adoption. §96.34*

- ***Agencies can still ask (demand) that families sign waivers of responsibility that effectively place all of the risk in the adoption process on the adoptive parents. §96.39***
- ***Regulations that purport to create fee transparency require agencies to disclose to adoptive parents only "totals" for categories such as Foreign Fees. Therefore, there is still no transparency with respect to where often substantial fees go once the money leaves the U.S. In addition, agencies can still require parents to accept contract provisions stipulating that all fees are non-refundable. §96.40***
- ***The requirement that parents be given two weeks to consider a referral before acceptance is weakened by an exception for "extenuating circumstances" that would make a shorter time in the best interest of the child. This exception could be applied in virtually every case as it is always "in the best interest of the child" to be placed more quickly. §96.49***
- ***The regulations disregard the subsidiarity principle of the Convention in outgoing Hague cases by allowing children to be placed outside the country without considering alternatives inside the U.S. if the birth parent has identified a person abroad—which will happen in virtually every case because agencies or attorneys will locate a person for the birthmother. Other provisions already provided judicial discretion for relative placements or those in which the parent personally knew someone abroad, making this allowance wholly unnecessary. §96.54***

Comments

The following comments discuss in more depth the points noted above. We have elected to note our comments on the positive provisions of the regulations by section number.

Ethica has identified several main areas 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.

Positive Provisions of the Regulations

§96.2 Definitions

The definition of "Adoption Services" delineates who must be accredited or approved. If an adoption service provider (ASP) performs any one of the following six services, the provider must be accredited or approved:

- 1) Identifying a child for adoption *and* arranging an adoption (emphasis added);

- 2) Securing the necessary consent to termination of parental rights *and* to adoption (emphasis added);
- 3) Performing a background study on a child or a home study on a prospective adoptive parent(s), and reporting on such a study;
- 4) Making non-judicial determinations of the best interests of a child and the appropriateness of an adoptive placement for the child;
- 5) Monitoring a case after a child has been placed with prospective adoptive parent(s) until final adoption; or
- 6) When necessary because of a disruption before final adoption, assuming custody and providing (including facilitating the provision of) child care or any other social service pending an alternative placement.

§96.12 Authorized adoption service providers

Once the Convention has entered into force, everyone who performs one of the six adoption services noted above must be accredited or approved, even if the person or entity is not licensed by the State. This provision applies to domestic adoption facilitators.

This provision is a positive development, especially for adoptive parents. Currently, there are many unlicensed facilitators operating in the United States. These facilitators have no oversight from state licensing authorities, and thus adoptive parents have no recourse when things go wrong. Under the new regulations, anyone who provides an adoption service (not all six, only one is necessary) must be accredited or approved.

It is, however, theoretically possible that some facilitators could manage to avoid performing any of the six services (or perform only part of a given service)³ and still operate. *Ethica* hopes that the accrediting entities and the Department will define these categories to ensure that this does not happen.

§96.32 Internal structure and oversight

An important provision added to the final regulations, §96.32 (e) requires agencies to disclose any names under which they previously operated. This will help accrediting entities discover agencies that may have lost their licenses previously and reopened in another location under a new name.

³ Subsections 1 and 2 of § 96.2 are weakened by listing services in the conjunctive (and). In other words, in order to trigger accreditation requirements, a person or entity must *both* identify a child and arrange the adoption. Under subsection 2, the person or entity must secure consents *both* to terminate parental rights and to adoption. Presumably accreditation would not be required for persons working on behalf of a primary provider as long as different individual performed each of the functions listed in subsections 1 and 2.

This practice has been used in the past by agencies wishing to avoid regulation. Agencies that lose their license to operate in one state can often move to another, reincorporate, and continue to operate with little disruption to their business. State licensing entities are often unaware that the agency has relocated, or are unable, *per* their regulations, to take action based on events that occurred in another state.

§96.33 Budget, audit, insurance and risk assessment requirements.

Under §96.33, agencies will have to conduct internal audits each year and be audited by an independent entity every four years. Also, accrediting entities will review financial records to ensure that an agency is operating on a sound financial basis and has at least two months of cash reserves. The agency must also have a plan to transfer cases to another accredited agency if it ceases to operate.

All of these provisions provide important protection to consumers, making it less likely that recent experiences with “agencies” beginning to operate and then closing within a matter of months, after accepting money from clients that is not refunded, will continue.

The most significant provision of §96.33, however, is its requirement that every accredited agency carry professional liability insurance. Currently, very few states mandate professional liability insurance. As a result, families who are defrauded or who bring wrongful adoption suits are often left without meaningful legal remedies: absent insurance, a client who does bring successful suit against an agency will not be able to collect. Moreover, it is unlikely that any adoptive parent will undertake the expense of retaining an attorney where there is no possibility of recovery, nor is it likely that an attorney will accept a case under such conditions. Agencies, aware of this reality, often choose not to carry insurance to avoid suits.

The agency lobby strenuously objected to the insurance provision, but the IAA mandated that insurance provisions be included. In practice, it may be that this provision effects the most change in intercountry adoption practice. Given that the regulations as a whole do not provide effective regulation of the industry, it is possible, and indeed likely, that regulation will occur mainly through extra-Convention vehicles such as tort and contract suits or insurance industry requirements. The number of lawsuits against agencies will probably increase, as the agencies often noted. However, that eventuality will likely be the result of flaws within the regulations themselves that do not provide sufficient incentives for agencies to remediate repeated failure to secure accurate medical information and continued failure to return fees for services not rendered. Agencies will also continue to have legal exposure for fraudulent activity not addressed by the regulations. Even so, as discussed below, agencies may continue to win such suits because of the failure of the regulations to prohibit blanket waivers of liability.

§96.39 Information disclosure and quality control practices

An agency must disclose to the general public, upon request, and to prospective adoptive parents, upon initial contact, its policies and practices, including general eligibility criteria and fees; the supervised providers with whom it works (see important caveat below); a sample written contract *substantially* like the one a client will be expected to sign; and statistics on the number of placements each year, the number of children available, the number of disrupted placements, etc.

These important provisions will help consumers choose an adoption agency based upon specific information. Unfortunately, the protections provided are substantially weakened by the fact that agencies will not have to disclose the names of most overseas facilitators/attorneys (see §96.46 below) and will still be able to force parents to sign contracts under the terms of which adoptive parents will assume all risks. (§96.39 (d), see discussion below).

§96.41 Procedures for responding to complaints and improving service delivery.

Section 96.41 requires agencies to have complaint policies in place and to respond to complaints within 30 days. This key provision will be of immeasurable help to adoptive parents who often deal with unresponsive agencies. The section also provides that agencies cannot discourage any client from complaining or retaliate against a person who complains. Most notably, it also forbids an agency from retaliating against a parent for questioning the conduct of, or expressing an opinion about, the performance of an agency or person.

In the current environment, when more and more parents are being threatened for speaking out about agency misconduct, and when agencies often incorporate gag clauses into their contracts, these provisions are a welcome relief for adoptive parents.

§96.42 Retention, preservation, and disclosure of adoption records.

Accredited agencies and approved persons must archive adoption records in a safe, secure and retrievable manner for the period of time required by applicable State law.

This is an important provision, but because some states do not have record retention policies, the provision would have been stronger had it mandated record preservation for the same 75 years required for Convention records.

Ethica hopes that because Convention records must be kept, agencies will decide to maintain all records.

§96.43 Case tracking, data management and reporting

The IAA mandated that certain statistics be reported and made available to the public. This data, which includes the number of cases handled, the ages and sexes of the children placed, the number of disruptions, etc., will provide important information to parents choosing an adoption agency.

§96.44 Acting as a primary provider

The IAA and the regulations mandate that in cases where more than one adoption service provider is utilized, one entity must take responsibility for the placement as a primary provider.

The identification of a primary provider is important to avoid the “round robin” of responsibility common today where every entity disclaims responsibility onto the other.

§96.48 Preparation and training of prospective adoptive parent(s) in incoming cases.

The regulations mandate that agencies and approved persons provide each adoptive parent with 10 hours of training covering a wide variety of topics, including the effects of institutionalization, fetal alcohol syndrome and attachment disorders, the impact on a child of leaving familiar ties and surroundings, etc. We welcome this important provision as a service to adoptive parents.

§96.49 Provision of medical and social information in incoming cases.

The regulations mandate that agencies and approved persons use reasonable efforts or require their *supervised providers* to use reasonable efforts, to obtain medical and social information on each child. The regulations contain extensive provisions on the extent of the medical information and provide that agencies must give parents sufficient time to review the information and seek competent medical advice.

This provision is seriously weakened by the fact that it requires reasonable efforts to be made only by agencies and supervised providers; therefore, most foreign facilitators/attorneys will be exempt from this requirement. In addition, the provision that calls for agencies to grant parents two weeks to review information is weakened by an exception for extenuating circumstances involving the child’s best interests. This exception can be exploited by pressuring adoptive parents into making quick decisions before

gathering all the facts and weighing their ability to parent a particular child. We urge the Department and accrediting entities to ensure that restrictions are placed on its use.

§96.69 and §96.92 Filing of complaints and dissemination of information to the public about complaints

The regulations contain extensive provisions governing the filing of complaints, as well as the process the accrediting entities use to review complaints. The Department will also maintain a complaint registry where parents can obtain information on substantiated complaints against an accredited agency.

In addition, the regulations clarify that persons not party to an adoption may file a complaint with the complaint registry if the person has information related to the operation of an accredited agency or approved person.

Significant Weaknesses and Areas of Concern

Ethica applauds these positive developments. We are, however, deeply concerned that the regulations fail to address adequately the four most salient ethical problems in current international adoption practice: child buying; unregulated fee structures—which both cloak and fuel illicit procurements and payments; lack of agency oversight and accountability for the actions of foreign intermediaries; and lack of meaningful consumer protection for adoptive parents.

It is *Ethica's* position that failure to tackle these issues in the final regulations means that not only has the current situation not been improved, but it will likely worsen considerably in the years to come. Many policymakers and legislators of good will believe that we have the tools in place to prevent the sale of or traffic in children. For this reason, enacting bad regulations can be more damaging than having no regulation at all.

We understand that some activities are mainly the responsibility of the government of the child's country of origin. However, the United States must understand and accept that the actions of our agencies and their foreign agents play a direct role in the illegal and unethical activities surrounding adoption. This is particularly true because of the exorbitant amounts of money involved in the process and the obvious incentives these large sums create for illegal and unethical behavior, particularly in developing countries. Failure to provide meaningful control and oversight of fee structures renders other provisions envisioned by the Convention moot; the regulations fail to ensure the transparency envisaged in the Convention, fail to fulfill the spirit of Article 32 prohibiting unreasonable compensation, and fail utterly to protect parents and children from exploitation.

It is understandable that activities in the foreign country are the least transparent aspect of intercountry adoption practice and hence, the least amenable to regulation. It is also understandable that adoption agencies, perhaps the most vocal and best organized stakeholders, found more regulation at the in-country level onerous and improved consumer protection in the form of increased agency exposure to legal liability burdensome. Nonetheless, failure to apply meaningful oversight to ethically and logistically problematic relationships and practices has wrought a regulatory framework that, at best, leaves the most significant ethical dilemmas unresolved and at worst may actually encourage and cloak illicit child procurement.

As scandals in recent years have made abundantly clear, the current (pre-Hague) regulatory framework for international adoptions is particularly vulnerable to abuse and illegality. No mechanisms currently exist to police the actions of in-country facilitators/attorneys who do most of the work identifying and making children available for international adoption. No mechanisms exist to require itemization or disclosure of the manner in which often exorbitant adoption fees are actually spent or to ensure that humanitarian aid actually benefits children left behind.⁴ Thus, adoption agencies, foreign governments and facilitators/attorneys are able to rely on the catchall of “foreign fees” or facilitator fees to cloak payments made as bribes or incentives to birth families. Facilitators/attorneys are often paid on a contingent fee basis, a practice that not only fails to police, but actually rewards unethical providers who create “paper orphans” by inducing poor, often uneducated birth parents to relinquish children on the basis of false promises and/or payment. Agencies in the United States treat these in-country intermediaries as independent contractors, with the result that agencies have no liability to adoptive parents and/or federal and state authorities for any improper or illegal behavior in which the intermediary engages overseas. Finally, broad exculpatory clauses, or blanket waivers of liability, in international adoption contracts absolve agencies from any responsibility for making accurate representations about the medical status of prospective adoptive children. These clauses, consistently upheld by the courts, allocate all of the risk in the international adoption process to adoptive families and leave families with no legal recourse against agencies when things go wrong.

The Intercountry Adoption Act was designed to remedy these (and other) systemic vulnerabilities. In fact, previous drafts of the Act’s implementing regulations included specific procedures to ensure greater transparency at the level of in-country intermediaries, as well as greater legal accountability for stateside adoption agencies. Proposed regulations mandated that agencies accept responsibility for foreign facilitators/attorneys, forbade

⁴ U.S. citizens adopt over 22,000 children each year. At an average of \$10,000 USD in foreign country fees (likely a low estimate) American citizens send 220 million dollars abroad each year with no accountability or transparency whatsoever.

blanket waivers in international adoption contracts, and required most fees to be itemized.

The final regulations contain none of these safeguards and have, in fact, eviscerated the regulatory protections envisioned by the Act. As will be discussed below, the final regulations leave current legally and ethically questionable industry practices essentially unchanged. In fact, key provisions of the final regulation's child buying provisions and in-country provider provisions actually undermine the legislation's aim of controlling unethical and illegal behavior.

Prohibition on Child Buying

Section 96.36, "Prohibition on Child Buying," not only fails to control incentives for child buying, but actually broadens the range of permissible payments to birth parents far beyond the more restrictive parameters of the current Immigration and Nationalities Act (INA) Regulations, whose provisions currently govern most visa determinations in intercountry adoption. Section 204.3 (14)(i) of the INA Regulations permits only "reasonable payments for necessary activities such as administrative, court, legal, translation and/or medical services related to the adoption proceedings." On the other hand, section 96.36 of the regulations allows payments to birth parents for a much broader range of "services," including care of the birth mother while pregnant and immediately following the birth of the child. More problematic still, section 96.36 provides for "reasonable payments" for activities—none of which are defined—related to the adoption proceedings.

Historically, child buying has taken the form of often shockingly small payments of cash or even food, characterized as humanitarian aid, to birth parents. Human rights organizations have unanimously criticized even these types of payments on the grounds that they create incentives to place children for adoption who might have been able to remain with their families, had aid not been conditioned on placement of the child. This is an important condition.

Some believe, and apparently the Department believes, that expenses should be allowable to birth parents overseas because current U.S. laws allow birth parents to receive expense reimbursements in the United States. However, 49 of the 50 U.S. states have specific provisions to protect birth parents by forbidding payments of expenses as a guarantee of placement. Foreign birth parents do not have this protection. Anecdotal evidence suggests that when foreign birth parents receive aid and later try to keep their children, they are required either to pay back the aid that was given or relinquish their child.

While the regulations note that expenses are allowed as long as they are not forbidden by the foreign country, it should also be noted that the payment of expenses to birth parents (except arguably as an incentive to relinquish a

child for adoption) is an alien concept in virtually every other country except the United States. Therefore, foreign countries have no reason to incorporate clauses preventing payment of expenses to birth parents into their laws. Allowing U.S.-based agencies to pay “expenses” to foreign birth parents, without protecting those same birth parents from exploitation, creates a veritable free market in children.

It is true that both the INA regulations and section 96.39 of the regulations prohibit payments to birth parents in order to “induce” release of a child for adoption. While neither set of regulations makes clear how one would actually prove that payments were an inducement to release a child for adoption,⁵ at least the INA’s limited range of permissible expenses are easier to link directly to the costs of the adoption process. Under the INA regulations, the bulk of permissible expenses would presumably be paid to government officials, not birth parents; thus, these types of payments would be less likely to function as an inducement to release a child. In addition, costs related to the birth of a child are limited and can be specifically itemized. On the other hand, it is difficult to imagine how section 96.36’s much broader and less clearly defined range of permissible payments to birth parents would not act as powerful inducements to release or, in effect, sell—children for international adoption, particularly in desperately poor nations, where child buying has been a persistent problem. Indeed, given the lack of transparency in the Regulation’s fees provisions discussed below, it would appear to be almost impossible to prove that payments to birth parents did function as inducements to relinquish children. In this respect, the Regulation’s permissible fees provision actually *increases* the incentives and thus, the likelihood that children will be trafficked for international adoption.

Lack of Meaningful Regulation of Fees

The regulations fail to limit in meaningful ways the fees charged to complete international adoptions. This failure, in turn, results in windfall profits for in-country intermediaries and in so doing, greatly increases incentives to procure large numbers of children, by licit or illicit means, for international adoption.

Reasonable Compensation

The regulations fail to place any meaningful limitations on the often exorbitant fees (and profits) generated in intercountry adoption. The Convention requires that state parties ensure that no one derives improper financial gain from adoption-related activity and that employees of adoption service providers not receive remuneration that is “unreasonably high in relation to the services rendered.”⁶

⁵ See *Ethica* Position Paper, “Child Buying: Why the Immigration Service Can’t Prove It,” available at www.ethicanet.org (last visited Mar. 23, 2006).

⁶ Article 32 of the Hague Convention.

Section 96.34(d) states that agencies should ensure that the “fees, wages, and salaries paid to the directors, officers, employees and supervised providers are not unreasonably high in relation to the services actually rendered, taking into account the country in which the adoption services are provided and the *norms for compensation within the intercountry adoption community in that country*. (emphasis added).

Apart from the fact that this provision apparently exempts unsupervised providers (most foreign facilitators/attorneys) from any oversight of the reasonableness of fees they receive, agencies and supervised providers can pay (and hence charge adoptive parents) whatever the agency wants as long as others operating in the country are doing the same. This provision lends itself to collusion and price-fixing. More seriously, the “normal” fees charged are often grossly disproportionate to the actual per capita income of the country in which the services are rendered. The regulations do nothing to address the current situation in which an attorney who charges less than \$100 to do a divorce may charge \$20,000 to complete an adoption. Moreover, conceivably agencies would be permitted to charge fees and compensate in-country intermediaries even where the country in question has no formal adoption fees. The regulations do nothing, therefore, to eliminate the potential for entrepreneurs in sending countries to earn windfall profits from brokering adoptions.⁷

“Fee for Service” vs. Contingency Payments

Section 96.34’s “Compensation” provision creates distinctions without difference. The regulations prohibit agencies or persons from “compensating any individual who provides intercountry adoption services with an incentive or contingent fee for each child located or placed.” Instead, the individual is to be paid on the basis of services rendered. Ostensibly, the provision was intended to remove incentives for soliciting children for adoption, thereby reducing the risk that children will be trafficked for international adoption. The regulations, however, contain no provisions specifically prohibiting solicitation of children for adoption. Absent such a prohibition, it is difficult indeed to perceive precisely how the regulations eliminate the evils of contingent fee arrangements: Under the regulations, an individual will be paid for each child located or placed for adoption and will not be paid if a child is not located or placed for international adoption. This is precisely what happens in contingency fee arrangements. Once again, despite superficially attractive regulatory language, the regulations fail to alter the status quo in any meaningful way.

⁷ Tax records show that one in-country facilitator earned \$70,000 from his adoption-related activities in 2001. This occurred in a country whose per capita income is approximately \$200 per year. Given the kinds of profits that foreign national can make facilitating adoptions in their home countries, it is simply unrealistic to contend that the high foreign fees paid by Americans do not feed a lucrative international adoption market.

Profit making would not necessarily be an evil in and of itself if it did not have great potential to create two additional problems, both of which undermine significantly important provisions of the Act. First, the “reasonableness in light of country norms within the IA community” provisions can function, in practice, to undermine the subsidiarity principles of the Act. Specifically, as long as the market for international adoption is significantly more lucrative for in-country providers, there is little reason to encourage the development of social service, child welfare, and domestic adoption infrastructures, all of which are granted higher priority in child placement under the Act than international adoption. Second, the potential to earn large incomes from international adoption activities greatly increases the risk that in-country entrepreneurs will have significant incentives to solicit large numbers of children (who may or may not be orphans) for international adoption. When viewed together with §96.36 (a)’s broad range of permissible payments to birth parents, the incentives to dishonestly procure children for international adoption are greatly increased.

Lack of Requirement that Fees be Specifically Itemized

None of the fee provisions discussed above would be such significant problems, from an ethical oversight standpoint, if adoption agencies were required to itemize specifically where each portion of the country fees actually goes. Itemization would provide some check on whether adoption fees were being used to pay facilitators/attorneys, government officials or were simply evaporating into the financial black holes that so often characterize financial dealings in less developed parts of the world. However, the regulations require only that the *total* amount paid for foreign fees be disclosed. As discussed earlier, supervising in-country activities presents unique challenges because it is perhaps the least transparent part of the international adoption process. But itemization of fees paid to foreign providers could provide information that would help agencies and accreditors draw inferences about what kinds of demographic trends were occurring in given countries and whether these trends suggested problems with improper solicitation of children for adoption or even outright trafficking. Here, again, the regulations simply affirm a status quo that has proven itself incapable of ensuring that any relinquishment is free from improper pressures or financial gain.

Exempting Foreign Facilitators/Attorneys from Supervision

Virtually all of the ethical and logistical problems associated with regulating international adoptions converge around the issue of supervision of foreign facilitators/attorneys or in-country providers. It is in this area that the regulations are most disappointing.

The regulations permit two types of in-country actors to provide adoption services: supervised providers and foreign providers not under agency supervision. Under previously proposed regulations, agencies were to

supervise all foreign country persons not specifically accredited by the foreign country. Agencies in turn would have assumed all of the normal legal responsibilities for acts of their in-country providers. The most significant of these responsibilities, of course, is *respondeat superior* liability in tort to those injured by an in-country provider's negligence. Bowing to considerable pressure from the adoption agency community, the final regulations have eliminated the requirement that agencies enter into an employer/employee relationship with their in-country providers. Instead, agencies will be held responsible for the misdeeds of their in-country facilitators/attorneys only within the context of the accreditation process. (for background on this issue see comments at page 8103). This is particularly problematic because the regulations require only substantial compliance in order for agencies to retain their accreditation. Conceivably, a supervised provider could engage in multiple actions that violated the principles of the Convention before an agency would face any action within the accreditation process. In addition, as long as the agency does not characterize the supervised provider as an employee, the agency is insulated from financial liability to adoptive parents and others.

A potentially far more serious problem is that the regulations exempt foreign facilitators/attorneys from any supervision in virtually all cases. Section 96.46 stipulates that the primary provider must now treat all non-governmental foreign providers, including agencies, persons, or entities accredited by a Convention country, that it uses to provide adoptions services as supervised providers consistent with 96.46 (a) and (b) *unless* the foreign provider performs a service qualifying for verification under 96.46 (c). (emphasis added).⁸ Most agencies use facilitators/attorneys abroad to perform services. Often, it is facilitators/attorneys who obtain a parent's consent to adoption. They also routinely prepare the reports on children. Under the exception in § 96.46 (c), these facilitators/attorneys do not have to be supervised providers, as long as the primary provider obtains a verification that the facilitator performed these services in accordance with the Convention. With this provision, the Department has eliminated all the protection consumers may have gained through the supervised provider stipulations.

The regulations permit agencies to elect whether to use supervised providers or foreign providers not under their supervision to perform tasks such as obtaining consents to termination of parental rights. It is at this level that the vast majority of problems associated with coerced consents and child buying occur. Yet, in what is arguably the most critical of all phases of the international adoption process, the regulations permit agencies to abdicate virtually all responsibility for the actions of unsupervised providers. Under section 96.39, agencies are not required to disclose the identities of their unsupervised providers. Non-supervised providers are not required to use reasonable efforts to procure medical or social information on children. Nor

⁸ Those services are obtaining consents, preparing a child background study, and home studies.

are stateside agencies under any obligation to exercise due diligence to determine whether an unsupervised provider is competent to provide adoption services or even whether the unsupervised provider has a criminal record.

Finally, and most seriously, the only requirement imposed on stateside agencies for the adoption services performed by their unsupervised providers overseas is that the stateside agency “verify” that consents to termination of parental rights were properly obtained and/or that any background study on a child was performed in accordance with foreign law and the Convention. (Section 96.46 (c) (1) (2)) While the exact mechanisms for verification are not stipulated, the regulations note that verification can be accomplished by review of documentation. Thus, in order to satisfy Convention requirements, agencies may need only to look over the paperwork provided by the unsupervised provider. Yet one of the persistent problems in international adoption is that foreign paperwork is often and easily forged, identities are erased or changed, and approvals and consents obtained by questionable and often illegal methods. Despite these widely recognized problems, the regulations do not specifically place agencies under any obligation to conduct a more searching inquiry into how a given child came to the unsupervised provider’s attention, nor are agencies required to account for how any monies sent to the unsupervised provider were actually disbursed. When viewed in conjunction with the regulation’s payment of pre-birth expenses provisions and its fee structures discussed above, the verification provisions are an invitation to child buying and all manner of questionable practices. Indeed, the provisions on both supervised and unsupervised providers are the most graphic illustrations of the extent to which the protections of the proposed regulations have been eviscerated.

Inadequate Consumer Protection for Parents

Blanket Waivers of Liability

The Convention does not grant adoptive parents a private right of action against providers or the accrediting entity, but neither does it preempt existing state laws under which parents can attempt to hold adoption agencies liable for injuries suffered. However, as discussed in the supervised provider section above, and amplified in greater detail below, any protection afforded adoptive parents by access to state tort and contract law remedies is more illusory than real.

Significant in this context is the absence of a ban on blanket waivers of liability for adoption agencies in international adoption contracts. It has been standard practice in the international adoption industry for agencies to require prospective adoptive parents to sign contracts absolving the agency from any responsibility for the medical condition of children placed. Often, these contracts include additional provisions that shift virtually all risk in the

adoption process to the adoptive parents. Typical provisions stipulate that the agency has no responsibility for money sent overseas, that all fees are non-refundable, and that the agency takes no responsibility for the completion of an adoption or for the actions of a foreign provider. In addition, some agency contracts contain "gag" provisions prohibiting adoptive parents from discussing their experiences with the agency.

The regulations qualify the circumstances under which blanket waiver provisions are acceptable by stipulating, "an agency or person can require a client to sign a waiver of liability as part of an adoption service contract *only where that waiver complies with applicable State law.*" (emphasis added). Research on this issue reveals that though many states disfavor contract provisions absolving persons and entities from liability for future negligence, **no** state prohibits, as a matter of law, inclusion of such clauses in contracts between private individuals or entities.

Section 96.39 (d) goes on to state that waivers must be "*limited and specific*" and must be "*based on risks that have been discussed and explained to the client in the adoption services contract.*" Unfortunately, adoptive parents often have no choice but to sign a contract that assigns all the risks to them, simply because virtually every agency uses such a contract. In the current situation, a parent's choices are to sign the contract or not adopt a child. The "protections" of section 96.39 (d) are rendered even more illusory by the fact courts have upheld the validity of broad exculpatory clauses in international adoptions contracts in *every* reported case. This is true even though many jurisdictions now recognize a tort of wrongful adoption (for negligent and/or intentional misrepresentation) in the domestic adoption context. Thus, under section 96.39 (d), parents who choose to adopt internationally find themselves in precisely the same legal position, and facing the same risks and unequal balances of power and knowledge, as they did prior to the Convention.

Other Consumer Protection Issues

The regulations contain many provisions that appear, at first blush, to be consumer friendly, but which actually fail to protect adoptive parents.

The Department failed to protect consumer's interests in regard to the payment of fees and refunds. Currently, it is standard practice for agencies to require parents to sign a contract providing that all fees paid are non-refundable, even if services are not provided and a child is not adopted. The regulations use empty refund provisions that simply state that an agency is required to note *when and how* fees will be refunded. (§96.40) Therefore, agencies are still free to tell parents fees are never refunded.

Information disclosure practices do not require agencies to name their foreign facilitators/attorneys. Therefore, as discussed above, agencies remain under no obligation to check the credentials of in-country

facilitators/attorneys and adoptive parents have no means to do so. Thus, the regulations fail to provide parents with what is perhaps the most significant protection against unethical adoptions.

The regulations do not require that unsupervised foreign providers gather adequate medical or social information on a child. Given that virtually all agencies that use foreign facilitators/attorneys will be exempt from this requirement, the provisions for medical information disclosure in §96.49 are significantly weakened.

Education requirements for adoption service providers are weakened by exemptions for “experience” in the field of intercountry adoptions. These provisions, while necessary for agencies that employ persons with many years of experience, do not contain any specific requirements for the type or length of such experience.

Provisions that provide parents two weeks to review a referral and medical information are weakened because agencies can shorten that time period for extenuating circumstances when, in the agency’s opinion, the best interests of the child are served.

The lack of protection for children and parents will result in an atmosphere that is not substantially changed from the current one—a bitter disappointment for all who have waited 12 years for adequate regulations.

About *Ethica*

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.