

Recommendations for Implementing the
Hague Convention & the Intercountry Adoption Act of 2000

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General Statement

Acton Burnell's preliminary draft regulations (draft regulations) fail to address, and in some important ways undermine, many of the State Department's key mandates in implementing the Hague Convention (Convention) and the Intercountry Adoption Act (IAA). The Convention and IAA reflect a broad international and national consensus for regulation of adoption practitioners in order to improve the quality, ethics and reliability of international adoption services. Unfortunately, the draft regulations do not implement the IAA or the Convention in a manner that will achieve these goals.

In drafting the regulations, Acton Burnell has failed to clearly articulate the following components of an effective regulatory system:

- ❑ *Enforceable standards that will govern international adoption practice.*
- ❑ *Oversight of the financial aspects of international adoption to eliminate "unreasonable" fees and unethical financial incentives.*
- ❑ *Regular monitoring of compliance with practice standards and financial rules.*
- ❑ *Timely enforcement to put poor quality providers out of business.*
- ❑ *Education of the public about how the system should operate, and the comparative performance of accredited agencies/approved persons.*
- ❑ *Reliable reports to the State Department and Congress about systemic performance, and the efficacy of the accrediting entities to improve system quality.*

If the regulations are not substantially changed, children will be harmed in very real and lasting ways. Unethical practitioners, even if they are a small minority of adoption providers, have a disproportionate impact on public perception of adoption. Without a positive public perception of international adoption in the U.S. and abroad, large numbers of children will likely lose their only hope of having a permanent loving family. Moreover, every year tens of thousands of birth and adoptive families make decisions about international adoption, and children's lives are inexorably changed. These decisions must be made within a system that is focused on the best interests of children and their birth and adoptive families, not the financial rewards of placement.

The IAA places broad responsibility with the accrediting entities to conduct 1) accreditation and approval, 2) oversight, 3) enforcement and 4) data collection, record maintenance and reporting. Of all their duties, the accreditation and approval responsibilities are the least important to achieving the goals of the Convention and the IAA. An accreditation review of accredited agencies/approved persons once every three or four years will not have a fundamental impact on system quality. The regulations should instead be focused on the monitoring, enforcement and reporting functions with two goals in mind: setting meaningful and enforceable standards that will fundamentally improve the quality of adoption practice, and creating an effective, efficient system to monitor and enforce compliance by accredited agencies and approved persons.

Yet the draft regulations focus almost exclusively on the first duty--accreditation and approval--while exempting many organizations large and small from any actual review by the accrediting

entities for years to come. And the accreditation process contemplated by the draft regulations is fundamentally flawed. Accreditation and approval should be linked to compliance with international and national standards. Instead, the regulatory scheme largely focuses on accreditation techniques that in other industries, such as health and education, are primarily used to measure an organization's quality and capacity against its own past performance, not adherence to industry regulatory standards. Quality assurance mechanisms (that measure whether practitioners are setting and achieving self-selected quality improvement goals), and agency-specific policy and procedure requirements will not remedy the problematic systemic practices that are the focus of the Convention and the IAA.

Acton Burnell has received considerable input about the poor quality, unethical and sometimes horrific experiences of prospective adoptive parents. The draft regulations do not in any effective or coherent way place appropriate legal responsibility for negligence with the accredited agencies/approved persons. They do not require that adoption contracts include the Convention, statutory and regulatory standards and disclosures. The draft regulations should be rewritten to insure that all legal agreements signed by birth and adoptive parents describe the legal safeguards and protections afforded triad members, and include all information relevant to making an informed decision about selecting a service provider.

The Evan B. Donaldson Adoption Institute (Institute) has attached its May 24, 2001 *Recommendations on Implementing the IAA*. Below are the Institute's general and specific comments with respect to the draft regulations.

Overall Deficiencies with the Draft Regulations

The Draft Regulations:

1. *Do not provide comprehensive and enforceable practice standards for the adoption industry.*
2. *Place too much emphasis on accreditation as a means of overseeing adoption providers, while failing to develop effective procedures to monitor performance, review and resolve complaints, enforce standards, gather and report data, and educate the public.*
3. *Do not establish responsibility for monitoring adoption fees according to the Convention and IAA standards.*
4. *Provide virtually no consumer protections for birth and adoptive parents in contrast with routine and common safeguards in other industries:*
 - ❑ *Do not require accredited agencies/approved persons to assume legal liability for acts of subcontractors and agents in other countries;*
 - ❑ *Fail to create standards for adoption contracts and other legal agreements;*
 - ❑ *Do not require the provision of accessible, comparable information to the public on accredited agencies'/approved persons' performance; and*
 - ❑ *Fail to include Ombudsman services to resolve individual complaints and research patterns of complaints within the accrediting entities' scope of work.*
5. *Do not create a framework for improving the quality of health and genetic information provided at the time of the placement and for gathering additional information in the future.*
6. *Fail to define specific timeframes, set documentation requirements and establish monitoring responsibility to insure that a diligent search is conducted for U.S. parents before a U.S. resident child is placed for adoption in another country.*

Specific Comments on Draft 22 CFR Part 96

Section 96.4: Central Authority Functions

In Subsection (c), the draft regulations provide that “the designated entity shall carry out the accreditation and approval functions”, but do not address the other three statutorily delegated duties—monitoring, enforcement and data collection/reporting.

Section 96.5: Applicability of Accreditation and Approval Requirements

Subsection (d), requiring the provision of the six core services for every Convention adoption is good policy, but standards should be set to insure that the services are provided in a meaningful and effective manner.

Once accreditation and approval are granted, prospective parents will have expectations of service quality and accountability, which are simply not supported by the draft regulations. In subsection (e), the draft regulations provide that accredited agencies and approved persons are not legally responsible for services provided by subcontractors in other Convention countries. Moreover, the draft regulations do not even require that subcontractors be accredited in their own countries. These distinctions are counter to the intent of the Convention and the IAA.

Specifying legal liability without adequate insurance coverage may not ultimately help aggrieved parties. IAA Section 203(b)(1)(E) requires accredited agencies and approved persons to have “adequate liability insurance”. The draft regulations, however, gut this requirement in subsection (e) by permitting accredited agencies and approved persons to enter into contracts that “require agencies or persons with whom they contract to have a bond, liability insurance, or an escrow account” as a substitute for agency coverage of their subcontractors. The result is that birth and prospective adoptive parents will have little recourse for malpractice or negligence if accredited agencies or approved persons shift responsibility to their subcontractors. Without liability coverage for non-salaried staff, and with no legal responsibility for overseas subcontractors, accredited agencies and approved persons simply will not be accountable for many of the critical services that are provided, placing families in a precarious position. After all, families choose to establish relationships with accredited agencies/approved persons, and have no control of or input into choices about subcontractors.

The Institute recommends that primary legal responsibility and liability be placed on accredited agencies and approved persons for the acts of all agents and subcontractors.

Section 96.13: Standards for Convention Accreditation and Approval

In general, the standards proposed are the minimum necessary to address only some of the identified problems with the system, and should not be phased in over two accreditation cycles. Given the timeframes being proposed to implement accreditation and approval, as well as the number of agencies that are initially exempted from the process, further delays are unnecessary and counterproductive.

Subsection A: Statutory and Convention Requirements

Subsection A reiterates or paraphrases sections from the Convention and IAA without clarifying the standards that would constitute specific compliance. For example, the regulations restate that accredited agencies/approved persons should disclose policies and practices, disruption rates and fees to the public and prospective adoptive applicants, but do not require that the disclosures be in writing. Since families rely on these representations to select a practitioner, accredited agencies/approved persons should be required to incorporate such written

disclosures into their adoption contracts so that families have legal recourse if provided with materially false or misleading information.

One important requirement of the IAA is given short shrift in subsection A.13, and that is data collection. In order for the Central Authority and accrediting entities to effectively oversee accredited agencies and approved persons, the accrediting entities must gather comparable and reliable information on a regular basis. This information should be made available to prospective adoptive families in an accessible fashion. Subsection A.13 does not require that accredited agencies and approved persons collect and report data in a uniform manner, though the *Draft Convention Accreditation and Approval Procedures* require the accrediting entities to collect data in a “standardized format”.

The Institute recommends that the draft regulations be amended to clarify that accredited agencies/approved persons must provide information consistent with a standardized format and definitions to be developed by the accrediting entities. The Institute further recommends that the regulations specifically address how disclosed information will be broadly disseminated to the public in a format that is accessible and allows comparisons among providers.

Without these changes, the IAA reporting requirements will not be useful as a monitoring or informational resource.

Subsection C: Oversight and Accountability

The IAA requires the accrediting entities to provide oversight of the accredited agencies and approved persons. The dictionary definition of oversight is: “management by overseeing the performance or operation of a ... group.” The draft regulations inaccurately characterize internal quality assurance mechanisms as “oversight”. Meaningful oversight requires the State Department or accrediting entities to monitor the performance of practitioners.

The Institute recommends that the State Department or accrediting entities monitor accredited agencies/approved persons’ performance in at least two basic ways. First, accredited agencies/approved persons must be evaluated by compliance with system-wide practice standards. Second, accredited agencies’ and approved persons’ performance must be compared to the median performance within the industry based on uniformly reported information on fees and services, disruption rates, time to finalize an adoption by country and other quantifiable and important variables.

Subsections D and E: Ethical Practices & Disclosure

The ethical practices and disclosure provisions satisfactorily address some of the reported problems with adoption practice. If they are recharacterized as mandated standards, with compliance monitored and enforced, the international adoption experience will improve. As written, however, it is unclear how compliance with ethical practices and disclosures will be monitored and enforced. For example, the Institute questions why E.4, which deals with the transfer of funds overseas, is presented as merely a disclosure. Is Acton Burnell suggesting that this requirement must simply be disclosed to families, or is it a practice that the accredited agencies/approved persons are required to follow?

The Institute recommends that Acton Burnell clarify the intent of these two sections as practice standards for accredited agencies/approved persons and specify how compliance will be monitored and enforced.

The draft regulations will provide no protection for individuals receiving services unless accredited agencies/approved persons are required to include these “standards” in their

adoption contracts, and the public is educated about the standards by an objective source, not the accredited agencies/approved persons.

The Institute recommends that all information about accredited agencies/approved persons that is required by law to be provided to birth and adoptive families be included in the body of or an attachment to the adoptive families' contract, and in written agreements with birth mothers. This requirement would afford individual families legal recourse in the event that fraudulent or intentionally misleading information is provided to induce families to work with a particular agency or person.

Subsection F: Complaints and Appeals

The IAA Section 202 (b)(2) specifically requires that the accrediting entities review complaints against accredited agencies/approved persons. Yet, the draft regulations place far too much authority on accredited agencies and approved persons to oversee themselves. As proposed, this section offers no meaningful assistance for birth and adoptive parents when problems arise with an accredited agency or approved person, and little opportunity for the accrediting entities to intervene. While requirements for internal complaint review mechanisms are a standard requirement in accreditation procedures, there must also be a timely appeals mechanism to an independent body, as well as an opportunity for independent intervention when an internal process is futile.

The Institute recommends that the State Department hire or contract for an Ombudsman, and require that accredited agencies/approved persons provide all families with information about how to access Ombudsman services. Moreover, the regulations should not be left solely to the family or accredited agencies/approved persons to determine whether a specific complaint falls within the scope of the IAA and/or the Convention. The accrediting entities should make that determination. Finally, the procedures and time frames for addressing and resolving complaints must be spelled out in the regulations, as well as the accrediting entities' scope of work with respect to complaint review and resolution.

Subsection G: Financial Management

The IAA Section 203 (b) (1) (E) requires that accredited agencies/approved persons "have in force adequate liability insurance for professional negligence and any other insurance that the Secretary considers appropriate". The proposed regulation in G.1 will not provide meaningful liability insurance coverage by requiring only professional negligence coverage of \$250,000 per occurrence.

The Institute recommends that coverage be set based on actuarial analysis, which does not appear to have been commissioned by either the State Department or Acton Burnell. Certainly floors of at least \$1-million per occurrence should be required, and analysis may support even higher minimum floors. No information is provided as to why coverage for general negligence is not also required. If the negligent act is attributed to a non-professional, then professional negligence coverage will not provide protection. Finally, the regulations should require that all staff, subcontractors and agents in the U.S. and abroad be covered by the accredited agencies'/approved persons' insurance.

G.5 provides for undisbursed funds to be retained in escrow accounts, which offers the potential to provide a much needed protection for prospective adoptive families.

The Institute recommends that this mandate be augmented to require that adoption contracts specify the milestones for fund disbursement and the amount to be disbursed. Additionally, families should receive written notification as funds are disbursed.

Subsection M: Standards Applicable to All Intercountry Adoption Services

If properly monitored and enforced, these draft regulations address some critical issues in a manner that can improve the quality of international adoption practice.

The Institute proposes two changes. First, the draft regulations should be amended to require that all child-specific information be provided in writing, with an accurate translation. Second, the Institute supports development of a medical questionnaire to be used as a guide in gathering more comprehensive medical and genetic information whenever possible. See the Institute's May 24, 2001 Recommendations.

Subsection O: Standards Specific to Children from the U.S. Placed for Adoption in Other Hague Countries

The draft regulations require accredited agencies/approved persons to conduct a diligent search for adoptive parents in the U.S. (O.5), and make diligent efforts to place siblings together (O13).

The Institute recommends that these efforts be documented in writing, and records be reviewed by the State Department or the accrediting entities in a timely manner to verify that reasonable efforts have, in fact, been made. The Institute supports amendment of the draft regulations to include a minimum time to conduct these critical activities, which can be waived for good cause.

Draft Convention Accreditation and Approval Procedures

Overall, this document does not dovetail with the Part 96 draft. For example, Part 96 does not describe a role for the accrediting entities in the complaint process, yet the Procedures do in general terms describe this function.

The Institute recommends that the drafts be changed to reflect a seamless process that allows individuals with complaints to appeal to the accrediting entities after the accredited agency/approved person has failed to resolve the complaint to their satisfaction. The Institute also supports a change that allows a complaint to be made directly to the accrediting entities. The Institute recommends that an independent Ombudsman be the front door for such complaints, either as accrediting entity staff or through a subcontract. Ombudsman services historically have resulted in positive outcomes with respect to individual complaint resolution, identification of patterns of complaints and practice changes.

There is a similar "disconnect" between the documents with respect to data collection and reporting.

The Institute recommends that Acton Burnell provide more detailed procedures and scope of work with respect to the accrediting entities' role in developing a data collection system that effectuates the goals of the IAA and is an integral component of its monitoring system.

Role of Accrediting Entities in Dissemination of Information to the Public

Acton Burnell should take a fresh look at the role of the State Department and the accrediting entities in public education and information dissemination. Currently, prospective adoptive families and birth parents rely on accredited agencies'/approved persons' representations to make critical life decisions. There is no objective, fact-based source for comparative information about adoption practitioners. The IAA already specifies that accredited agencies/approved persons must provide certain information to individuals and/or the accrediting entities and the Secretary has authority to require that more information be provided. While members of the

triad are entitled to privacy as to the details of a particular adoption, agencies and persons receiving accreditation and approval should not be accorded such protections.

The Institute further recommends that relevant information about accredited agencies and approved persons be made available to the general public through a website and the State Department annual report required by the IAA.