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To: adoptionregs@state.gov
Subject: State/AR-01/96

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CA/OCS/PRI

Adoption Regulations Docket Room

SA-29

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Re: State/ AR-01/96

International Children's Alliance (ICA) Comments on

22 CFR Parts 96 Hague Convention on Intercountry Adoption;

Intercountry Adoption Act 2000; Accreditation of Agencies; of Persons; Proposed Rules

Approval

International Children's Alliance ("ICA"), an intercountry adoption services agency with headquarters in Silver Spring, Maryland, is pleased to submit these comments to the U.S. Department of State on the proposed regulations implementing the Hague Convention on Intercountry Adoption. ICA welcomes the reforms and standards envisioned by the Hague that are generally reflected in these regulations. However, we also believe there are several critical areas, particularly regarding risk and liability, that either are not required by Hague, or that will prove extremely damaging to agencies, thereby seriously endangering the prospects for adoption of many children overseas. We strongly urge State to reconsider its position on these issues, as discussed below.

A. Strict Liability Imposed On Agencies

As currently drafted, the regulations expressly require that an agency primary provider overseeing a supervised provider retain legal responsibility for each adoption and "(1) assume tort, contract, and other civil liability to the prospective adoptive parent(s) for the supervised provider's provision of the contracted services and its compliance with the standards in this subpart F; 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 supervised providers..." Proposed Reg. §§ 96.45(b)(8) & (c) and 96.46(b)(9) & (c).

These provisions have two important and troubling implications:

(1) The provisions will channel all liability, in tort, contract or otherwise within each case to a single "primary provider" for the actions of all adoption service providers in the U.S. and abroad in the process (subject to certain limited exceptions); and

(2) The provisions will assign all risk that is inherent in the international adoption system to the agencies versus the adoptive parent(s), thereby creating a statutory cause of action for the adoptive parents to pursue against their agencies.

The Department's stated goals were: (i) to "improve supervision," by American agencies over its counterparts in the U.S. and abroad, Preamble, at 54081, and (ii) to give parents "legal recourse against a single entity." Preamble, at 54081. The Department's proposed solutions present enormous dangers for a number of reasons.

First, the fact is that agencies have little meaningful control over their foreign counterparts. American agencies cannot reasonably be expected to visit every orphanage, attend every doctors' visit, file every paper for every child eligible for international adoption. American agencies' chances of successfully policing their foreign counterparts are extraordinarily difficult to accomplish, and this purpose will not be furthered effectively by imposition of liability on such agencies.

In addition, in relation to U.S.-based supervised providers, most of whom do only home study, parent preparation and post-placement services, the Proposed Regulations would cause accredited agencies to avoid using their services altogether. Given a choice between utilizing the services of another accredited provider for these functions and utilizing an unaccredited supervised provider, most accredited agencies would be unwilling to accept the legal responsibility and liability that using supervised providers would entail under the proposed regulatory scheme. If these small agencies and social workers (who collectively place thousands of children) are unable to procure written agreements with accredited agencies, they will surely go out of business, which would have a devastating impact on the adoption infrastructure in the U.S.

Further, channeling of liability to the primary provider to "improve supervision" is duplicative of other provisions in the Hague Regulations and, therefore, unnecessary. See Preamble, at 54084; Proposed Reg. §§96.45(a) & 96.46(a)(requiring agencies to investigate their foreign contacts, and to ensure that supervised providers here and abroad are ethical, meet certain standards, and understand and abide by the principles behind the Hague Convention); see also Proposed Reg. §§96.45(b) & 96.46(b) (American agencies must execute written agreements with their supervised providers in the U.S. and abroad that impose certain predefined requirements and certifications that are consistent with the Convention goals).

In this provision, the Department also would place an enormous financial burden on the agencies that the agencies are in no position to assume. Most agencies are not deep pockets - they are non-profit corporations with inherently limited resources. Non-profit corporations face enough of a challenge in training and promoting responsible behavior of, and protecting themselves from the negligence of, their own employees without asking them to assume responsibility for the "local service providers" in the U.S. as well as for third party independent contractors in foreign lands.

Moreover, the language of proposed §§96.45 (c) and 96.46(c) creates a classic strict liability scheme, as these provisions would require that agencies be held financially responsible for all risks within the international adoption process without gard to their fault. By statutorily shifting all risk undertaken by prospective doptive parents in pursuing foreign adoption to their agencies, this provision creates a statutory cause of action for them. These provisions undoubtedly will invite litigation from adoptive parents against the very agencies that are trying to help them build a family. The Preamble leaves no doubt as to the intended effect of these provisions, i.e., to "give the adoptive parents legal recourse against a single entity..." Preamble V (c)(6).

Under standard principles of common law evolved over the decades, a plaintiff must demonstrate that a defendant was negligent in order to hold such defendant legally responsible for resulting damages.[1] The Proposed Regulations alter basic principles of tort law by removing the need for adoptive parents to demonstrate any fault whatsoever on the part of their agency in order to collect a judgment. Adoptive parents need merely assert a claim for damages incurred to collect against their agency. Indeed, the proposed scheme would appear to bestow upon parents a greater legal guarantee than they would have if their adopted child had been conceived biologically.

In addition, there is no need for this provision. Parents already have a right to sue and are actively using it. See Wall Street Journal, December 7, 1998, "Are Adoption Agencies Liable for Not Telling All?" In fact, these regulations will further promote litigation and, thereby, pit agencies against other agencies and agencies against client adoptive parents. Moreover, the provision is unnecessary in view of other parts of the proposed regulations, specifically Subpart J, which permits adoptive parents to file complaints against agencies, ensures their timely investigation, and permits imposition of adverse actions or other sanctions.

Agencies should not be held strictly liable for events that are beyond their control, including world events, unforeseen travel conditions, orphanage conditions, unknown or undisclosed medical issues or genetic predispositions, or any of the other risks that gencies must be allowed to address and allocate contractually.

Nor is liability insurance a realistic way of dealing with the additional and unnecessary liability exposure implicated by these provisions. We do not expect our current carrier to insure for the acts of foreign independent contractors. Finally, the flaws discussed above are not remedied by the Departments' permitting the agencies to retain the right to seek indemnification against their providers. See Proposed Regulation §§96.45(d) and 96.46(d). The agencies will be long out of business before they could ever make use of these tools.

More broadly, ICA believes that implementation of the proposed risk and liability framework exceeds the State Department's authority to implement such a structure. It is the province of the legislature, not the executive branch, to dictate rules of strict liability.[2] There is nothing in the implementing statute that warrants the creation of a strict liability scheme here.

Similarly, nothing in the Hague Convention Treaty requires the imposition of such strict liability. The Hague Convention speaks to a specific and different mandate - to protect children, birth parents and adoptive parents from abuse and child trafficking. The majority of the proposed regulations accomplish this mandate successfully and properly within the scope of the IAA; however, the risk and liability provisions exceed far beyond permissible boundaries.

For all of these reasons, the Department should strike sections §§96.45(b)(8) & (c) and 96.46(b)(9) & (c).

3. Apparent Prohibition Against Contractual Waivers

In addition to statutorily assigning all risk to agencies that normally is shared with parents, the drafters further prohibit reallocation of this risk by contract. Specifically, the Regulations state "the agency or person [may] not require a client or prospective client to sign a blanket waiver of liability in connection with the provision of adoption services in Convention cases." §96.39(d).

It is currently standard practice for agencies to advise their clients that international adoption is not a risk-free means of growing their families. Agencies advise the adoptive parents at the outset of the process that they will be working in a foreign country, with a foreign government, foreign language, foreign culture, foreign medical systems and will be subject to the unknowns of foreign law and custom. We all run the risk of countries spontaneously deciding to close their adoption programs. Moreover, agencies cite the universal risk of developmental delays in orphanage children and the possibility of unknown or undiagnosed medical and psychological conditions of the children due to factors beyond their control. After acknowledging the possible hurdles and roadblocks, many prospective adoptive parents choose to proceed despite the known obstacles. And agencies reasonably ask parents to forego suing the agency if any of the risks becomes a reality.

By this provision, the Department would alter current practice substantially, and would prohibit adoption agencies from protecting themselves in a very reasonable manner. Simply stated, to be able to survive as a business, agencies must be able to share the risk and to protect themselves contractually from the threat of litigation by adoptive parent(s). Why should agencies be prohibited from educating their clients about the inherent risks and asking them to decide whether they wish to proceed. This seems directly contrary to the thrust of the Hague Convention, which is to provider greater transparency in the adoption process and to encourage agencies to be fair and open about the risks and uncertainties in adopting internationally. It also conflicts with recent jurisprudence, as various courts have determined that exculpatory provisions in this precise context are appropriate and consistent with public policy. See Howard M. Cooper, "Enforcement of Contractual Release and Hold Harmless Langue in 'Wrongful Adoption' Cases," Boston Bar Journal, May/June 2000 (citing Forbes v. The Alliance for Children, Inc., et al, Suffolk County, Civil Action No. 97-04869B; Regensburger v. China Adoption Consultant Ltd., 138 F.3d 1201 (7th Cir. 1999); French v. World Child, Inc., 977 F. Supp. 56 (D.D.C. 1997), aff'd, No. 97-7167 (D. D.C. Cir. Sept. 10, 1998)). Thus, waiver provisions should and must be permissible so that agencies can educate their clients about known risks and parents can knowingly decide whether to undertake such risks.

For these reasons, the Department should strike proposed reg. §96.39(d). In the alternative, the Department should clarify that the provision in no way prohibits contracts that operate to advise adopting parents of the risks and potential problems associated with intercountry adoption, and that permit agencies to waive liability for certain occurrences relating to such risks and potential problems.

C. Prohibitive Insurance Requirements

The Regulations further propose a prohibitively high amount of insurance coverage - $1 million per occurrence. Proposed Reg. §96.33(h). This is inappropriate for several reasons. First, it is already impossible for many agencies to procure professional liability coverage. Our agency has determined that the costs would be so excessive, that if divided per family it could be in excess of an additional cost of $1,000.

Second, the level of $1 million is extraordinarily high given the type of compensatory damages most parents could seek. Adoption expenses typically run between $25,000-$35,000, and much of these expenses are now setoff against government tax credits and employer contribution benefits.

Third, again, the Department is inviting litigation from adoptive parents who otherwise would not have such a large policy to pursue. The proposed liability statute, coupled with the high level of insurance coverage, will open the floodgates to litigation by parents seeking to pursue a deep pocket following a problematic or disappointing adoption experience.

For these reasons, the Department should strike proposed reg. §96.33(h). In addition, we propose that the Department consider asking the insurance industry to analyze underwriting international adoption insurance policies for parents to

individually defray the known risks of international adoption. Insurers cover domestic adoption risks, as well as travel insurance risks. It is not a far stretch for insurance companies to cover the risks associated with foreign adoption and not unreasonable to ask at the parents pay insurance premiums if they want the added protection from financial ss in the event of a disappointing result.

D. Cash Transfers and Receipts

Proposed reg. §96.40(e) requires the agency to have mechanisms in place for transferring funds to Convention countries when the financial institutions of the Convention country so permit and for obtaining written receipts for such transfers, so that direct cash transfers by the prospective adoptive parents to pay for the adoption services provided in the other Convention country are minimized or unnecessary.

The problem with this regulation is that while certain countries do "permit" alternative methods to cash transfers, such as wire transfers, the wire transfers run a very serious risk of being diverted in the foreign country to illegitimate purposes by corrupt or unauthorized officials. Therefore, while we appreciate the interest in minimizing direct cash transfers, the regulation should make clear that alternative methods such as wire transfer are not mandatory, particularly given an agency's inability to ensure that the funds will be properly deposited and accounted for in connection with intended and legitimate foreign adoption services rendered.

Proposed reg. §96.40(e) also refers to a requirement that the agency obtain written receipts for cash transfers, and proposed reg. §96.40(f)(3) requires the agency to provide written receipts to the prospective adoptive parent(s) for fees and expenses paid in the Convention country, and to retain copies of such receipts. In our experience, obtaining receipts from foreign adoption officials for cash transfers or fees r services rendered is simply not feasible. Moreover, like most agencies, we provide ospective adoptive parents with full disclosure of fees and services at the outset of a adoption process, and these are also fully reflected in our contract. This disclosure and contractual obligation renders the obtaining and provision of receipts unnecessary.

Therefore, these provisions pertaining to the requirement that an agency obtain such receipts should be stricken.

E. Post Adoption Reports

Proposed reg. §96.51(c), which concerns post-adoption reports, raises a very real problem for agencies. Many countries require post-placement reports as a condition for allowing agencies to place children from those countries. Sending countries understandably do this as a best interests safeguard measure against abuse, exploitation, or other heinous practices against the children they allow to be adopted. The problem, however, is that parents who have adopted through the agency are responsible for generating those reports. ICA, like many other agencies, already exercise our "best efforts" to persuade parents to provide these reports. However, on many occasions we have encountered difficulty in obtaining these reports from parents.

Therefore, the regulation needs to specify that parents are obligated by law to provide these reports in a timely manner. Otherwise, agencies run the risk of being shut out of a foreign country through no fault of their own. Nor is it sufficient protection for agencies that this obligation is reflected in their contract with adopting arents. The obligation is routinely ignored and puts the agency in an extremely fficult position of needing to take legal measures against the parent in order to honor reign government requirements, a dilemma no agency should be forced to bear.

The implementing statute gives the Department ample authority to require parents to provide these post-placement reports on a timely basis. Section 103(b) of the IAA states that the Department shall be responsible for, inter alia, "providing the central authorities of other Hague Convention countries with information concerning...any other matters necessary and appropriate for implementation of this Convention." In

addition, the Department shall be responsible for "facilitating the transmittal of other appropriate information to, and among, central authorities..." and for "taking other appropriate actions to implement the Convention." One of the objects of the Convention, in turn, is to "establish a system of cooperation amongst Contracting states to ensure that those safeguards (concerning the best interests and rights of the child) are respected and thereby prevent the abduction, the sale of, or traffic in children." Article 1(b) of the Hague Convention.

Thus, the above-cited IAA statutory provisions provide abundant authority, indeed mandate, that the Department discharge its obligations to fully implement the Convention's safeguards by requiring adopting parents to comply with all post-placement reporting requirements, as instructed by the agency. The Department should revise this regulation accordingly.

F. Educational Requirements

Proposed reg. §96.37(f) requires that the agency's employee who conducts home studies must have a minimum of a master's degree from and accredited program of social work education or a master's degree (or doctorate) in one of several related human services field. Unfortunately, the fact is that most of the individuals ICA employs to perform home studies do not have their MSWs, and we expect this is the case with many other agencies. To ensure accountability and professionalism in a way that better reflects industry reality, we propose that the provision be changed to require that such workers have a minimum of a bachelor's degree in social work or a related human service field, and that all home studies be approved by a licensed social worker. This standard would better reflect industry norms, while ensuring that all home studies are subject to approval by those at the highest levels of the profession.

International Children's Alliance (ICA) appreciates this opportunity to comment on the proposed regulations implementing the IAA. We are available at (301)495-9710 to answer any questions you may have regarding our comments. Thank you.

Sincerely,

Deborah L. McFadden

Deborah L. McFadden,
President

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[1] Negligence is understood as a failure to exercise in the given circumstances that degree of care for the safety of others which a reasonably prudent person would exercise under the same or similar circumstances. Negligence may be the doing of an act which the reasonably prudent person would not have done, or it may be the failure to do that which the reasonably prudent person would have done under the circumstances then existing. Negligence is a departure from that standard of care.

[2] See e.g., Chambers v. St. Mary's School, 82 Ohio St.3d 563, 697 N.E.2d 38 (1998)(ability of court to find negligence per se depends upon legislative authorization, not agency's administrative rule-making).