June 19, 2019

EO 12866 Meeting – RIN: 1400-AE39

About National Council For Adoption:

National Council For Adoption (NCFA), is an organization passionately committed to the belief that every child deserves to thrive in a nurturing, permanent family. NCFA serves children, birth parents, adopted individuals, adoptive families, and adoption professionals. In addition, we work tirelessly to educate U.S. and foreign government officials and policymakers, members of the media, and all those in the general public with an interest in adoption. NCFA has been actively working on intercountry adoption policy issues for decades, including NCFA's founding president serving as an original member of the Hague Special Commission's work to create the Hague Convention on Intercountry Adoption.

Regulation of Adoption Service Providers:

Prior to our below suggestions to prevent overly burdensome or ineffective regulations, we want to clearly express our overall support for the important role that regulations play in governing intercountry adoption practice. NCFA has been, and continues to be, an avid supporter of regulations that serve to promote transparent, ethical, and efficient adoption processes. NCFA endorsed the Intercountry Adoption Act (IAA) and the Intercountry Adoption Universal Accreditation Act of 2012 (UAA), both of which brought about substantial regulatory compliance measures to bear upon adoption service providers. These regulations have undoubtedly led to a higher standard of practice, and more uniform practice, within the field of intercountry adoption.

It is unfortunate that needed regulations for intercountry adoption of relatives has been promised to stakeholders for years from the Department of State (Department), but are still not available; yet the Department continues its steadfast efforts to prohibit, limit, restrict, and overly burden adoption service providers. With a new accrediting entity, increased fees on accredited agencies, new reporting requirements, and the announcement of forthcoming changes to the compliance process for accreditation, this is not the time to add additional burdensome regulations.

All adoption service providers, as well as our government officials, should be held accountable to enforce high standards that meet the needs of families (birth and adoptive) and the best interests of children. Adoptions should be conducted in an ethical, transparent manner while also ensuring that regulations are not an unnecessary burden on the providers that serve families and children or unnecessarily burden (financially, workload, or timeframe) the process for adopting children who are in need of permanent, loving families.

The Trump Administration has demonstrated the desire to remove unnecessary regulatory burdens, including by issuing Executive Orders 13771 and 13777. It is our hope that the Administration will review the following comments as they consider new proposed regulations from the Department of State. Now, the Department has indicated these new regulations are related to their previously withdrawn regulations at RIN-1400-AD91. We address many of our concerns based on those previously proposed (and withdrawn) regulations as well as on the new policy guidance issued without notice-and-comment rulemaking by the Department.

Department of State Proposed Rules - RIN: 1400-AE39

In September 2016, the Department of State proposed new rules that were widely viewed as detrimental to intercountry adoption, and were eventually withdrawn (see RIN 1400-AD91). The new proposed rules at RIN 1400-AE39 indicate they are related to the previously withdrawn rules, which the U.S. Small Business Administration expressed concern about, including a statement that "The Proposed Rule Was Certified In Error under the Regulatory Flexibility Act."

The Department Unified Agenda indicates the Department has once again determined the Regulatory Flexibility Analysis is not required. We encourage the Administration to ensure that the Department does not make the same error it made previously.

Proposing new regulations that are burdensome to accredited adoption service providers is well out of line with Executive Order 13771 and Executive Order 13777.

We respectfully request that the Department not create new regulations that will place unjustified burdens on accredited adoption service providers. Additionally, we request that the Department not propose or promulgate new regulations without first working with the intercountry adoption community to receive feedback from stakeholders regarding the potential benefits or unintended negative consequences of regulatory change. Working with the wider community is permissible, yet shunned in recent years, by the Department of State Office of Children's Issues, to the deficit of U.S. citizens, small business, and orphaned children in need of parents.

Indeed, NCFA specifically responded to the publication of the Department's Unified Agenda, asking the designated contact (Carine Rosalia) for an opportunity to engage on these issues – only be have the request denied. NCFA and other stakeholders have repeatedly asked the Department to engage with stakeholders prior to issuing new policies and regulations, but the Department has chosen not to do so.

Instead of overburdening accredited adoption service providers with additional and unjustified regulations, the Department ought to find ways to improve the existing conditions for service providers to serve the population of orphaned, abandoned, and relinquished children worldwide.

Below, we have listed our recommendations to ensure there is not unnecessary burdens to prevent orphaned, abandoned, and relinquished children from finding families.

Foreign Supervised Providers (FSPs)

The current regulations require in § 96.46(b) "The agency or person, when acting as the primary provider and using foreign supervised providers to provide adoption services in Convention countries, ensures that each such foreign supervised provider operates under a written agreement with the primary provider…". However, in recent years the Department has published guidance (in an expansive overreach, without new rulemaking) to expand the definition of a Foreign Supervised Provider so broadly that anyone tangentially connected to an adoption may apply; at one point in conversation with adoption agency professionals, absurdly suggesting that even foreign taxi cab drivers' may be helping to facilitate intercountry adoptions. Later, when they proposed (now withdrawn) regulations, they sought to substantiate the policy they had instituted without due process. There are also significant concerns that accredited agencies may not be able to obtain the liability insurance they are required by law to obtain, if the definition of Foreign Supervised Provider is expanded too broadly. **We urge the Administration not to allow the Department to use an expanded or broadened definition of Foreign Supervised Provider**.

Additionally, in the previously proposed regulations, the Department sought a change in the proposed regulations in 96.14 (c)(3) that would limit an accredited agency to only work with a foreign supervised provider that was working with the ASP during the previous accreditation cycle (these are 4-year long cycles). Such a change could potentially have very detrimental impacts, including:

i. Putting agencies in a situation where they cannot move on to a better service provider;
ii. Not allowing agencies to work with someone new if the foreign supervised provider retires, dies, or terminates their working relationship; and/or
iii. Not allowing agencies to bring on additional foreign supervised providers to handle any increase in work.
iv. Does not allow for sending country changes impacting Foreign Supervised Providers.

What a terrible situation this could lead to: Agencies are operating a program in a country, working with many adoptive families, and all of a sudden cannot work with foreign supervised providers until they get re-accredited? This could be catastrophic for established, functional programs and families who are mid-process. **We urge the Administration not to limit accredited agencies to only work with a foreign supervised provider that was working with them during the previous accreditation cycle.**

Accreditation Expenses

On February 1, 2018, the Department of State announced a new schedule of fees for accredited agencies and approved people. The new fee schedule dramatically changed the structure of

payments, most pointedly on the "monitoring and oversight" fee which changed to a per applicant fee. Many agencies now expect dramatically increased fees since fees are now based on the number of applications to each agency, rather than the number of completed placements. There is no provision for a refund for families who apply to adopt but withdraw from the adoption process after contracting with the provider. Every agency has applicants who decide not to proceed with the adoption process due to becoming pregnant, adopting domestically, financial or health setbacks, etc. Additionally, the accredited providers were told that in circumstances where siblings were placed for adoption, the providers would be charged on a per-child basis. Child welfare advocates asked for (and have thus far been denied) reconsideration of this request, due to the longstanding practice of seeking to keep siblings connected, and not have these additional fees serve as a financial disincentive for the adoptive placement of sibling sets.

The Department's previously proposed (now withdrawn) regulations were alarming to the U.S. Small Business Administration previously, and now, with new, substantially higher costs for adoption service providers' accreditation, **we urge the Administration not to permit the Department to cause intercountry adoption to become even more expensive**.

Country Specific Authorization

In the previously proposed (now withdrawn) regulations, the Department sought a process to establish special authorization powers where they could determine certain countries would require an additional burden of accreditation to work in those countries. They purported to want to "enhance existing protections" but then sought to create a process that would limit agencies' ability to work in particular countries.

We urge the Administration not to grant the Department or its accrediting entity the authorization to create a special class of accreditation for agencies, enabling fewer providers to work in countries. Rather, if the Department is serious about seeking country specific solutions, they should work with accredited providers and other stakeholders to develop solutions to existing problems. We encourage the Administration to read the comments from the previous accrediting entity Council on Accreditation, and their concern regarding Country Specific Authorization.

Anonymous Complaints

The process for making complaints against accredited adoption service providers was established after a long process of working with the wider stakeholder community. Now, the Department is seeking to eliminate this established process and allow for anonymous complaints.

We urge the Administration not to allow for anonymous complaints. It is extremely difficult, costly, and overly burdensome to adoption service providers to defend against complaints, if they don't even know the case they are seeking to defend. We encourage the Administration to read the comments from the previous accrediting entity Council on Accreditation, and their concern

regarding anonymous complaints, as they have experience seeking to respond and investigate complaints against agencies. COA's well-founded reservations about anonymous complaints are even more valid today than they were when the IAA regulations were first mooted in 2003; in the current social media climate, the use of anonymous negative reviews posted at the touch of a screen, has become a reflexive action. If it is permitted in this case, it will force the accrediting entity and adoption service providers to spend countless, unnecessary hours addressing complaints that were impulsively posted.

Pre-matching Children with Families ("Soft-Referrals")

In 2018, the Department issued through a series of notices on their website, new and prohibitive guidance, restricting the advocacy that accredited adoption service providers were able to do on behalf of orphaned children waiting on families. NCFA filed a lawsuit against the Department's actions and the matter is currently being litigated. **We urge the Administration not to allow the Department to limit advocacy of behalf of special needs children in need of parents.**

Training Requirements

The Department's previously proposed (now withdrawn) regulations required that prospective adoptive parents seeking an intercountry adoption would first get trained by local foster care licensing standards. This was widely opposed by the adoption community and others involved in child welfare, including foster care training providers. We have been told that the Department never consulted with any of the thousands of impacted U.S. counties or county equivalents prior to creating this new, unfunded burden.

To be clear, NCFA and the wider community strongly support additional training for prospective adoptive parents. NCFA and the wider stakeholder community continue to offer to work with the Department, however as previously mentioned, the Department has not indicated a desire to work with stakeholders to develop meaningful regulations. **We urge the Administration to not require prospective intercountry adoptive parents to be required to work with local foster care officials for training/licensing.**