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The Failure of Promise: The U.S. Regulations on Intercountry Adoption Under the Hague Convention

Trish Maskew

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THE FAILURE OF PROMISE: THE U.S. REGULATIONS ON INTERCOUNTRY ADOPTION UNDER THE HAGUE CONVENTION

TRISH MASKEW*

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INTRODUCTION

On April 1, 2008, the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (Hague Convention on Intercountry Adoption or Convention)¹ entered into force in the United States. To implement the Convention and the Intercountry Adoption Act of 2000 (IAA),² the U.S. Department of State (State Department or DOS) released final rules³ (DOS regulations) to regulate adoption service providers on February 15, 2006. The Department of Homeland Security (DHS) released an interim rule⁴ on the immigration aspects of the Convention on October 4, 2007 (DHS regulations).

The Convention and the IAA primarily seek to ensure that an adoption is in the best interest of the child,⁵ to guard against the abduction, sale, or trafficking of children,⁶ and to establish procedural norms that allow countries with different legal systems to work together cooperatively to facilitate intercountry adoption.⁷ The State Department has noted that “[o]nce the Convention enters into force for the United States, prospective adoptive parents who adopt from Convention countries⁸ will have assurance that their child was not a victim of unscrupulous adoption practices but was a child eligible for adoption and in need of a permanent and loving home.”⁹

1. Hague Conference on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 29 May, 1993, *available at* http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=69 [hereinafter Hague Convention on Intercountry Adoption].

2. Intercountry Adoption Act of 2000, 42 U.S.C. §§ 14901–14954 (2000). The Intercountry Adoption Act is the U.S. implementing legislation for the Hague Adoption Convention.

3. Hague Convention on Intercountry Adoption, *supra* note 1; Intercountry Adoption Act of 2000, *supra* note 2; Accreditation of Agencies; Approval of Persons, 71 Fed. Reg. 8064 (Feb. 15, 2006) (codified at 22 C.F.R. pts. 96, 97–98).

4. Classification of Aliens As Children of United States Citizens Based on Intercountry Adoptions Under the Hague Convention, 72 Fed. Reg. 56,832 (Oct. 4, 2007) (to be codified at 8 C.F.R. pts. 103, 204, 213a, 299, and 322).

5. 42 U.S.C. § 14901(b)(2); Hague Convention on Intercountry Adoption, *supra* note 1, art. 1(a).

6. Hague Convention on Intercountry Adoption, *supra* note 1, art. 1(b).

7. *See* 42 U.S.C. § 14901(b)(3) (listing the purposes of the Act, including improving the government’s ability to assist citizens of contracting parties seeking to adopt from abroad); *Hague Convention on Intercountry Adoption*, *supra* note 1, art. 1(b) (declaring the establishment of a system of cooperation among contracting states as an objective of the Convention).

8. The U.S. rules only apply to adoptions between two countries which have both implemented the Convention. Adoptions by U.S. citizens in non-Hague countries will not be held to the same standards, and in fact, no other federal regulation applies to those adoptions outside the basic provisions of the Immigration and Nationality Act.

9. *Hague Convention on International Adoptions: Status and the Framework for Implementation: Hearing Before the Subcomm. on Africa, Global Human Rights and*

This Article examines whether the regulations fulfill the objectives of the Convention and the IAA, and whether they provide the assurances the State Department promised adoptive parents and their children. Part I details the intended purpose of the Convention and the IAA, and outlines abuses the law was meant to address. Part II discusses the history behind the promulgation of the DOS regulations and how the State Department took congressional intent into account throughout the process, until the issuance of the final DOS regulations when it abruptly changed course and significantly altered the regulatory scheme. Part III explores how the State Department included in its requirements a provision that U.S. adoption agencies supervise their overseas agents, but then exempted from this requirement agents who obtain birth parent consent to adoption or prepare the required report on the child. In addition, Part III discusses the failure to adequately regulate the fees involved in intercountry adoption and regulatory provisions that allow adoption agencies to pay birth parents significant sums of money as a reimbursement of prenatal and adoption expenses. Part IV provides recommendations to address the most serious shortcomings of the regulations, concluding that the regulations may actually *increase* child trafficking.

I. BACKGROUND

A. *The Adoption Process and the Essential Role of Foreign Facilitators*

When a U.S. citizen seeks to adopt a child from a foreign country, he or she generally uses the services of at least one, and often two or more, adoption service providers (ASPs).¹⁰ The prospective parent obtains a required home study from a local provider, and then contracts with a placement agency that will locate a child abroad and facilitate the entry of the child into the United States.¹¹ Virtually all U.S. placement agencies

International Operations of the H. Comm. on International Relations, 109th Cong. 9–10 (2006) (testimony of Catherine Barry, Deputy Assistant Secretary for Overseas Citizens Services, U.S. Department of State).

10. See JEAN NELSON ERICHSEN & HEINO R. ERICHSEN, *HOW TO ADOPT INTERNATIONALLY* 50 (Mesa House 2003) (noting that most local agencies will provide a home study for adoptions even though they will not be able to refer a child from abroad, and that U.S.-based international agencies have child-placing contracts with foreign governments, attorneys, and liaisons in foreign countries).

11. *Id.*

contract with independent “facilitators” abroad.¹² In most cases, these facilitators are not actual employees of a U.S. agency, but independent contractors.¹³

Foreign facilitators are the linchpin of the adoption process, as they perform the bulk of the adoption services for a U.S. agency. These services might include locating a child and obtaining consent to the adoption, obtaining the child’s social and medical information, and informing the U.S. adoption agency of the process and documentation necessary to complete the adoption in the foreign country. Facilitators might also file the paperwork and obtain adoption clearance from foreign officials, deliver the child to the adoptive parents, accompany parents to official appointments, and often act as a translator during court hearings.¹⁴

The IAA requires that any person performing an adoption service¹⁵ either be accredited or work under the supervision of an accredited entity.¹⁶ The IAA reiterates the intent to extend this provision to foreign facilitators by clearly stating that “[t]he term ‘providing,’ with respect to an adoption service, includes facilitating the provision of the service.”¹⁷

12. Telephone Interview with Thomas J. DiFilipo, President and CEO, Joint Council on International Children’s Services (Mar. 4, 2007) [hereinafter DiFilipo Interview]. Joint Council is the largest organization of adoption agencies, medical clinics, and support and advocacy organizations in the United States. Joint Council members coordinate approximately 75% of the international adoptions by U.S. citizens each year. Joint Council on International Children’s Services, *History*, <http://www.jcics.org/History.htm> (last visited Apr. 17, 2008).

13. See DiFilipo Interview, *supra* note 12 (commenting that some agencies treat overseas personnel as employees and while the employer/employee model could be used by other agencies, the vast majority of overseas workers are independent contractors).

14. See *id.* (opining that overseas agents of any variety, including employees, agents, facilitators, and attorneys, are key to the process of adoption and that adoption would not be possible without the involvement of key foreign personnel).

15. See Intercountry Adoption Act of 2000, 42 U.S.C. § 14902(3) (2000). The Act defines an adoption service as: (1) identifying a child for adoption and arranging an adoption; (2) securing necessary consent to termination of parental rights and to adoption; (3) performing a background study on a child or a home study on a prospective adoptive parent, and reporting on such a study; (4) making determinations of the best interests of a child and the appropriateness of adoptive placement for the child; (5) postplacement monitoring of a case until final adoption; and (6) where made necessary by disruption before final adoption, assuming custody and providing child care or any other social service pending an alternative placement. *Id.*

16. See *id.* § 14902(1) (defining “accredited agency”); *id.* § 14921(a)(1)–(2) (providing that “[e]xcept as otherwise provided in this subchapter, no person may offer or provide adoption services in connection with a Convention adoption in the United States unless that person (1) is accredited or approved in accordance with this subchapter; or (2) is providing such services through or under the supervision and responsibility of an accredited agency or approved person”). Section 14921(b) provides exceptions for those who provide only home studies, child welfare services, legal services, or for prospective adoptive parents working on their own behalf. *Id.* § 14921(b).

17. *Id.* § 14902(3).

B. Essential Concerns Addressed by the Convention and the IAA

The problems that led to the creation of the Hague Convention on Intercountry Adoption¹⁸ included child trafficking,¹⁹ induced or coerced consents to adoption,²⁰ abduction,²¹ unregulated activity of adoption intermediaries,²² and improper financial gain.²³ In addition, the international community recognized that providing prospective adoptive parents with accurate medical and social information on a child was

18. The preparatory work on the Convention began in the late 1980s and continued until its adoption in 1993. *See generally* J.H.A. VAN LOON, INTERNATIONAL CO-OPERATION AND PROTECTION OF CHILDREN WITH REGARD TO INTERCOUNTRY ADOPTION 326–70 (Martinus Nijhoff 1993) (reporting that in December 1987, the Permanent Bureau of the Hague Conference sent Member States a “[n]ote on the desirability of preparing a new convention on international co-operation in respect of intercountry adoption” and that the work began after approval was granted by the Sixteenth Session of the Hague Conference on Private International Law).

19. *See id.* at 251–54 (outlining the general features of trafficking related to adoption and noting that, in some countries, networks involve notaries, attorneys, hospitals, doctors, and social workers).

20. *See id.* at 252 (stating that a “convincing intermediary” may persuade a pregnant woman or young mother that a better life awaits her child in a rich country); *see also* Maria Josefina Becker, *The Pressure to Abandon*, 5 INT’L CHILDREN’S RIGHTS MONITOR, Nos. 2/3, at 12, 13 (1988) (noting that coercion includes not only the “‘well intentioned’ variety but also the activities of veritable criminal gangs willing to employ whatever means necessary to obtain babies in order to sell them under the pretext of charging fees to the prospective parents or international adoption agencies”).

21. *See* PRE-STUDY SURVEY ON THE TRAFFICKING AND SALE OF CHILDREN IN BOLIVIA, DCI-BOLIVIA, DCI-BOLIVIA (Jan. 1987), *reprinted in* DEFENCE FOR CHILDREN INT’L, PROTECTING CHILDREN’S RIGHTS IN INT’L ADOPTIONS 5 (1989) (quoting the police statement of Julia Vaca Cuellar to Brazilian authorities in which Cuellar admits to abducting several children from the local market). Cuellar stated:

I first became involved about three months ago, mainly little girls and one boy. In all, there were four little girls and a one-month-old baby boy

. . . .

. . . The two-week-year-old [sic] was a girl and I grabbed her in the “Pozos.” Her mother was tall and dark and she was on the phone when I snatched the baby. I took her to the main square and sold her to a foreign woman

Id.

22. *See* Terres des Hommes, *Children for Parents. An Investigation into Adoption and Trafficking in Children*, GERMANY REV. 1988, *reprinted in* DEFENCE FOR CHILDREN INT’L, PROTECTING CHILDREN’S RIGHTS IN INT’L ADOPTIONS 21 (1989) (finding that in 55% of the adoptions studied, the children were received without the participation of the official German institutions responsible for adoptions and that the involved Germans found their adoptive children either through their own contacts or through private agencies or individuals).

23. *See An Organised Cross-Border Crime*, 4 INT’L CHILDREN’S RIGHTS MONITOR, Nos. 3/4, at 12, 13 (1987) (reporting on a presentation by the Save the Abducted Children Committee of Thailand that noted that Malaysian agents or “go-betweens” normally earned about US\$1,200–US\$1,600 per child, depending on the child’s features and characteristics); DEFENCE FOR CHILDREN INT’L & INT’L SOCIAL SERV., ROMANIA: THE ADOPTION OF ROMANIAN CHILDREN BY FOREIGNERS 9 (1991) (stating that children had become objects of illicit buying and selling and quoting a Ministry official as saying that “[i]t’s just like a market where you sell potatoes”).

essential to a successful adoptive placement.²⁴ The Convention broadly addresses these concerns.²⁵

In drafting the IAA, Congress sought to address these concerns by regulating ASPs.²⁶ Testimony before the House International Relations Committee and the Senate Foreign Relations Committee centered on problems that U.S. citizens encounter, and discussed the large numbers of children arriving in the United States with undiagnosed medical and psychological problems.²⁷ Testimony also focused on the failure of adoption agencies to provide parents with adequate medical information,²⁸ the exorbitant fees of facilitators,²⁹ and the lack of recourse against

24. See G. PARRA-ARANGUREN, EXPLANATORY REPORT ON THE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION, ¶¶ 308–309 (noting that the report on the child, which must include medical and social information, is a necessary step in establishing the condition of the child because this information must be available in order to make an appropriate decision on the matching of a child and adoptive parents to ensure the protection of the interest of all involved).

25. See Hague Convention on Intercountry Adoption, *supra* note 1, art. 1 (outlining the purpose of the Convention as “to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children”); *id.* art. 4 (an adoption can only take place after authorities have determined that “the persons, institutions and authorities whose consent is necessary . . . have been counseled as may be necessary” and that they “have given their consent freely, in the required legal form” and that “consents have not been induced by payment or compensation of any kind”); *id.* art. 8 (“Central Authorities shall take . . . all appropriate measures to prevent improper financial or other gain in connection with an adoption . . .”); *id.* art. 16 (requiring that a report on the child contain medical and social history); *id.* art. 29 (forbidding contact between prospective adoptive parents and the parent or guardian of a child until consents have been properly obtained); *id.* art. 32 (“No one shall derive improper financial or other gain from an activity related to an intercountry adoption.”).

26. See generally Intercountry Adoption Act of 2000, 42 U.S.C. §§ 14901–14954 (2000) (implementing the Hague Convention on Intercountry Adoption by setting forth an accreditation scheme by which providers of intercountry adoption services are required to meet standards of service delivery and ethical conduct).

27. See *The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption: Treaty Doc. 105-51 and Its Implementing Legislation S. 682: Hearing Before the S. Comm. on Foreign Relations*, 106th Cong. 14 (1999) (statement of Ronald Steven Federici, Clinical Director, Psychiatric and Neuropsychological Associates, P.C.) (testifying that research findings of 1,500 internationally adopted children showed 30% had severe neuropsychological disorders such as mental retardation, autism, fetal alcohol syndrome, or chronic and long-term disabilities; 50% displayed mild to moderate learning disabilities and developmental disorders; and that 80% of children reported to be “healthy” by adoption agencies displayed some type of neuropsychological impairment).

28. See *Implementation of the Hague Convention on Intercountry Adoption: Hearing Before the H. Comm. on International Relations*, 106th Cong. 35 (1999) (statement of Dr. Jerri Ann Jenista, American Academy of Pediatrics) (stating that the Academy’s most significant concerns include inadequate or unavailable information released to parents about the health and well-being of children being considered for adoption and that a significant increase in the number of “wrongful adoption” suits had resulted from undisclosed or foreseeable medical or behavioral problems).

29. See 146 CONG. REC. H6395 (July 18, 2000) (statement of Rep. William Delahunt) (noting that documented abuses in intercountry adoptions range from the charging of

adoption agencies and facilitators.³⁰ The *Congressional Record* accompanying the passage of the IAA also contains statements acknowledging problems of coerced birth parent consent, abductions, and child trafficking.³¹ Unlicensed or unsupervised overseas facilitators are at the center of all of these problems.³² The IAA attempted to address these issues several ways: accreditation of all involved in the process,³³ professional liability insurance,³⁴ medical documentation,³⁵ and fee transparency.³⁶

II. DESIGNING A REGULATORY FRAMEWORK

A. Drafting the DOS Regulations

Subsequent to the passage of the IAA, the State Department contracted with a private company, Acton Burnell,³⁷ to perform public hearings and collect comments from the adoption community at large. Beginning in

exorbitant fees by “facilitators,” to child kidnapping, baby smuggling, and coercing birth parent consent).

30. See *Implementation of the Hague Convention on Intercountry Adoption: Hearing Before the H. Comm. on International Relations*, *supra* note 28, at 36 (recommending that agencies not be allowed to require parents to sign waivers that absolve the agency of the responsibility to collect pertinent data on the medical and social history of the child).

31. See 146 CONG. REC. H6395 (July 18, 2000) (statement of Rep. Delahunt); *Implementation of the Hague Convention on Intercountry Adoption: Hearing of the H. Comm. on Int'l Relations*, 106th Cong. 17 (1999) (statement of the Hon. Christopher Smith) (stating that the purpose of the Convention is to ensure transparent and fair regulation of international adoptions so that adoptions that are not in the best interest of the child—whether they involve gross abuses such as baby stealing and baby selling or other abuses that result in placing children in inappropriate settings—will not take place).

32. See *supra* note 14 and accompanying text (outlining the detailed responsibilities of the overseas facilitator).

33. Intercountry Adoption Act of 2000, 42 U.S.C. § 14921(a) (2000) (providing that “no person may offer or provide an adoption service in connection with a Convention adoption unless that person is accredited or approved”).

34. *Id.* § 14923(b)(1)(E) (requiring adoption service providers to carry “adequate liability insurance for professional negligence and any other insurance that the Secretary of State considers appropriate”).

35. *Id.* § 14923(b)(1)(A)(i) (stipulating that an agency provide to “prospective adoptive parents . . . a copy of the medical records of the child”).

36. *Id.* § 14923(b)(1)(A)(iv)–(v) (providing that agencies must employ “personnel . . . on a fee for service basis rather than on a contingent fee basis,” and that the agency must fully disclose all fees necessary for each intercountry adoption).

37. Acton Burnell, now called CACI AB, Inc., is a company that specializes in system integration and network assurance. Under contract with the State Department, Acton Burnell worked to get the input from all sectors of the adoption community to assist in writing regulations that would be widely accepted. Acton Burnell wrote and released draft adoption regulations before the proposed State Department rule. A history of the project is available at <http://web.archive.org/web/20050404093301/www.haguereg.org/History.htm> (last visited Feb. 18, 2008).

2001, Acton Burnell issued questionnaires³⁸ and held public meetings on the proposed content of the DOS regulations, and produced two sets of draft regulations.³⁹

On September 15, 2003, the State Department issued a proposed set of regulations in the *Federal Register*⁴⁰ and opened a sixty day public comment period, which it later extended to ninety days.⁴¹ The DOS received 1,500 comments on the proposed regulations⁴² and issued the final regulations in February 2006.⁴³

Throughout this process, the State Department recognized Congress's intent in passing the IAA and emphasized the fundamental issues included in the IAA—retaining remarkably similar provisions about the accuracy and completeness of medical information,⁴⁴ fee control and transparency,⁴⁵ and agency control of unaccredited intermediaries.⁴⁶

38. See, e.g., *Public Input to the Hague Regulations Project*, <http://web.archive.org/web/20050409213222/www.hagueregs.org/HistoryPages/Surveys-Input> (last visited Feb. 13, 2008) (reporting results of a survey about the promulgation of standards).

39. *Hague Adoption Standards Project Meeting of April 2, 2001*, CACI AB, <http://web.archive.org/web/20050404093301/www.hagueregs.org/History.htm> (last visited Apr. 10, 2008); *Hague Adoption Standards Project Meeting of June 18–19, 2001*, CACI AB, <http://web.archive.org/web/20050404093301/www.hagueregs.org/History.htm> (last visited Apr. 10, 2008).

40. Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons; Preservation of Convention Records, 68 Fed. Reg. 54,064 (proposed Sept. 15, 2003) (to be codified at 22 C.F.R. pt. 96).

41. Accreditation of Agencies; Approval of Persons, 71 Fed. Reg. 8064, 8064–65 (Feb. 15, 2006) (codified at 22 C.F.R. pts. 96, 97–98).

42. See Maura Harty, Asst. Sec'y of State for Consular Affairs, Dep't of State, Remarks at the Holt International Conference on *Looking Forward: A Global Response to Homeless Children* (Oct. 20, 2006), available at http://travel.state.gov/law/legal/testimony/testimony_3069.html (explaining that the final regulations were “the product of considerable research, interagency coordination, and input from the adoption community—including roughly 1,500 public comments, which we painstakingly reviewed and considered”).

43. Accreditation of Agencies; Approval of Persons, 71 Fed. Reg. at 8064.

44. See 22 C.F.R. § 96.49(a) (2007) (stating the agency or person should “provide a copy of the child’s medical records (including, to the fullest extent practicable, a correct and complete English-language translation of such records) to the prospective adoptive parent[s] . . . no later than two weeks before either the adoption or placement for adoption,” and that the agency or person itself should use reasonable efforts, or require its supervised providers in the child’s country of origin who are responsible for obtaining medical information about the child on behalf of the agency or person to use reasonable efforts, to obtain all available information); Accreditation of Agencies; Approval of Persons; Preservation of Convention Records, 68 Fed. Reg. at 54,107 (requiring an agency or person to provide a copy of the child’s medical records (and an English translation) to the prospective adoptive parent(s) at least two weeks before the adoption); Acton Burnell, *Preliminary Draft Hague Regulations*, 19 (2001), available at <http://web.archive.org/web/20050517142219/www.hagueregs.org/images/DraftDoc1.pdf> (requiring the agency or person to “provide prospective adoptive parents . . . [with] a copy of the medical records . . . [and] to the fullest extent practicable . . . an English-language translation of such records”).

45. See 22 C.F.R. § 96.40(a) (2007) (“The agency or person provides to all applicants, prior to application, a written schedule of expected total fees and estimated expenses and an

B. The Final DOS Regulations: A Step Forward

The final DOS regulations set forth a framework for regulating intercountry adoption—a significant first step in protecting children and parents. For instance, key provisions of the DOS regulations compel ASPs to carry professional liability insurance,⁴⁷ set up complaint procedures,⁴⁸ and provide training to adoptive parents.⁴⁹

Where prospective parents use more than one agency to facilitate a Convention adoption, one of the U.S. agencies involved must be a “primary provider.”⁵⁰ As the primary provider, that agency takes ultimate responsibility for an adoption, including oversight of “supervised providers.”⁵¹ The final DOS regulations require that agencies and their “supervised providers” supply detailed medical information on the child offered to prospective parents⁵² and give the prospective parents two weeks

explanation of the conditions under which fees or expenses may be charged, waived, reduced, or refunded and of when and how the fees and expenses must be paid.”); Accreditation of Agencies; Approval of Persons; Preservation of Convention Records, 68 Fed. Reg. at 54,107 (providing that the agency or person must provide all applicants, prior to application, a written schedule of estimated fees and expenses and an explanation of the conditions under which fees or expenses may be charged, waived, reduced, or refunded); Acton Burnell, *supra* note 44, at 32 (stating that an agency or person should provide all applicants with “a written schedule of fees” and “estimated and actual expenses prior to application”).

46. *See* Accreditation of Agencies; Approval of Persons; Preservation of Convention Records, 68 Fed. Reg. at 54,106 (providing that an agency or person acting as the primary provider, and using foreign supervised providers to provide adoption services in other Convention countries, assumes tort, contract, and other civil liability to the prospective adoptive parent(s) for the foreign supervised provider’s provision of the contracted adoption services); Acton Burnell, *supra* note 44, at 22 (requiring the primary agency or person to assume responsibility, including legal responsibility, for the compliance and performance of a supervised agency or person).

47. *See* 22 C.F.R. § 96.33(h) (2007) (requiring that “the agency or person maintain[] professional liability insurance in amounts reasonably related to its exposure to risk, but in no case in an amount less than \$1,000,000 in the aggregate”).

48. *See id.* § 96.41 (requiring agencies to have written complaint policies and procedures).

49. *See id.* § 96.48 (mandating that agencies provide prospective adoptive parents with extensive training on the intercountry adoption process, the general characteristics and needs of children awaiting adoption, the effects of malnutrition, environmental toxins, maternal substance abuse, and other dangers).

50. *See id.* § 96.14 (stipulating that one agency has to act as the primary provider of services, taking responsibility for the entire adoption process).

51. *See id.* § 96.2 (defining a supervised provider as “any agency, person, or other non-governmental entity . . . that is providing one or more adoption services in a Convention case under the supervision and responsibility of an accredited agency, temporarily accredited agency, or approved person that is acting as the primary provider in the case”).

52. *See id.* § 96.49(a) (outlining that an agency must provide to the prospective adoptive parent a copy of the child’s medical records, including a complete and correct English translation where practicable).

to consider the referral.⁵³ Further, the DOS regulations require that agencies give prospective parents a copy of the contract the agency expects prospective parents to sign,⁵⁴ a disclosure of fees,⁵⁵ and the names of all supervised providers who will be working on their adoption.⁵⁶ Unfortunately, a broad exception to the definition of “supervised providers” could undermine these vital provisions.⁵⁷

III. THE FAILURE OF PROMISE

A. The Fatal Flaw: Exempting Facilitators from Supervision

Throughout the development of the DOS regulations, the State Department clearly recognized that Congress intended to regulate foreign intermediaries and that such regulation was necessary to meet the objectives of both the Hague Convention on Intercountry Adoption and the IAA.⁵⁸ Each draft of the DOS regulations—from the unofficial proposed regulations written by Acton Burnell in 2001 to the official proposed regulations in 2003—required accredited U.S. providers to take legal responsibility for the actions of their overseas agents.⁵⁹

53. *See id.* § 96.49(k) (requiring an agency not to “withdraw a referral [of a child] until the prospective adoptive parent[s] have had two weeks . . . to consider the needs of the child and their ability to meet those needs”).

54. *See id.* § 96.39(a)(3) (mandating agencies to provide to parents upon initial contact “a sample written adoption services contract substantially like the one that the prospective client[s] will be expected to sign should they proceed”).

55. *See id.* § 96.39(a)(1) (instructing agencies to provide to prospective adoptive parents upon initial contact “its adoption service policies and practices, including general eligibility criteria and fees”).

56. *See id.* § 96.39(a)(2) (requiring agencies to disclose the names of the “supervised providers with whom the prospective client[s] can expect to work in the United States and in the child’s country of origin and the usual costs associated with their services”).

57. *See id.* § 96.14(c)(3) (exempting from supervision foreign providers who secure the necessary termination of parental rights and consent to adoption, prepare the background study on a child, or the home study on an adoptive parent).

58. *See* Accreditation of Agencies; Approval of Persons; Preservation of Convention Records, 68 Fed. Reg. 54,064, 54,106 (proposed Sept. 15, 2003) (to be codified at 22 C.F.R. pt. 96) (providing that “[t]he 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: . . . Assumes tort, contract, and other civil liability to the prospective adoptive parent(s) for the foreign supervised provider’s provision of the contracted adoption services and its compliance with the standards in this subpart F”); Acton Burnell, *supra* note 45, at 22 (“The primary agency or person must assume responsibility, including legal responsibility, for the compliance and performance of the supervised agency or person.”).

59. Accreditation of Agencies; Approval of Persons; Preservation of Convention Records, 68 Fed. Reg. at 54,106. Although the State Department notes in its comments to the Final Rules that some people questioned the statutory basis for legal liability, the record of the development of the regulations shows that it was the State Department’s clear understanding, from the time of the enactment of the IAA forward, that Congress intended for primary providers to assume legal responsibility for supervised providers. Accreditation

The vicarious liability issues became the most hotly contested portion of the DOS regulations. The State Department's 2003 proposed regulations sparked an intense reaction from ASPs because the regulations specifically required the primary provider to assume legal responsibility for tort, contract, and other civil claims, and cover foreign supervised providers under the primary provider's professional liability policy.⁶⁰ Conversely, adoptive parents and children's rights advocates protested against an exception to this rule that freed ASPs from assuming liability for any agent whom the foreign country had already accredited.⁶¹ This tension sparked considerable debate. Family and child advocates demanded that ASPs take responsibility for *all* of their contracted workers overseas. Some ASPs did not want to take responsibility for *any* of their contracted workers, protesting that they would be unable to obtain professional liability insurance and claiming that they lacked the ability to effectively control their overseas employees' actions.⁶² However, the IAA reflects Congress's intention that the regulations cover overseas contractors.⁶³

The State Department—in an abrupt change from all previous versions of the regulations—drastically altered the vicarious liability provisions in the final rules. In an apparent attempt to respond to the concerns of all parties, the State Department made contradictory changes. First, in response to public comments arguing that foreign accreditation should not be the sole means of ensuring that foreign providers comply with the Convention,⁶⁴ the State Department *broadened* the category of persons requiring supervision in the foreign country by removing the exemption for those accredited by the foreign country.⁶⁵ This change appears to protect

of Agencies; Approval of Persons, 71 Fed. Reg. 8064, 8068 (Feb. 15, 2006) (codified at 22 C.F.R. pts. 96, 97–98).

60. Accreditation of Agencies; Approval of Persons; Preservation of Convention Records, 68 Fed. Reg. 54, 105–06.

61. *See id.* at 54,097 (noting that there is no requirement for the primary provider to supervise or assume responsibility for entities accredited by other Convention countries).

62. *See* Accreditation of Agencies; Approval of Persons, 71 Fed. Reg. at 8080 (acknowledging that some commentators believed primary providers should be responsible for accredited entities overseas and that other commentators stressed that U.S. agencies are not able to oversee the conduct of foreign providers, and concluding that this issue is one about which “reasonable people differ”).

63. *See* Intercountry Adoption Act of 2000, 42 U.S.C. § 14921(a) (2000) (requiring that anyone providing adoption services must be subject to the accreditation scheme and that facilitating a service is the same as providing the service).

64. *See* Accreditation of Agencies; Approval of Persons, 71 Fed. Reg. at 8067 (noting that accreditation by a foreign Central Authority is not a guarantee of proper conduct).

65. *See* 22 C.F.R. § 96.14(c)(2) (2007) (stipulating that a provider accredited by the foreign country must also be treated as a supervised provider).

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“The Failure of Promise: The U.S. Regulations on Intercountry Adoption Under the Hague Convention”

by Trish Maskew, published in the Administrative Law Review, Volume 60, No. 2, Spring 2008.

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the rights of parents and children by requiring ASPs to take responsibility for a larger number of agents than required under the proposed rule.⁶⁶

At the same time, the State Department created an *exception* to this larger category of supervised providers by allowing ASPs to exclude from supervision any foreign provider that obtains consent from a birth parent or writes the required report on a child.⁶⁷ As long as the ASP verifies that the performance of these services occurred in accordance with the Convention, a foreign agent whom the ASP is not required to supervise may perform these services.⁶⁸

In addition, the State Department removed the assignment of liability provisions that appeared in the proposed regulations and stated that the regulatory scheme would now solely rely on substantial compliance with the accreditation standards.⁶⁹ Rather than explicitly declaring that the ASP be legally responsible for its agents, the final rules set forth accreditation standards and use the threat of losing that accreditation to control an ASP's unethical or illegal activity. Adoptive parents may still be able to file suit, but the DOS regulations no longer specifically assign liability.⁷⁰

Under the plain language of the final rule, the primary provider must now treat all nongovernmental foreign providers—including agencies, persons, or entities accredited by a Convention country—as supervised providers, *unless* the foreign agent performs one of the services outlined in the exceptions—writing the report on the child or obtaining the birth parent's consent to the adoption.⁷¹ By adding this exclusion, the State Department nullified any additional protection it had initially added by including foreign providers accredited in the foreign country in the

66. *See id.* By requiring that entities accredited by the foreign country be supervised, the regulations place more individuals into the accreditation scheme, allowing the U.S. regulations to apply to the supervision of activities most dangerous to children and families, such as child buying or abduction.

67. *Id.* § 96.14(c)(3). The regulation also excludes those who prepare a homestudy on a prospective adoptive parent, but this provision is not within the scope of this Article.

68. *See id.* § 96.46(c) (requiring a primary provider to document that the performance of services was in accordance with the Convention through document review or other appropriate steps).

69. *See* Accreditation of Agencies; Approval of Persons, 71 Fed. Reg. at 8068 (explaining that many people strongly opposed liability provisions and that these provisions were removed, but that primary providers would remain responsible for their supervision of supervised providers in determining whether an agency was in substantial compliance with the regulations).

70. *See id.* at 8066 (explaining that subsection B.4 of subpart F was modified to remove provisions “that would have required a primary provider to assume the legal responsibility for tort, contract, and other civil claims against supervised providers” and that “[t]he final rule is not intended to have any effect on the allocation of legal responsibility”).

71. 22 C.F.R. § 96.14(c)(3) (2007).

categories of those who require supervision.⁷² Obtaining consent from a birth parent and preparing the report on the child provide the greatest opportunity to exploit birth parents or participate in child trafficking. Yet the DOS regulations allow an ASP to choose whether to supervise the involved agent.⁷³ While the DOS regulations require the U.S. primary provider to verify that these services were done “in accordance with . . . the Convention,” the regulations state that this should be done through a review of documentation “or other appropriate steps.”⁷⁴

It is the very documentation provided in foreign countries, however, that came under scrutiny in discussions surrounding the need for the Convention.⁷⁵ Documentation, including consents and medical reports, is notoriously unreliable in some countries.⁷⁶ State Department regulations do not outline any other verification procedures, and the Department has not commented on ASP complaints that DOS is asking ASPs to develop their own verification procedures rather than having the government stipulate what they should be.⁷⁷

72. See *supra* notes 64–65 and accompanying text (discussing the requirement that persons and entities accredited by the foreign country be included as supervised providers because foreign accreditation did not guarantee good conduct).

73. See *infra* note 88 and accompanying text (exempting providers of these services from the supervision of a primary provider in the United States means that the accreditation scheme, which requires U.S. agencies to take responsibility for the actions of its supervised providers, is moot in relation to those excluded from supervision).

74. See 22 C.F.R. § 96.46(c) (requiring agencies that use foreign providers not under the agency’s supervision to verify the completion of consents and reports according to Convention standards through review of the relevant documentation and other appropriate steps).

75. See VAN LOON, *supra* note 18, at 255 (describing the ways of concealing the real status of the child, including the production of false birth certificates and abandonment decrees); *The Hague Convention on protection of Children and Cooperation in Respect of Intercountry Adoption: Treaty Doc. 105-51 and Its Implementing Legislation S. 682: Hearing Before the S. Comm. on Foreign Relations, 106th Cong. 24–25 (1999)* (statement of Mark T. McDermott, American Academy of Adoption Attorneys) (noting that agencies often use unregulated facilitators to gather information and that such facilitators receive payment only if the adoption is completed, giving them a “built-in incentive to divulge only the positive medical information”).

76. See FACT SHEET, U.S. CUSTOMS AND IMMIGRATION ENFORCEMENT, DOCUMENT AND BENEFIT FRAUD TASK FORCES (Mar. 1, 2007), <http://www.ice.gov/pi/news/factsheets/070301dbfi.htm> (outlining the creation of Document and Benefit Fraud Task Forces to deal with document fraud in relation to immigration benefits, and enumerating many investigations showing document fraud in relation to various countries). Document fraud has been the basis of several investigations into adoption irregularities. See, e.g., *United States v. Galindo*, No. 04-0270Z (W.D. Wash. June 4, 2004) (outlining a visa fraud scheme in which Galindo and co-conspirators created false identities and documents for children adopted by U.S. citizens); *Indictment filed in United States v. Focus on Children*, No. 07-00019 (D. Utah Feb. 28, 2007) (outlining charges against seven persons alleging the creation of false visa paperwork and documents to obtain immigrant visas for children from Samoa).

77. E-mail from author to Katherine Monahan, Hague Implementation Chief, U.S. Dep’t of State and Dep’t of State Hague Implementation Team (May 22, 2007, 18:33:00).

The State Department's articulated reason for including the supervision exception in the DOS regulations is that an agent might perform these services in a foreign country before a primary provider becomes involved in a specific adoption.⁷⁸ It remains unclear, however, how this exclusion changes the responsibility of the U.S. agency. Supervision requires ASPs to carefully choose foreign agents because the ASPs will be responsible for their agents' work and could lose their accreditation and permission to perform intercountry adoptions if they do not remain in substantial compliance with the regulations.⁷⁹

In other provisions, the State Department makes no distinction between overseas agents' actions based on the date of completion. Other provisions hold ASPs liable for agents' actions both before and during the agency relationship. For example, the regulations require ASPs and their supervised providers to provide a complete copy of the child's medical record and to use all available means to obtain a detailed medical history on the child.⁸⁰ An agent might remove evidence of a serious medical condition from the record to make it more likely that adoptive parents will adopt the child. The ASP is responsible for the agent's failure to disclose the information whenever the failure occurs because the requirements for obtaining medical information do not provide an exception for actions taken before the foreign agent is employed by the U.S. agency.⁸¹ The primary provider and all supervised providers must fully disclose medical information regardless of whether they obtained the information before or after the U.S. agency employed the agent.

Likewise, the language of the provision allowing ASPs to exclude from supervision those agents obtaining consents to adoption and writing child reports does not require or exclude agent supervision based solely on when an action occurred.⁸² It does not, for example, state that an agent would be

EST) (on file with author); E-mail from Dep't of State Hague Implementation Team to author (May 22, 2007, 18:33:00 EST) (automated reply verifying receipt of question and promising a prompt reply) (on file with author). No reply was received.

78. See Accreditation of Agencies; Approval of Persons, 71 Fed. Reg. 8064, 8067 (Feb. 15, 2006) (codified at 22 C.F.R. pts. 96, 97-98) ("A limited number of adoption services will generally have been performed in a Convention country before a U.S. primary provider has been identified.").

79. See *id.* at 8080 (noting that a primary provider could lose its accreditation for failing to exercise care in selecting foreign supervised providers).

80. 22 C.F.R. § 96.49 (2007).

81. See *id.* § 96.49(d) (requiring reasonable efforts from an agency and its supervised providers to obtain a child's medical information but not stipulating that this requirement only pertains to information obtained subsequent to the employment of a foreign supervised provider).

82. See *id.* § 96.14(c)(3) (exempting from the supervision requirement only those who obtain consent or write a report on a child or adoptive parents, but making no distinction

exempt only if he obtained consent or wrote a report prior to his employment with an agency.⁸³ Indeed, the language of the exemption specifically includes actions that will occur either *after* the involvement of the primary provider when it does not require supervision of a foreign provider who has secured, or *is securing* the necessary consent to terminate parental rights or adoption, or who has prepared or *is preparing* a background study on a child or parent.⁸⁴ In all other services, the primary provider is responsible for the actions of its supervised providers regardless of when the provider performs the service, making the stated reason for the exemption puzzling at best and disingenuous at worst.

The enormity of the exemption for those who perform services eligible for “verification” becomes clear when one realizes that the State Department’s regulations predicate virtually every standard on the relationship between the primary provider and the supervised provider.⁸⁵ For example, the topic mentioned most often in the congressional record regarding medical information is that the regulations require U.S. agencies and their supervised providers to provide all available information to adoptive parents.⁸⁶ Therefore, those exempted from supervision by virtue of writing a report on a child may arguably continue to withhold medical information simply because these providers do not meet the definition of a supervised provider. This could also affect the regulations on reasonable compensation, child-buying, fee and contract disclosures, and refunds because the regulations only require ASPs and supervised providers to meet the high standards set forth in the regulations. Indeed, ASPs are not required to disclose the identities of their unsupervised providers to accrediting entities.⁸⁷

Most ominously, the DOS regulations and attached comments setting forth the accreditation scheme as the primary regulatory mechanism also contain language limiting adverse action against an ASP for work that its

that this exemption apply only to services rendered prior to the engagement of a primary provider).

83. *Id.*

84. *Id.*

85. *See, e.g., id.* § 96.34(d) (stipulating that agencies must ensure that supervised providers receive reasonable compensation).

86. *See id.* § 96.49(d) (mandating reasonable efforts on the part of an agency and its supervised providers to obtain medical information regarding the child).

87. *See id.* § 96.39(a)(2) (requiring agencies to disclose the names and fees charged by “supervised providers with whom a prospective client can expect to work in both the United States and the child’s country of origin,” and stipulating that agencies provide their adoption-service policies and practices to prospective adoptive parents upon initial contact); *see also id.* § 96.32(e)(3) (requiring that an ASP inform the accrediting entity of “[t]he name, address, and phone number of any person or entity it uses or intends to use as a supervised provider,” but not requiring such information for excluded providers).

supervised providers perform. The comments note that the regulations require a primary provider “to exercise care in selecting foreign supervised providers, and will need to oversee their work; it may lose its status as an accredited agency or approved person if it fails to ensure that its use of foreign supervised providers meets the relevant standards in § 96.46.”⁸⁸ The provisions for complaint procedures and adverse action state that they apply to the actions of an accredited provider, “including complaints concerning their use of supervised providers.”⁸⁹ These statements indicate explicitly that an agency’s potential loss of accreditation is tied to its use of supervised providers. There is, however, no mention of ASP responsibility for those whom §§ 96.14(c) and 96.46(c)(3) exclude from supervision. The State Department clearly indicates in both the rule and the accompanying comments that ASPs have the option of treating their overseas agents as supervised providers or as excluded providers.⁹⁰ It is unlikely that any ASP would *choose* to supervise an overseas agent when doing so would increase its liability.

By virtue of the fact that almost every foreign agent employed by a U.S. agency will be involved either in obtaining consent to adoption or in preparing the report on a child, the regulations may exempt the vast majority of foreign agents employed by U.S. agencies from supervision. This lack of oversight renders the DOS regulations completely ineffective in addressing the problems that Congress intended to target.⁹¹ In effect, the DOS regulations do little to change the current problematic situation. While the DOS regulations look substantive at first glance, the exception to the regulations swallows the rule.

B. Preventing Child Trafficking?

Vulnerable birth parents are still open to coercion and forced consent under these DOS regulations as a result of the exception for foreign contractors who obtain a birth parent’s consent to termination of parental

88. Accreditation of Agencies; Approval of Persons, 71 Fed. Reg. 8064, 8063, 8080 (Feb. 15, 2006) (codified at 22 C.F.R. pts. 96, 97–98).

89. See 22 C.F.R. § 96.68 (declaring “[t]he provisions in this subpart establish the procedures that the accrediting entity will use for processing complaints against accredited agencies and approved persons (including complaints concerning their use of supervised providers) that raise an issue of compliance with the Convention . . .”).

90. *Id.* § 96.15, Example 11 (allowing the ASP to either treat the facilitator as a supervised provider or verify the consent); Accreditation of Agencies; Approval of Persons, 71 Fed. Reg. at 8067 (stipulating that ASPs have the option of treating providers as supervised providers).

91. See *supra* notes 27–31 and accompanying text (outlining congressional intent to address coerced adoption, child-buying, child abduction, failure to provide medical information, and payment of exorbitant fees).

rights or to adoption. No one in the United States is responsible for coercive acts if the affected child is offered to potential parents in the United States.⁹² Conceivably, abductions could occur before the ASP's agent creates a child report, relieving the U.S. agency of responsibility for the agent's actions because the agent is not a supervised provider.⁹³

Even if the regulations applied to every entity that an ASP employs or with whom it contracts, the regulations open new avenues for unscrupulous agents to pay indigent families abroad for their children. Under current U.S. law, the Immigration and Nationality Act (INA) allows adoptive parents to pay a limited number of expenses that are not considered "child buying" activities.⁹⁴ However, the new DOS regulations expand the categories of allowable expenses to include reasonable payments for "activities related to the adoption proceedings," months of prenatal care, and care of the mother prior to and after the birth of the child—which most read as synonymous with the U.S. domestic adoption provisions for the payment of "living expenses."⁹⁵

While the DOS regulation prohibits payment as compensation for the release of a child,⁹⁶ it provides no specific standards for measuring whether a payment induces a parent to release a child. Rather, DOS leaves the details of effectively controlling this expansion of allowable expenses to DHS.⁹⁷ DHS attempts to provide substance to the child-buying provisions in its regulations.⁹⁸ However, given the expansive categories of allowable expenses, and the practical realities of adoption, the task of classifying coercive payments is not easy and may, in fact, be impossible.

92. See *supra* notes 73, 88 and accompanying text (exempting service providers from supervision of a primary provider in the United States means that the accreditation scheme, which requires U.S. agencies to take responsibility for its contractors' actions, will not apply to these providers). ASPs could be held responsible for failing to use due diligence in verifying consent, but no provision holds ASPs legally responsible for the underlying act.

93. See *supra* note 71 and accompanying text (stating that foreign adoption requirements apply to *supervised* foreign providers).

94. See 8 C.F.R. § 204.3(i) (2008) (permitting the payment of reasonable adoption-related expenses such as "administrative, court, legal, translation, and/or medical services").

95. See 22 C.F.R. § 96.36 (2007) (allowing the payment of "reasonable" expenses permitted by the child's country of origin, including "pre-birth and birth medical costs, the care of the child, [and] the care of the birth mother while pregnant and immediately following birth of the child").

96. See *id.* (disallowing remittances that constitute "payments for the child or . . . an inducement to release the child").

97. See Accreditation of Agencies; Approval of Persons, 71 Fed. Reg. 8064, 8093 (Feb. 15, 2006) (codified at 22 C.F.R. pts. 96, 97–98) (noting that procedural requirements for the Department of Homeland Security petition process are outside the scope of the State Department regulations).

98. See *generally* Classification of Aliens as Children of United States Citizens Based on Intercountry Adoptions Under the Hague Convention, 72 Fed. Reg. 56,832 (Oct. 4, 2007) (to be codified at 8 C.F.R. pts. 103, 204, 213a, 299, and 322).

For example, both sets of regulations forbid payments to induce a parent to consent to the adoption of a child.⁹⁹ The DHS regulations interpret the DOS regulations as allowing payments to locate a child for adoption and care for the mother during the pregnancy.¹⁰⁰ However, an ASP paying nine months of living expenses could be a powerful inducement—convincing parents in developing countries who live on less than one U.S. dollar a day to release a child for adoption.¹⁰¹ While most U.S. states allow the payment of expenses to birth parents, and thus indicate support for allowing these payments abroad, all but one state stipulate that a birth parent does not need to release a child for adoption after receiving expense reimbursement.¹⁰² These protections are unlikely to exist in other countries where the payment of expenses is not normal practice. Nothing in the DHS regulation prevents ASPs or their overseas agents from conditioning the payment of expenses on the placement of the child. While the U.S. regulations allow the payment of expenses only if the foreign country's laws allow such payments.¹⁰³ However, countries have had no reason to implement such laws until now and it is unclear whether, in the absence of such provisions, payments are presumed lawful.¹⁰⁴

99. See *supra* notes 95–96 and accompanying text.

100. Classification of Aliens as Children of United States Citizens Based on Intercountry Adoptions Under the Hague Convention, 72 Fed. Reg. at 56,856–57. The comments on the DHS regulations note that the categories of allowable expenses are modeled on the 1994 Uniform Adoption Act (UAA). *Id.* at 56,840 (citing the Uniform Adoption Act, available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/uaa94.htm>). The DHS regulations follow the language of the allowable expenses of the UAA very closely, but change “advertising and similar expenses incurred in locating a minor for adoption” to simply “locating a child for adoption” and “living expenses of a mother for a reasonable time before the birth of her child and for no more than six weeks after the birth” to the language of the DOS regulation: “care of the birth mother while pregnant and immediately following the birth of the child.” *Id.*

101. A federal investigation into Cambodian adoption practices revealed that parents accepted as little as US\$15 for their children. See Richard Cross, Senior Special Agent, Immigration and Customs Enforcement, Remarks at the Samford University Cumberland School of Law Rushton Distinguished Lecture Series, Reforming Intercountry Adoption: Present Realities and Future Prospects (Apr. 15, 2005), available at http://cumberland.samford.edu/cumberland_programs.asp?ID=630.

102. See CHILD WELFARE INFORMATION GATEWAY, CHILDREN'S BUREAU, ADMINISTRATION FOR CHILDREN AND FAMILIES, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, STATE REGULATION OF ADOPTION EXPENSES 3 (2005), available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/expenses.pdf (noting that Idaho is the only state that requires a birth parent to reimburse expenses if she decides not to relinquish rights to her child).

103. See 22 C.F.R. § 96.36(a) (2007) (allowing the payment of expenses permitted by the “child's country of origin”).

104. *Id.*

Once payments become commonplace in a country it will become virtually impossible to adequately control them.¹⁰⁵ Competition for available children will increase and payments will rise, providing incentives not only for placing children, but also for intentionally conceiving children for the purpose of placing them for adoption—already a problem in some countries.¹⁰⁶ ASPs valuing good practices and refusing to pay finders' fees and living expenses will lose business to providers who will. As a result of these provisions, the Departments of State and Homeland Security have virtually guaranteed that every parent relinquishing a child for adoption will receive a significant amount of money.

Further, making "locating a child for adoption" an allowable expense exports problematic practices experienced in countries like Cambodia to the rest of the world.¹⁰⁷ As written, this provision legitimizes and incentivizes the solicitation of children by allowing ASPs to pay people to search for children. This practice is already prevalent in countries experiencing significant problems with international adoption, even though not specifically allowed under previous U.S. law.¹⁰⁸ With the new DHS regulations, fees paid to child finders seem to be legal. These payments will no doubt result in increased child-buying and abduction activities because solicitors have incentives to find more children to maximize their finding fees. If adoption serves children without families, ASPs have no reason to employ people to find children for adoption by soliciting them from their birth families. Recognizing that soliciting children for adoption creates extensive opportunities for inducement and coercion, several U.S.

105. See, e.g., Interview by Dawn Davenport with Dr. Manuel Manrique & Kelley Bunkers, UNICEF Guatemala Representatives, at BlogTalkRadio (Oct. 17, 2007), available at <http://www.blogtalkradio.com/creatingafamily/2007/10/17/creating-a-family-unicefs-position-on-guatemalan-adoptions> (stating that the current payment rate to birth families in Guatemala is about US\$2,000 and that such payments occur in virtually all current adoptions).

106. See, e.g., James White, 4 GSSG NEWS 13, Mar. 2006, available at <http://www.gssg-usa.org/Newsletters/GSSGnewsVol4-1.pdf> (reporting on a thirteen-year-old Guatemalan girl who was purposely impregnated to produce a child for adoption).

107. See *supra* note 101 and accompanying text (describing a Cambodian investigation that revealed extensive recruitment of children for adoption).

108. *Id.*; see also Adopted Children Immigrant Visa Unit, Embassy of the United States, Hanoi, Vietnam, Announcement Regarding Adoption in Vietnam (Nov. 2007), available at <http://vietnam.usembassy.gov/adoptionstatement1107.html> (citing "insufficient control of so-called child finders"); IGNACIO GOICOECHEA, REPORT OF A FACT-FINDING MISSION TO GUATEMALA IN RELATION TO INTERCOUNTRY ADOPTION 7, 9, 13, 35 (2007) available at http://www.hcch.net/upload/wop/mission_gt33e.pdf (detailing the pervasive use of "jaladoras" and defining a jaladora as a person who traces pregnant women or women with very young children to convince them to relinquish their children for money).

states have made solicitation illegal.¹⁰⁹ Yet, the new DHS regulations seemingly permit U.S. agencies to pay unsupervised agents to go into villages and towns in desperately poor countries and solicit children for adoption while providing months of living expenses to their birth families. It is absurd to believe that such practices will not serve as powerful inducements to desperately poor families.

C. Reasonable Compensation by Whose Measure?

Article 32 of the Convention stipulates that no one should derive improper financial gain from an activity related to an intercountry adoption and that adoption personnel should not receive compensation that is “unreasonably high in relation to services rendered.”¹¹⁰ Further, Article 8 requires each country’s Central Authority¹¹¹ to take “all appropriate measures” to prevent improper financial gain.¹¹²

Congress intended the regulations to address the exorbitant fees charged by overseas facilitators.¹¹³ In addition, countries that are party to the Convention have expressed concerns about high fees and related unscrupulous activities.¹¹⁴ One of the most disconcerting aspects of the current adoption fee structure is that ASPs pay overseas agents fees that are often astronomically high in comparison to the cost of living in those countries.¹¹⁵ While accepting some reasonable fees, the Convention seeks to limit adoption-related profiteering.¹¹⁶

109. See, e.g., FLA. STAT. ANN. § 63.097 (West 2005) (prohibiting “[a]ny fee or expense that constitutes payment for locating a minor for adoption”); OR. REV. STAT. § 109.311(3) (2007) (“A person may not 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.”).

110. Hague Convention on Intercountry Adoption, *supra* note 1, art. 32.

111. Each country that becomes party to the Hague Adoption Convention must designate a “Central Authority” to act as the official body responsible for discharging the responsibilities of the Convention. The State Department is the Central Authority in the United States. *Id.* art. 6.

112. *Id.* art. 8.

113. See 146 CONG. REC. H6395 (July 18, 2000) (statement of Rep. William Delahunt) (discussing exorbitant fees exacted from prospective parents).

114. See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, REPORT AND CONCLUSIONS OF THE SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE HAGUE CONVENTION OF 29 MAY 1993 ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION 25 (2000), available at <http://hcch.e-vision.nl/upload/scrpt33e2000.pdf> (outlining state-party concerns over attorney and intermediary fees and outlining recommendations for handling such fees).

115. See, e.g., Children’s Home Society Family Services, *Guatemala Adoption Fees*, http://www.childrenshomeadopt.org/Guatemala_Adoption_Fees.html (last visited Jan. 31, 2008) (showing that Guatemala adoptions cost at least US\$22,500). Guatemala’s annual per capita income was approximately US\$2,640 in 2006. THE WORLD BANK, WORLD DEVELOPMENT INDICATORS DATABASE 2 (2007), available at <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GNIPC.pdf>.

116. See Hague Convention on Intercountry Adoption, *supra* note 1, art. 32.

Unfortunately, the State Department has chosen to regulate fees in a way that does not address these concerns.¹¹⁷ Rather than requiring that fees be reasonable in relation to the cost of living in the child's country of origin, or reasonable in relation to other legal services in that country, or even reasonable in relation to the cost of providing child welfare services in the United States, the DOS regulations require that agencies keep fees reasonable in relation to the norms of the *intercountry adoption* community.¹¹⁸ In other words, ASPs can charge as much as the markets will bear, provided that all other agencies do the same.

This shortcoming, combined with the lack of supervision over those obtaining consent to adoption and the provision allowing agents of U.S. agencies to pay living expenses and birth and prenatal expenses, results in a trifecta that will likely lead to an increase in child-buying activity, rather than the decrease envisaged in the Convention and the IAA.¹¹⁹

IV. RECOMMENDATIONS

A. *The Exemption for Foreign Facilitators*

The greatest weakness in the DOS regulations is the vicarious liability exclusion for overseas agents who obtain consent to either the termination of parental rights or to the adoption of a child, or write a report on the child. This weakness exacerbates problems caused by the expense provisions and the compensation allowances. Unless this weakness is addressed or removed, the regulations will fail to protect children and parents, and will not meet the IAA's purpose.¹²⁰

Removing the exemption would clearly address this issue. There is no more reason to exempt these activities from regulation than there would be to exempt medical reports from the requirements of § 96.49 merely because the reports were compiled prior to a U.S. agency's involvement in a case.

117. See *supra* note 109 and accompanying text (noting that fees must only be reasonable in relation to other intercountry adoption providers).

118. See 22 C.F.R. § 96.34(d) (2007) (requiring agencies to ensure that fees paid to the agency's directors, officers, employees, and supervised providers are not unreasonably high in relation to services rendered, "taking into account the country in which the adoption services are provided and norms for compensation within the intercountry adoption community in that country . . .").

119. See *supra* notes 6–7 and accompanying text (explaining that the purposes of the Convention and the IAA are to guard against the abduction, sale, and trafficking of children).

120. See *supra* notes 27–31 and accompanying text (outlining the congressional intent to guard against coercion, sale of children, abduction, exorbitant fees, and inadequate information for adoptive parents).

The State Department responded to criticism of the exemption by saying that it will not let ASPs interpret the provisions of §§ 96.14 and 96.46 as loopholes that allow them to avoid supervising an overseas provider.¹²¹ It is difficult to see, however, how any interpretation the Department could construct will withstand a rulemaking challenge by an ASP. It is quite possible that, during the initial accreditation period, ASPs will accept whatever interpretation the State Department provides simply to attain accreditation. However, once the State Department tries to take action against an ASP for the conduct of a provider excluded from supervision, the ASP is likely to challenge the DOS's interpretation.

The Council on Accreditation, which accredits agencies for the DOS, has suggested to ASPs that the exclusion in §§ 96.14(c)(3) and 96.46(c) only applies to government officials of foreign countries and not private parties.¹²² This interpretation, while perhaps serving as a patch in the short-term, is unlikely to withstand challenge because the language of § 96.14 draws a clear distinction between employees of a foreign government and those excluded from supervision under § 96.46(c). To date, the State Department has declined to make this interpretation official guidance.

A better option may be for the State Department to issue guidance clarifying that it will hold the primary provider responsible for verifying the overseas provider's services under § 96.46(c) *and* proper completion of the excluded services. This option creates little distinction between an ASP's liability for the services completed by supervised providers and those completed by excluded providers under §96.46 (c). This change will not solve the overall problem, however, because ASPs would still not be liable for the agent's conduct concerning medical reports, fee disclosures or other similar provisions.

Perhaps the best, although by no means perfect, interpretation would be for the State Department to articulate that, because the overall purpose of the statute and regulations is to provide oversight of ASPs and their agents, and because the stated reason for the exemption was that some actions might occur before an ASP is involved in a case, the exemption only applies to the first adoption that an ASP and a respective overseas agent undertake together. Once the two entities complete one case, there is no reason why the parties could not reach a supervised provider agreement.

121. E-mail from Katherine E. Monahan, Chief, Hague Intercountry Adoption Unit Office of Children's Issues, U.S. Dep't of State, to author and Linh Song, Executive Director, Ethica, Inc. (Dec. 07, 2007, 6:51:00 EST) (on file with author).

122. E-mail from Jared N. Rolsky, Council of Accreditation Liaison for Joint Council on International Children's Services, to members of Joint Council (May 23, 2007) (on file with author).

While still questionable in light of DOS's comments about the ASP's option to decide whether to treat someone as a supervised provider,¹²³ this interpretation is more likely to withstand challenge. It places the excluded agent under ASP supervision for all subsequent adoptions and future services the agent provides during the relationship with the ASP. This interpretation leaves only the initial act that sparked the foreign provider-ASP relationship outside the scope of the regulation.

Regardless of which interpretation it adopts, DOS must make clear that complaints related to the ASPs' use of an excluded provider are allowable under 22 C.F.R. §§ 96.78–96.82 and the State Department can take adverse action against an ASP for an excluded provider's actions. Unfortunately, the State Department's intent is so clear in the language of the regulation that ASPs are likely to challenge any interpretation requiring them to supervise excluded providers.

B. Inducive or Coercive Payments to Birth Families

Addressing the problems posed by the expanded expenses in 22 C.F.R. § 96.36 may ultimately prove even more difficult. The State Department could interpret its rule to read that expense reimbursements are only allowed in countries that take positive steps to permit them. Therefore, if the country does not say that expense reimbursements are allowed, then the DOS regulations prohibit payment. The State Department and Department of Homeland Security will still have to address issues that arise in countries that choose to allow expense reimbursements.

The State Department could adopt the INA's approach and modify the DOS final rule to limit the reimbursable expenses to costs specifically related to the adoption, as opposed to the birth of the child. However, the Department of Homeland Security has an opportunity to make some changes with its final rule.

To prevent exempted providers from inducing birth parents to consent to the adoption, DHS could clarify that ASPs can only pay for medical expenses for the "care of the birth mother" during the pregnancy and after the birth, rather than for general living expenses. ASP should document the expenses with receipts and, where possible, ASPs should pay a service provider directly, rather than the birth parent. For example, the ASP could pay the hospital directly for parent or child medical exams.

123. 22 C.F.R. § 96.15 (2007), (illustrating rules from §§ 96.12 to 96.14 in example 11); Accreditation of Agencies; Approval of Persons, 71 Fed. Reg. 8064, 8067 (Feb. 15, 2006) (codified at 22 C.F.R. pts. 96, 97–98).

Both DOS and DHS must take steps to limit the solicitation of children. In the domestic adoption context, “locating a child for adoption” generally includes advertising a couple’s availability as adoptive parents or publicizing the opening of a crisis pregnancy center. In the international context, “locating” a child has a much different connotation: paying solicitors. The State Department and DHS should limit the term “locating a child for adoption” to the operation of adoption programs in which a parent can voluntarily bring a child to an orphanage or center, or to advertising the existence of adoption options. The Departments should specifically forbid solicitation of children for adoption, directly or indirectly, through paid intermediaries as contrary to the Convention’s purposes.

In addition, the Department of Homeland Security could implement additional safeguards in the final rules that will serve to break the link between the payment of expenses and the decision to offer the child for adoption. At a minimum, the rules should include a requirement that the provision of expense reimbursement not obligate a birth parent to release the child for adoption. Another safeguard could require that an entity not benefiting directly from placing the child for adoption provide services and expense reimbursements. For example, DHS could require all ASPs working in a country to contribute to a local nongovernmental organization that provides family preservation assistance to families in danger of separation. Ideally, providers of such assistance would provide food, clothing, or medicine to families as opposed to cash payments. In the alternative, the Department of Homeland Security could require that ASPs pay fees for medical or legal services directly to the providers of the service. These provisions might protect birth parents from being induced to exchange their child for necessities.

In addition, DHS should set limits on expenses based on the normal fees for services in each country. If a hospital birth in a developing country costs US\$5, ASPs should not be allowed to reimburse birth parents US\$500 for birth expenses. DHS could easily compile a schedule for each country where adoptions occur.

On February 29, 2008, DHS took the first step toward shoring up the regulation by releasing a new form requiring adoptive parents to file a financial disclosure, under penalty of perjury, of all official or unofficial fees paid during an adoption. This new development is an excellent first step. DHS could go further by requiring the ASP to provide a detailed disclosure of how those fees were spent, including what expenses were paid to birth parents or solicitors. The disclosure would provide consular officers with the ability to determine where money is being paid and would allow investigators to determine if coercion has occurred. These

disclosures are common in domestic adoptions and ASPs do not consider them overly burdensome. This basic level of transparency is vital to effective regulation.

Further, the State Department—as the U.S. Central Authority and the diplomatic arm of the U.S. government—should immediately notify countries from which Americans adopt children that these provisions are in effect and give them the opportunity to enact provisions banning the payment of all expenses if the countries wish to prevent child solicitation and cash payments to parents. As such payments have not been allowed in the past, the U.S. government should warn other Central Authorities about the possible affects of the enactment of these provisions.

C. Compensation of Adoption Service Providers

Finally, the State Department should also consider modifying the compensation regulation to require that compensation to overseas agents be reasonable in relation to the foreign country's cost of living rather than reasonable within the international adoption community. This provision runs contrary to the Convention itself and must be corrected. Short of an actual change in wording, the State Department could interpret this regulation to mean that the international adoption community average is only reasonable if the wages comport to local wages that similar practitioners normally earn. For example, if lawyers in country X earn US\$100 for providing documents for a local adoption, or for a divorce, it is unreasonable to pay them US\$10,000 for paperwork for an international adoption.

CONCLUSION

While the regulations, as written, may protect families and children against the actions of unethical providers operating in the United States, the regulations may not protect families and children from the illegal and unethical actions of U.S. agencies' foreign facilitators. Indeed, without modification or creative interpretation, very little in the current practices of adoption agencies overseas will change. This frustrates the purposes of both the Convention and the IAA, and leaves adoption advocates to wonder why it took seven years to produce regulations that simply maintain the status quo.¹²⁴

124. See Accreditation of Agencies; Approval of Persons, 71 Fed. Reg. at 8065 (commenting that, contrary to congressional intent to address problematic practices and change the current reality of the adoption process, “[w]here 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”).