National Council For Adoption

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NCFA Response/Comments on Regulatory Changes to Accreditation and Approval

In response to the Department of State (the Department)'s notice of proposed rulemaking (NPRM), public notice 10732, RIN 1400-AE39, the National Council For Adoption (NCFA) submits these comments on the proposed changes to 22 CFR part 96 as well as responses to the Department's preamble, supplemental information, response to regulatory reform solicitation of comments, process of working with stakeholders on comments/feedback for regulatory change, and the regulatory analysis provided.

Background: Founded in 1980, National Council For Adoption is a non-profit adoption advocacy organization whose mission is to serve children that need families, expectant and birth parents, and adoptive families by promoting a culture of ethical adoption through education, research, legislative action, and collaboration. NCFA's founder served as an original delegate to The Hague Special Commission on the Protection of Children and Co-operation in Respect to Intercountry Adoption. Subsequently, NCFA was the first national adoption advocacy organization to endorse the Hague Convention on Intercountry Adoption. NCFA's role in supporting passage of the Intercountry Adoption Act of 2000, and the resulting implementing regulations, is well documented. For decades, NCFA has been one of the United States' most vocal and leading advocates for intercountry adoption and a preeminent authority on issues pertaining to intercountry adoption, the implementation of the Hague Convention, and on the policies and practices of intercountry adoption. NCFA's president and CEO served on the Board of Trustees for the Council on Accreditation (COA) during a timeframe when COA was the only national accrediting entity (AE). NCFA staff have extensive academic, professional, and personal experience and knowledge regarding intercountry adoption regulation, accreditation, and other issues relevant to intercountry adoption.

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NCFA believes the Hague Convention has brought positive changes, including a more uniform standard of practice among adoption professionals, a more qualified corps of adoption practitioners, greater transparency with adoption fees, and a much stronger system of oversight. However, with some of these reforms came a level of regulation that hampers adoptions from occurring, due to increased cost, complexity, and overly burdensome regulations. The decline in intercountry adoptions is out of alignment with the extensive number of children without and in need of families worldwide, the increasing unavailability of adoptive families worldwide, and the willingness of U.S. adoptive parents to adopt children internationally. Without a doubt, some of the reasons for the decline in intercountry adoption are a direct result of the Department's restrictive implementations of the Hague Convention and lack of proactive solutions and collaboration with other countries as the Hague Convention encourages.

The vast majority of children placed for intercountry adoption are children with medical and/or cognitive special needs, older children, and children who are part of sibling groups. NCFA is committed to continued advocacy of behalf of the children still in need of a permanent family – in their country of origin, first, and when that is not possible, through intercountry adoption.

NCFA's Comments on Proposed Changes to 22 CFR Part 96

After publication of the Department's proposed regulations, NCFA took the following steps to hear from stakeholders, including accredited ASPs, to hear their perspectives, thoughts, questions, and concerns about the proposed regulations:

- NCFA hosted five videoconference meetings to discuss and solicit feedback from stakeholders.
- NCFA has solicited and received email feedback from our membership and others regarding the proposed regulations.
- NCFA consulted with experts in international adoption, including past personnel at a previous AE, experienced adoption/immigration attorneys, adoptive parents, individuals who were adopted through intercountry adoption, university researchers/scholars involved with adoption, other adoption advocacy and resource organizations, etc.
- NCFA conducted a survey from accredited ASPs to provide feedback on the Department's cost calculations.

96.2 - Definitions

***Authorization**:* This is a new term being defined and we offer two suggested changes:

1. Strike the word "an" in the second sentence: "…with respect to ~~an~~ intercountry adoption." (Authorization is not for one specific adoption, authorization is for an ability to generally provide adoption services); and
2. Strike the last sentence, requiring authorization of the relevant country where required. The sentence does not add to the definition of the word "authorization" but rather imposes a

regulation on agencies that already exists. Definitions are not the place to proffer regulations. Moving that regulation elsewhere is also not advisable, as it should be the foreign country's determination if an agency has violated rules of foreign operation – not the opinion of an accrediting entity (AE).

Best interest of the child: The change in definition of "best interest of the child" in situations where a child is outside the United States does not recognize that foreign countries are determinative of a child's placement and adoption processes. The best interests of children are determined by the foreign country, in both Convention and non-Convention cases. Sometimes, these countries allow ASPs to have a role in the adoption processes, but the placements are ultimately determined by foreign countries' adoption authorities. Even when these countries defer matching decisions to authorized U.S. adoption providers, they are only provisional matches until the foreign country finalizes the placement decision (through a civil or judicial process of providing adoption or guardianship).

Client: The Department suggests a definition of "client" to only include prospective adoptive parents. NCFA suggests adding expectant and birth parents and children to the definition. For example, an accredited ASP doing an outgoing adoption may view their primary client as the birth parent(s) or the child they are working with.

Complaint: The Department's change in definition will result in far more communications (standard agency/client communications) and matters of dispute becoming formal complaints. Instead, it is recommended that ASPs have a process whereby the complainant confirms if the complaint is easily clarified/resolved or if the grievance warrants involvement with the complaint registry/AE. See comment in 96.41. This will mean more complaints unnecessarily being included in the semi-annual report on complaints (SARC), including minor concerns that could have been easily resolved. The Department's definition includes issues that "may raise an issue of non-compliance" – leaving it unclear if the accredited agency is to determine if they believe it may raise an issue. This should be clarified. The proposed definition also fails to take into account that concerns a client or others raise that are demonstrably inaccurate, easily resolved, or not intended as formal written complaints would now warrant entry into the complaint registry. If transparency is the intended goal, listing frivolous complaints only serves to muddy the water, creating confusion rather than actionable information.

Additionally, the Department has changed the definition by adding new language saying any written or electronic communication to the Department that *may* raise an issue of non-compliance is to be considered a complaint. This would be a notable expansion in the Department's role. The existing regulations in 96.69 only allow the Department to accept complaints from domestic or foreign officials. The current regulations require the Department to refer anyone else with a concern to the Complaint Registry. This practice should continue as it is in the current regulations. It is essential to a fair complaint process that the person with the complaint be the one to enter that into the Registry. Circumventing that requirement seriously compromises the integrity and effectiveness of the complaint review process. Additionally, since the Department did not propose any changes to 96.69, there is no

clear process for how these "complaints" received by the Department would be handled. Would the Department conduct its own investigation? If so, would they file the concern in the registry? If so, who would be named complainant?

Public foreign authority: The Department proposes changing the definition limiting public foreign authorities to only courts or regulatory authorities. Should the Department move forward with this in the final rule, NCFA requests that the preamble to the final rule clarify that this does not change the interpretation of foreign public entities (e.g., a public orphanage). The Department can clarify this by stating, "ASPs do not need to enter into foreign supervised provider agreements with public entity orphanages." NCFA continue to advocate that NGOs operating with authorization of a foreign government should not need to be FSPs, and we should allow partnerships with orphanages and other private entities who are prohibited by their government from entering into an arrangement whereby they are supervised by a U.S. ASP.

Why does the Department suggest a change for Public Foreign Authority but not Public Domestic Authority? A rationale should be provided for a change to one but not the other.

Supervised provider: This definition could be clarified to state "foreign or domestic," replacing the proposed, "…, including any foreign person or entity," otherwise, it will be an ambiguous sentence that could be interpreted in multiple ways. (Foreign non-governmental entities should *not* be supervised providers.)

Unregulated Custody Transfer: In its current format, it is unclear how this is to be applied. The phrase "…intent of severing…" is too ambiguous. How, and by whom, will the parents' intentions be determined? Instead of describing the severing of an existing parent-child or guardian-child relationship, the focus should be on the severing of an existing *legal* relationship.

96.6 – Performance Criteria for Designation as an Accrediting Entity

The current designated AE (IAAME) fails to meet multiple qualification criteria for an AE, according to the qualifications listed in the IAA as well as those in the existing regulations. The Department is proposing changes to 96.6(f) that will bring IAAME into alignment with this particular criterion. If this change is made in the final rule, it will not change the unlawfulness of the Department's designation nor will it bring IAAME into full alignment with other qualifications.

96.7 Authorities and Responsibilities of an Accrediting Entity

The Department's proposal for it to be, "…for a period of at least ten years, or as otherwise set forth in its agreement with Secretary…" means it can be far shorter. Why not make ten years a minimum requirement? NCFA suggests "…for a period of at least ten years, or longer if otherwise set forth in its agreement with Secretary…".

96.8 Fees Charged by Accrediting Entities

NCFA notes that the Department went to considerable length in the preamble to the proposed rule's response to regulatory reform solicitation to defend the Department's decision to ensure that AE fees are non-refundable but continues to insist ASP fees be refundable for services not rendered. NCFA agrees that ASPs should refund fees for services not rendered and disagrees with the Department's assertion that this should not be the case for an AE. The Department contradicts itself by stating that an AE monitors "activity as a whole, not individual cases" yet in the very next section defends an AE's charging for additional children as part of a sibling group. The current AE does not charge based on adoptions, but rather based on applications and sibling groups. The language used by the current AE is inaccurate and the continued disingenuous description by the Department and the current AE that this is based on the number of adoptions, puts the Department and the AEs at significant risk of legal challenge.

The Department's *entire* rationale as to why the AE fees should be non-refundable could be used to argue in support of why ASP fees should be non-refundable – yet the Department takes the opposite approach. An ASPs fee schedule is calculated based on the full cost of delivering services in compliance with the regulations to an estimated number of children and families. So, why is this logic acceptable to the Department in one case but not another? Why should an AE keep funds paid for services they have not, and will not, render?

NCFA also suggested in response to regulatory reform solicitation of comments, that the Department require more transparency of an AE's finances by requiring AEs to make available, upon request from the public, its demonstration of compliance with 96.8 (a) and (b). We are disappointed that the Department chose not to require this level of transparency of AEs in the proposed regulations. Such transparency would only serve to instill greater confidence in the designated AE(s) without placing an undue burden on their administrative staff. NCFA believes that the Department should change the current practice of allowing the AE to charge additional fees for siblings, creating a financial disincentive/penalty for keeping siblings together.

96.10 – Suspension or Cancellation of the Designation of an Accrediting Entity by the Secretary

In 96.10 (c)(1), NCFA suggests clarifying that "evidence" be changed to "sufficient evidence".

96.25 – Access to Information and Documents Requested by the Accrediting Entity

NCFA is supportive of the changes in 96.25(c), so long as there is an established system whereby agencies are afforded due process to understand allegations and defend themselves of accusations of wrongdoing. The Department should make it clear that destruction of documentation consistent with an ASP's document retention/destruction policies is not a violation. Also, NCFA recommends the Department require an AE provide formal written document retention/preservation notice to an ASP as part of an oversight review should they desire the ASP to maintain particular records.

96.26 – Protection of Information and Documents by the Accrediting Entity

NCFA is not supportive of limiting the requirements on AEs regarding maintenance and protection of information. The change may lead toward less oversight of AEs; and the Department's proposal for it to be, "…at least ten years, or as otherwise set forth in its agreement…" is ambiguous. NCFA suggests language to clarify that ten years is a minimum requirement: "…for a period of at least ten years, or longer if otherwise set forth in its agreement with Secretary…".

NCFA proposes an addition here to obligate the AE to disclose to any ASP subject to an adverse action all of the information collected in support of said adverse action. Without this requirement, the ASP is in the difficult, and often untenable, position of defending an adverse action without knowledge of the evidence being used to support the decision. Such actions run counter to standard due process and should be corrected.

96.27 – Substantive Criteria for Evaluating Applicants for Accreditation and Approval

Please clarify why the Department is proposing the changes to 96.27(c), which would allow the AE much more leeway in making accreditation decisions. This is particularly concerning since the Department has received numerous complaints of the current AE using too much subjective, inconsistent, and contradictory judgement with the current regulations. Presently, with a few clearly listed exceptions, AEs may *only* use the standards in subpart F when making accreditation decisions. By removing the word "only," the Department is giving AEs even more latitude to establish the basis for their accreditation decisions. Can the Department explain why they chose to remove the word "only" and what specific other regulations or rules AEs may reference when making accreditation decisions? The lack of objective standards injects dangerous subjectivity into the process, making accreditation vulnerable to the whims of individuals and furthering the ambiguity of the process for ASPs. How can ASPs know what standard to meet if the AE is working out of their own playbook that's not shared with ASPs? And how would this work with multiple AEs?

96.29 Compliance with All Applicable Laws

Obviously all ASPs should be compliant with laws; we do not need regulations to reiterate that. It is not an AE's role to unilaterally determine if an agency has violated a law - there are *legal avenues* for such purposes. Does the Department expect AEs to have and maintain expertise in domestic and foreign law? Practically speaking, AEs are not in a position to make such determinations – and may be in legal peril if they do so. The proposed rule, at 96.29(d), puts AEs in a position of understanding (and enforcing consequences) based on foreign law – but what about when foreign adoption authorities grant waivers or consistently do not enforce their own requirements? What about situations where there are contradictory, outdated, or ambiguous laws? Are ASPs no longer allowed to work within a foreign infrastructure to seek exceptions, waivers, or other permissions to adopt – if granted by appropriate authorities– if there is a foreign law in contradiction? For example, if a foreign law requires an extended residency for the U.S.

PAPs, but a judge in the country reduces or eliminates that requirement, would an ASP be found non-compliant? Would an ASP be considered non-compliant if they seek a waiver/exception through legal channels? The proposed change is unworkable on its face, and insolvent in practice.

Further, stating, "without authorization from the relevant foreign country, if required by that country" [96.29(a)(2)], and "...unless authorized to do so, where such authorization is required" [96.29(c)] is not always clear in practice and should *not* be left to an AE to determine. If an AE has concerns that an agency should have authorization or permission, such concern should be reported to U.S. law enforcement or the U.S. Central Authority, both of which are better equipped to interact with foreign authorities than an AE.

Additionally, if a foreign country grants a waiver or permission for a case to proceed – despite an agency not having authorization – that alone should constitute evidence that the foreign country is permissive of the agency's work with the adoption process, and we should not prohibit such determinations by a foreign authority. To do so may impair or proscribe the interests of children in need of a family.

An alternative is to examine how a determination by a foreign or domestic authority of non-compliance can be used in evaluating an ASP's suitability in 96.35 – which is already provided in the regulations, and a more suitable way for an AE to take into consideration any compliance finding issued by another authority.

96.29(a) and 96.29(c) – These new standards state that accredited/approved ASPs may not have previously provided adoption services without accreditation, approval, supervision or required authorization. By framing these in the negative ("…has not…") it means any action previously taken would be a violation of this section, even when compliance was not an option (e.g., agencies that provided such services prior to April 1, 2008). Further, there should be clear exceptions for situations, including when foreign central authorities have waived authorization requirements (e.g., for relative cases; or cases where PAPs are acting on their own behalf; etc.).

96.32 – Internal Structure and Oversight

In 96.32(c), none of these categories seem to provide general information that would aid in a typical request from an adult adoptee to "learn about their adoption or origins" as is the stated intent.

Why does the Department not account for the ongoing costs this will have on ASPs?

96.33 – Financial and Risk Management

96.33(e)

The change proffered in 96.33(e) is redundant. To add "liquid assets" in a serial list after "assets" does not change the standard at all, as "assets" is already inclusive of "liquid assets."

NCFA suggests that the requirement should be that ASPs have cash reserves or other assets necessary to meet operating expenses *for adoption services*. Note, we strongly believe this should not be a necessary requirement beyond adoption services – as there are some multi-service organizations that are providing a significant amount of social services beside intercountry adoption, and such organizations should not have a requirement for cash reserves/liquid assets, *so long as they can demonstrate sound financial operation* which is already a part of the standard.

NCFA suggests the standard in 96.33(e) be revised to say:

> The agency's or person's balance sheets show that it operates on a sound financial basis taking into account its liabilities, projected work volume, size, scope, and financial commitments. The agency or person maintains, on average, sufficient cash reserves or other assets to meet its operating expenses for at least two months of adoption services.

96.34 – Compensation

96.34(a)

NCFA is supportive of the Department's continuation of maintaining regulations that prohibit the payment of incentive fees or contingent fees. However, we suggest that clarity be given as to what it means to "plan to compensate" and how this addition changes the standard. NCFA suggests that the phrase "offer of compensation" may be a better fit. Additionally, clarity is needed for how agencies can demonstrate compliance with this change. It is not possible to prove the non-existence of something, yet ASPs have been asked to do just that by the current AE in a number of instances. The Department should explain with specificity how ASPs can prove that they do not have a plan to offer compensation.

96.34(b)

Currently, ASPs have been permitted to provide non-valuable gifts and provide certain other expenses in relation to foreign government officials and others so long as they comply with the Foreign Corrupt Practices Act (FCPA). The Department should clarify and confirm in the final rule that they are not prohibiting non-valuable gifts (e.g., a coffee mug with a logo; a tote bag, etc.) so long as the ASP is not violating the FCPA. The Department of Justice has already issued multiple legal opinions regarding intercountry adoption and NCFA is concerned the Department's actions will confuse and contract such law.

96.34(d)

NCFA is not supportive of the simplification to "taking into account what such services actually cost in the country" because this lacks clarity (e.g., who determines this?) and because it would be reasonable and appropriate for ASPs to make compensation decisions to ensure they have a good staff team and limit the ASP's expenses whenever possible. For example, what if an ASP has worked out an arrangement that is lower than what is determined to be "average"? What if they choose to pay more because they want to retain a good employee or supervised provider? How will the Department and an AE put a financial value on a longstanding/trusted relationship with someone? Would an AE have authority to find an ASP in non-compliance, if they can show that "on average" a foreign attorney in a foreign country makes less than what the ASP pays, even if the ASP prefers to continue working with the attorney as a supervised provider because she or he has proven to be a trusted worker that serves clients, children, and partners well? What about situations where an ASP generously provides significant humanitarian support for an orphanage? What if an ASP is one of a few or the only provider of intercountry adoption services in a country – in such a situation, how would the Department or AE understand "what such services actually cost in the country"?

NCFA believes that reducing the financial barriers to adoption is important and therefore is supportive of working to create an environment where there are not unreasonably high expenses for anyone involved with adoption. But, we believe that by creating a regulation without clarity, it leaves too much room for an AE to make determinations that are detrimental to ASPs acting/working in good faith.

96.34(a-f)

As a general comment on this section, NCFA believes it is imperative that the Department make clear that nothing in this section or the overall regulations in 22 CFR 96 prohibit ASPs from continuing to work with adoptive families who choose to make donations, including China's voluntary orphanage donation.

96.35 – Ethical Practices and Responsibilities

96.35 (c)(2)

The Department proposes adding "formal disciplinary actions" to the types of events to be reported and the Department has removed "who is in a senior management position." Why has the Department chosen to broaden this standard to all employees? This proposed revision would now expand the disclosure requirement to every single employee, including employees that have no involvement whatsoever with the adoption-related activities of the organization. Some accredited ASPs provide other social services and this would seem to be an unnecessary invasion of employee's privacy and could be contrary to state prohibitions related to the use of criminal history information collected during the hiring process.

If an office assistant is disciplined for repeatedly being late to work, would that need to be reported? Without defining "formal disciplinary action" the Department leaves this for others to define differently. Does the Department have a rationale for this?

Elimination of the Current Standard in 96.35(c)(4)

NCFA is supportive of the removal of the current regulation at 96.35(c)(4) requiring an FBI fingerprint form that is no longer usable for the intended purpose.

96.36 – Prohibition on Child Buying and Inducement

NCFA asks the Department to explain why it is proposing the elimination of language that permits ASPs from providing permissible payments for adoption-related proceedings? NCFA opposes the removal of this language in 96.36(a), as they provide clear/specific examples of acceptable practice and state that it must be permitted by the child's country of origin.

NCFA notes that the Department's removal of language in 96.36 may also impact outgoing adoptions, which has routinely allowed for reimbursement of a birth parent's pregnancy-related expenses (in accordance with U.S. state law).

NCFA notes that the term inducement [found in both the current and proposed regulations at 96.36(a)] is not defined in these regulations and suggests that the Department include a definition for this term that makes clear it would only be prohibiting *illicit* inducement. An inducement is something that persuades or influences – but obviously someone may be influenced by something positive and in-accordance with the Hague Convention's principles. For example, an ASP providing information to a foreign adoption authority about suitable adoptive parents could be persuasive to the foreign adoption authority releasing a child to particular parents (e.g., because they can competently meet a complex medical special need; because they're a relative; etc.) – and this would therefore meet the standard dictionary definition of "inducement" when the Department seems (by context) to want to eliminate only illegal or inappropriate persuasions.

In response to 96.36 and 96.40, the Department says that "there is not a formal process AEs use for analyzing or auditing the reasonableness of the fees charged…". While NCFA appreciates such candor, we point us that the AE's lack of a formal process (and the Department's knowledge/approval) has been what has led to the inconsistent, subjective, and confusing manner the re-accreditation process has been applied on ASPs. Until the Department can identify a formal process, they should not expect that ASPs will know what is expected for compliance. The standard should be publicly available and clearly understandable.

Also, see note at 96.40(c)(4), on use of funds for children who are seriously ill, require specific and urgent medical attention, etc.

96.37 and 96.38 -- Professional Qualifications and Training for Employees

It is unclear why introductory clauses were added to 96.37(a), (b), and (c). The majority of the current regulations and the proposed regulations do not have such clauses, so it would be helpful if the Department clarifies for AE(s) and ASPs if these are intended to change the understanding of the otherwise unchanged regulatory sections, if the addition is simply meant to provide structure for readers, or if there is another purpose.

NCFA is supportive of the decision to add to the training requirements for accredited providers' social service personnel in 96.38(b)(3-4), and, in addition NCFA recommends adding the following topics:

i. trauma-based parenting;
ii. the impact of adoption on children already in the home;
iii. adolescent identity formation in individuals who are adopted;
iv. educational advocacy, including IEP plans, 504 plans, etc.;
v. how adoptive parents can support children who experience racism and discrimination; and
vi. how adoptive parents can support and advocate for children discriminated against due to physical disabilities, cognitive impairments, and other special needs.

The proposed change in 96.37(d)(7) calls for ASPs to provide training that includes information about the "most frequent sociological…problems experienced by children". NCFA is not concerned about this change, but does request that clarity be given to ASPs if training needs to be provided on pervasive sociological problems experienced in many countries (e.g., climate change, poverty, etc.) or if the intent is to focus on sociological problems that are somewhat unique or specific to the particular countries where the accredited providers work. Also, we note that the way this section currently reads, it calls for training on the possibility the sociological information would not be in medical reports transmitted to PAPs, but we assume this is not the Department's intention, since most child referral medical reports do not specify sociological problems; therefore, we suggest this be re-written for clarity.

NCFA believes that the changes in 96.38(d) will actually work against the interests of building a well-educated adoption personnel workforce. If an agency is hiring an experienced professional with documented training, the ASP should be able to determine what additional training is required to expand the experienced social service personnel's knowledge and conduct such training accordingly rather than requiring training on topics already familiar to the employee or irrelevant to their role with the agency. Also, note that this is worded incorrectly and should be fixed: It currently reads as though an exemption is required. If/When an agency wants to take their new hire through an orientation/training process, they ought to be allowed to do so and not forced to exempt the new hire from such training.

96.39 – Information Disclosure and Quality Control Practices

96.39(a)

NCFA notes that it is impracticable to ask ASPs to offer the required information to prospective clients upon initial contact:

- How is an agency expected to know it is the prospective client's initial contact?
- What if the prospective clients aren't interested in this information when they first contact the ASP?
- Often such contact is via telephone, and it's impractical to impart information in this manner.

Many agencies get initial contact from hundreds of prospective clients who never follow-up. Why not simply ensure the information is 1) available to anyone interested (i.e., the general public upon request); and 2) provided to all prospective clients prior to contracting with the ASP? (Note that the regulations in 96.40 already require ASPs to provide fee estimates prior to contracting.) Alternatively, and NCFA's primary recommendation, would be require that such information is available on an ASP's website and therefore publicly available to those interested.

Since the reasons for initial contact with an ASP can vary widely, it is unwise to require such burdensome requirements upon ASPs when it's not necessary.

96.39(a)(1)

The Department proposes to eliminate previous element (2) requiring disclosure of the names of supervised providers that PAPs could expect to work with, but still requires information about fees and has broadened this to include exempt providers as well as supervised providers. This is not realistic unless the Department and AEs permit ASPs to offer estimated ranges of fees for services – as they may not know the exempt or supervised providers that they will work with in the particular case.

96.40 – Fee Policies and Procedures

Will the Department please share data pointing to the need for such significant changes in disclosure? How many PAPs, children, or others have been harmed within the confines of the existing regulations that would have been protected under the proposed revisions?

The Department states a desire for more transparency and NCFA fully supports that goal, but NCFA believes the opposite will happen with the Department's proposal. With the excessive amount of information required, and the inclusion of the many variables that can arise with processes as complex as intercountry adoptions, implementation of the proposed regulations will result in excessive information for PAPs to try to consume. Those unfamiliar with intercountry adoption will undoubtedly find it difficult to understand, and those who are familiar with intercountry adoption, will see that there are even more levels of complexity at each of the various process stages listed in sections (b) and (c).

In other words, instead of adding complexity to disclosure, NCFA believes simplifying disclosure will lead to more accurate and helpful information. Even if every ASP listed the fees identified in the Department's proposed regulations, it would not be an "apples to apples" comparison. It goes beyond a reasonable expectation of what an ASP can be expected to provide at any given point in time for any particular family. Throughout the changes proposed in this section of the regulations we see repeated issues of workability, solvency, and comparative advantages over the status quo or previously suggested alternatives. As a result, we believe that implementation of the regulations as proposed will actually undermine the Department's stated intent of increasing transparency for prospective adoptive parents. Instead, the Department's intent can be achieved by requiring ASPs to disclose the fees they charge for their services and the total estimated fees for completion of an adoption based on the country program where the PAPs are seeking to adopt. ASPs can base estimates on actual data from current and past clients.

It appears the Department's re-write of 96.40 is with incoming cases in mind and does not take into account outgoing cases. The Department is encouraged to make this section applicable for all types of adoptions that would need to comply with these standards, otherwise, the Department will create a standard impossible to meet.

96.40 (b) and (c)

The Department proposes to require ASPs to publish information from 40(b) and (c) on their websites. NCFA believes that ASPs should post information publicly on their website, but we disagree with the categorization and extent of the proposed disclosure requirements. More information does not automatically result in better information. The Department has not offer sufficient rationale for why this level of disclosure is necessary – and NCFA believes the proposed changes will add to the overload of information required, as some of the information is specific to the state each PAPs reside in (e.g., legal fees, court fees, exempt provider fees, etc.) or may be impacted by the region they are adopting from and is subject to change by any number of factors outside the ASP or PAPs' control, at any time, without notice.

It is unclear how the Department propose ASPs publish this information, but if there's no specific required methodology ASPs will likely have varying amounts, which could leave PAPs confused or suspicious, which is what the Department states it wants to prevent.

Does the Department expect ASPs to publish information for all 50 states (plus D.C., territories, etc.), and all regions in a foreign country, accounting for variances in travel, length of stay, etc.? There are many detailed disclosures in (b) and (c) that could change frequently, and monitoring and keeping all that information current on ASPs' website would be a significant undertaking for every ASP.

Does the Department intend international travel to be listed as an "estimated expense in the United States" or an "estimated expense in the foreign country"?

What level of specificity is expected for travel costs? For example, a family in Florida will likely pay a lot less than a family in Alaska to fly to Haiti – do ASPs need to account for this? Do ASPs need to give estimates based on how far in advance PAPs will purchase tickets? Any number of subjective factors, and decisions by the family themselves, can impact travel costs in a way that an ASP would simply have no ability to project. The time of year that the family ends up traveling, whether they choose to upgrade their tickets, their point of origin from within the U.S., the number of people they decide to bring, their personal choices while in country in regard to food, accommodations, activities and sightseeing, etc. In the majority of cases, the choices that families make can significantly alter the costs they incur. Additionally, there is no mechanism by which to require or enforce family reporting of their final fees or to guarantee the accuracy and reliability of such reporting.

Does the Department expect ASPs to proactively update clients when estimates change?

Why does the Department not account for the expense for ASPs to update these fees disclosures on a regular basis?

96.40(b)(3)

The Department proposes to require that program fees be changed on a *pro rata* basis. This is a significant change and the Department provides no details about what that means. Dictating when fees are charged seems to be an overreach and unnecessary because of the provisions requiring segregation of client funds collected in advance of service delivery. This change favors larger ASPs because they probably have greater flexibility with cash flow.

96.40(b)(3) and 96.40(c)(2)

The elements addressing operational costs are confusing. Operating costs would be reflected in an ASPs program budget, and direct fees specifically to fund operational costs are not typical in any business. Fees charged to clients are based on total costs to deliver each service, including some portion for covering overhead expenses. It is an undue burden for ASPs to detail and separate out those costs with no specific evidence that doing so will help PAPs or others. If the Department has concerns about the lack of transparency around operational expenditures, it would be better to address these in the oversight of ASPs' actual expenditures.

96.40(b)(4)

Legal and court fees in the U.S. would be specific to the state in which the PAP resides, and disclosure on ASPs' websites would undoubtedly be confusing and inconsistent.

96.40(b)(5)

Because the travel expense category is now split between domestic and foreign travel, this portion for domestic travel is unnecessary for most ASPs. This should be limited to domestic travel *required* by the ASP.

96.40(c)(1)

Estimates can be beneficial, but with the percentage of special needs adoptions having increased so significantly, ASPs will not be able to provide reliable estimates. This previously was encompassed with care of the child more generally, so pulling this category of medical expenses out on its own makes it more problematic.

96.40(c)(4)

Many adoption stakeholders, including NCFA, advocate for allowing a higher standard of institutional or pre-adoption care. The Department's proposed language would prohibit such practice. The Department should not prohibit ASPs or PAPs from funding a higher standard of institutional or pre-adoption care, but this language would actually prohibit such practice. For example, if an orphanage has a lower child/staff ratio or uses foster care instead of congregate care, it would therefore have a higher personnel expense and higher cost, which ASPs may coordinate to help support. Other examples may be higher quality or increased quantity of food, increased medical, educational, or other supportive services. To prohibit such funding seems contrary to the best interests of children. There should be clear evidence of the underlying concerns, their causes, and a review of policy solutions.

In some circumstances, often unplanned, PAPs could be waiting for years for a referral and/or the number or needs of the children in an institution could change. Events can occur (e.g., COVID-19) that would require more intensive medical or other services or significantly delay the adoption process, and ASPs might seek to contribute funds to support those medical or prolonged child welfare efforts. It is not in the best interest of children to pre-emptively limit such service.

E.g. If a child has rickets and the ASP works with PAPs to send the right vitamins to prevent further degeneration, would even that be an issue of non-compliance?

The Department has not provided specific or meaningful justification for their proposed limitations. Before limiting support for the care of children, there should be clear evidence of the underlying causes and best solutions.

The Department says that "the AEs have identified these situations via ongoing internal research and monitoring, including comparisons of like-services provided by other ASPs as well as reviews of databases related to the provision of certain services." If this is true, the Department is admitting there is

data that has not been shared as part of the NPRM. This is contrary to Executive Order (EO) 12866, which calls for data to be provided so that it can be evaluated as part of the comment period.

96.40(c)(4) and 96.36(a)

When PAPs have accepted a referral of a child who later becomes seriously ill in an institution and requires specific medical care, the provision of funds for that care does not provide incentives to illicitly recruit children into institutions or deliberately delay the processing of an adoption for financial benefit. PAPs would not have a complaint with the agency for charging a previously undisclosed fee for this. No justifiable rationale exists to prohibit ASPs or PAPs from funding care of that child. To prohibit such practice is clearly contrary and harmful to the best interests of children, and we ask the Department to amend its position on this matter.

One of NCFA's primary concerns in the proposed rule is the Department's statement that fees must be dissociated from the care of a specific child and must be told to PAPs at the time of fee disclosure. How will ASPs know in advance what medical or other needs would arise? Why would PAPs be prevented from making such payments, if it's for the well-being of their child? This proposal would undoubtedly lead to terrible outcomes for children and will likely lead toward an increase in need for post-placement and post-adoption support.

96.40(d)

Fees associated with a third country or in the foreign country would already be included in (b) not (c), especially with regard to fees and expenses associated with living in the child's country of origin. It would make more sense to include all foreign expenses in that category, or to simply create a third category.

96.40(e)

This provision requires ASPs to inform an AE of expected fees and expenses. The Department should provide a clearer definition of "country program," for instance, would this encompass pilot programs? It is unclear when this is to be provided and whether it needs to be provided each time it is updated. If the Department removes (a), then this requirement is more reasonable.

96.40(f)

The Department's description indicates a level of flexibility regarding the "segregation of funds" and indicates they need not be actual/physical segregation of funds in separate financial accounts. NCFA agrees with the Department that such funds would not be considered general operating funds nor part of the ASP's "two months reserve fund". NCFA does not agree with the Department's suggestion in the preamble that this can properly be done with the "use of a paper spreadsheet method to keep track of

client funds." NCFA urges the Department to amend this statement, clarifying to both AEs and ASPs that this would be an inappropriate and unadvisable accounting system.

The Department's statement that refunds should be processed within 60 days and must comply with State law is a redundancy.

If the Department has data/evidence that they are solving an existing problem with this proposed change, it was not shared publicly as part of the NPRM.

96.40(i)(2)

The Department's proposed change removes the waiver available to PAPs. Can the Department offer an explanation as to why they are removing this option? As an alternative, the Department could add an upper limit to the amount of fees for a waiver of the notice and consent. Does the Department have data to demonstrate the problem it is solving before adding additional regulation?

96.41 – Procedures for Responding to Complaints and Improving Service Delivery

The proposed changes in this section should be understood with two important points for context:

1. The Department is proposing to change the definition of the word "complaint"; and
2. There has been a significant rise in the number of complaints by the Department and complaint investigations carried out by the current AE, many of which later proved to be unsubstantiated, but at great expense to ASPs.

The Department's proposed changes dramatically expands the definition of a complaint, and the Department is proposing to eliminate the exclusion for complaints associated with other programs/services offered by the agency. The proposed changes would also significantly expand the information required to be reported to AEs and the Department under 96.41(f). The Department does not estimate the cost involved in this extra undue burden. Furthermore, ASPs may have concerns about the privacy of non-adoption clients if they are required to report complaints relating to other services/programs.

NCFA notes that this change creates a direct contradiction now to 96.69(b) and 96.71(b)(1) which require complainants who are parties to a case to first file a complaint and seek resolution with an agency before it can be filed in the Complaint Registry. The contradiction with a standard in Subpart J means that if the Department changes 96.69(b) in the final rule, they'll be making a change that was not addressed in their preamble or proposed rule; therefore, the Department is urged to maintain the practice outlined in 96.69(b).

The Department does not include a cost calculation impact on agencies responding to additional complaints.

One alternative would be for the Department to provide a new standard or to update 96.41(h) for ASPs to receive and consider feedback about their performance from others who are not able to file a complaint under the existing 96.40(b)? Clients and those receiving services directly, or a party to the adoption, should have more rights to complain than others. Why give everyone in the world the same right to file a complaint and put this obligation/burden on the ASP?

Over the last few years, many ASPs have indicated having to defend against complaints without knowledge of what they're accused of in terms of non-compliance. ASPs have told of having to incur thousands of dollars in expenses, and scores of hours in response to inaccurate or unsubstantial complaints. The Department's proposed regulations will only lead toward even more of these harmful encounters. Where is this accounted for in the Department's cost calculations?

Heidi Cox, Executive Vice President and General Counsel, at Gladney Center For Adoption reports, "*Our agency has had to deal with an unfounded complaint in the last few years. In responding to this single anonymous complaint filed by someone who was not a client, we were required to pull records for an entire year for every child who was referred from China's CCCWA as well as every family we had worked with. In preparing the response, we pulled, researched, and reported specific details on every child and family. Gladney was successful, and the complaint was found to be unsubstantiated. The staff time to research and reply to this anonymous complaint was in excess of 50 hours. While we understand the importance of having oversight to review complaints, we do not believe this process was handled in a useful or appropriate manner.*"

96.41(d)

The Department has not proposed changing the term "investigate" to "review" which will have it be inconsistent with its proposed revisions in 96.7(a)(4).

96.42 – Retention, Preservation, and Disclosure of Adoption Records

NCFA does not oppose this addition, but rather questions the need for the Department's proposed change to include "…to the extent permitted by State law." Was that ever in doubt? Does this change make any difference in practice or understanding for anyone involved?

96.43 – Case Tracking, Data Management, and Reporting

96.43(b)(3) and 96.43(b)(4)

The Department's proposed changes should be modified to recognize that ASPs may not be able to provide this information if it's unknown to them and the PAPs do not provide this information. This can be modified by adding "Wherever possible" in the beginning of 96.43(b)(3) as is in place for

96.43(b)(4). NCFA agrees with the Department that this is valuable information to include in a report, when known, and therefore is supportive of proposed changes in 96.34(b)(4).

96.43(b)(6)

The Department proposes to remove from the existing regulation "…set forth in the child's country of origin…" which significantly broadens the scope of this standard. Additionally, by requiring this for each of the proposed sections in 96.40(b) and 96.40(c), this will be significantly more work/reporting by ASPs.

If the Department's proposed changes to 96.40 are the same or similar in the final rule, ASPs will not be able to comply with this regulation until after the proposed changes in 96.40 have been in place for a considerable length of time.

The concerns noted above in 96.40 are also relevant here.

96.45 – Using Supervised Providers in the United States

96.45(a)

The Department is proposing to add a new standard requiring primary providers to ensure supervised providers comply "…with the Convention, the IAA, the UAA, and the regulations implementing the IAA and the UAA." NCFA is, of course, supportive of supervised providers complying with the law, but we question the need for this regulation. Can the Department address what problem this is solving?

This seems redundant with 96.45(a)(3) and 96.45(a)(4).

96.46 – Using Providers in Foreign Countries

The Department's preamble to the proposed regulations states that:

> *In response to the Department's Federal Register document, the Department received comments relating to foreign supervised providers (FSPs) as well as other concerns… while we acknowledge the concerns identified by the commenter related to oversight of FSPs in certain limited circumstances, in this notice of proposed rulemaking, we are not addressing any regulatory changes to accreditation standards relating to FSPs.*

<u>This is demonstrably false:</u> The Department has in multiple instances proposed rulemaking that addresses regulatory changes to accreditation standards about FSPs, including how financial transactions between FSPs, ASPs, and PAPs are handled, FSP record retention, and more. The Department's preamble, proposed regulations, and cost calculations all show that they knowingly are proposing rulemaking to impact FSPs. NCFA calls upon the Department to take seriously the need for change to

the FSPs and notes that the Department's obviously false statement compromises the validity of their rulemaking.

96.47 – Preparation of Home Studies in Incoming Cases

NCFA is supportive of many of the proposed additions to 96.47(e), and is hereby providing suggestions for amending this section to improve service provision.

96.47(e)(1) should not have limitations on what information may be used in withdrawing ASPs' recommendation of PAPs for adoption. If an ASP has a cogent reason to withdraw a recommendation, it should not be prevented from doing so.

96.47(e)(1) should not have a rule disallowing USCIS to be informed prior to PAPs. This should be based on the ASPs' discretion, clients' availability, etc. Giving a clear timeframe whereby both USCIS and PAPs should be informed is sufficient.

In the proposed 96.47(e)(2), everything after the word "parent(s)" is superfluous and should be removed.

In 96.47(e)(3), NCFA suggests that the Department remove "good cause".

The Department should strike 96.47(e)(4) as it is redundant. Creating a new regulation that states ASPs should follow an existing regulation is unnecessary and if this is part of the final rule, it means that when the Department or an AE determine substantial compliance, any infraction on this matter will be counted doubly against an ASP.

The clause in the Department's proposed 96.47(e)(5) stating that ASPs should "comply with any applicable State law" is also a redundancy and should be removed.

96.48 – Preparation and Training of Prospective Adoptive Parent(s) in Incoming Cases

NCFA notes that there are not proposed changes to 96.48, despite widespread agreement in the intercountry adoption community that there should be an increase in the number of minimum required training hours for PAPs as well as additional topics (e.g., trauma-informed parenting; sexual abuse; sensory-processing disorder, etc.) that would be beneficial for PAPs' preparation. NCFA suggests a minimum of thirty hours of training prior to placement, and suggests that the Department work with adoption professionals to better understand the topics/themes that would be most relevant/useful.

96.49 – Provision of Medical and Social Information in Incoming Cases

NCFA is supportive of the change to 96.49(i), specifying the role of ASPs and their FSPs in documenting information. NCFA suggests amending the word "videotapes" to "videos" and amending the word "photographs" to "photos" so as to be clear this is inclusive of pictures and film taken digitally.

NCFA also notes that the continually changing/expanding view of what people/entities are considered a foreign supervised provider will impact application of this standard.

96.50 – Placement and Post-Placement Monitoring Until Final Adoption in Incoming Cases

NCFA appreciates that the Department is proposing to separate issues that arise in the United States and the child's country of origin.

NCFA is concerned that too many aspects of the proposed changes in 96.50 are ambiguous and depending upon how the Department (or AEs) understand what is meant, it may have a significant negative impact on ASPs.

In 96.50 the term "placement for adoption is in crisis" is used multiple times. Providing clarification for what the Department considers a placement in crisis may prevent ambiguity and reduce instances where an AE and ASP disagree, where the PAPs and ASP disagree, etc. NCFA suggests that clarity should be given that the ASP make a determination by qualified social service personnel.

In 96.50(c)(1), clarity should be given to indicate it is not the financial responsibility of the ASP to provide this – but rather that it would be an additional expense for the parents. NCFA suggests that using the word "counseling" is problematic (see note below) and therefore suggests that referring to this as support, training, advising, or coaching may be a better fit.

As proposed, 96.50(c)(2) and 96.50(d)(3) puts ASP professionals at risk of unauthorized practice of law. NCFA suggests that this is clarified so that the ASP would only provide information that is already publicly available.

In 96.50(c)(4) and 96.50(d)(5), clarity should be given to indicate it is not the financial responsibility of the ASP to provide resources – but rather that it would be an additional expense for the parents. ASPs can identify resources, provide referrals to resources, etc. The Department is not clear when they say there should be provision for "potential future crises". Not all crises are predictable, so there cannot be a standard requiring ASPs to provide resources for a crisis that hasn't happened. In one sense, every family has the *potential* for a future crisis. There should be a clear standard to demonstrate compliance that is not based on child/family outcomes, but the Department has not indicated what that would be.

In 96.50(d)(1), how will the Department and AE measure if the individual or entity has "appropriate skills"? There should be a clear standard that is not based on child/family outcomes.

In 96.50(e), the phrase "intent to disrupt" should be defined/clarified to indicate a final decision has been reached that involves the PAPs taking a step/action toward legal or custodial separation; often, this can be confirmed by ASPs contracting in an agreement for particular service provision. ASPs note that often PAPs consider disruption or may even say they need a disruption, but that this is not necessarily an

indication that they understand or want to disrupt. ASPs should be given latitude to consult/support the child/PAPs in these situations and make an assessment before reporting to the Department and/or AE.

In the proposed 96.50(f)(1-3), NCFA suggests: In (f)(1) remove the extraneous period (".") typo. Also note that in (f)(1) there may be limitations on an ASP's ability to assume responsibility if they are not in custody of the child. In (f)(2) there should be more than "info about… outstanding reports" but should also include a plan for completion/submission of outstanding reports. Clarity should be given to ASPs on what to do if they have not had adequate consultative response from Secretary within required timeframe (i.e., should they inform the foreign Central Authority or wait – and NCFA strongly believes waiting is not likely in anyone's best interest). In (f)(3), NCFA recommends changing from "24 hours" to "two business days".

NCFA is concerned about the promulgation of regulations where neither the Department nor the ASP have authoritative jurisdiction, such as that proposed in 96.50(g) – in such situations, the ASP may have limited options to ensure additional placement outcomes as they may be decided upon by the foreign authority. In 96.50(g)(3), NCFA believes it may not always be in the child's best interest to wait on a consultation from the Department before informing the Central Authority of the child's country of origin. Instead, which Central Authority is informed first should be determined on a case-by-case basis. Often these situations require a swift ability to act, and historically the Department has not been quick to provide consultation, so this could be very problematic for children and families in this situation. The Department is encouraged to issue clear guidance that ASPs may proceed when working with foreign child welfare authorities in the best interest of children. Further, in 96.50(g)(3), NCFA is concerned that the Department overemphasizes the importance of the visa interview with the use of the word "immediately". While NCFA agrees that it is important to notify the Department in these situations, it is very rarely the case that this is the most immediate need; often what is best for the child and PAP(s) is provision of other immediate assistance/support.

96.51 – Post-Adoption Services in Incoming Cases

The proposed change in 96.51(b) means that ASPs will have to change their contracts with PAPs to include provision of information about "assistance in the event an adoption is dissolved" for the local, State, and other services for every one of their clients across the country, unless they're directly providing the post-adoption service themselves. This is a massive undertaking and has not been accounted for adequately in the Department's calculations. NCFA views the Department's estimate of 1-10 hours for completion of this update as woefully inadequate. NCFA also suggests that a service contract is not the best place for the provision of information of this nature. NCFA also notes that the Department does not have authority to regulate issues related to post-adoption and therefore questions the Department's authority to require more of ASPs in this regard.

It is not clear how the Department intends this to work for U.S. citizens living abroad or military families who move frequently.

In situations where the agency does offer post-adoption services, it is unreasonable to expect ASPs to honor fee schedules that were in place at the time the contract was signed, especially if it is many years after a placement that a client seeks post-adoption services. Instead, ASPs should be able to indicate the current service offerings and fees *as an example* of what might be available in the future.

96.50 and 96.51

NCFA believes the Department's emphasis on the need for additional regulations on disruption and dissolution lacks relevant data to make an informed policy decision. Regrettably, the Department offered no specific data points beyond what is provided in their annual reports. This is unsurprising, since the federal government has failed to meaningfully follow-through on the requirements of the IAA section 205, whereby real understanding of service provision options and reliable data on disruptions and dissolutions would be available.

In the absence of such data, the research and scholarship that does exist suggests that intercountry adoptions have lower rates of disruption/dissolution than compared to placements from foster care.[1],[2] This would point to the relative success of accredited ASPs' provision of child welfare and adoption services. The Department fails to demonstrate that such costly regulatory change is beneficial in relation to the expenses on ASPs (and the impact on children/families) for incurring such changes.

Fortunately, the federal government will begin collecting more data on intercountry country placements and this data will be available to the Department and others through AFCARS reporting in coming years, at which point the Department will be able to propose a more data driven regulation based on reliable information.

96.52 – Performance of Communication and Coordination Functions in Incoming Cases

In 96.52(a)(1), the Department is requesting that they, and the foreign Central Authority, be kept informed of relevant aspects to an adoption case as updates arise. These overly broad terms need clarification and specification as currently, in asking for information related to "material facts about… the child or case," virtually all updates/information would need to be channeled to both Central Authorities. This is, undoubtedly, not what the Department intends, as they'd be getting every medical update, progress report, etc. Does this not raise privacy concerns? What purpose will this serve? Will the Department now be providing direct oversight of ASPs' compliance?

[1] Palacios, J., Rolock, N., Selwyn, J., & Barbosa-Ducharne, M. (2019) Adoption breakdown: Concept, research, and implications. *Research on Social Work Practice*, *29*(2), 130-142.
[2] Child Welfare Information Gateway. (2012). Adoption disruption and dissolution. Washington, DC: U.S. Department of Health and Human Services, Children's Bureau. Retrieved from: https://www.childwelfare.gov/pubPDFs/s_disrup.pdf

Should the Department proceed with their plan, ASPs should be informed of the following:

i. The preferred means whereby the Department would like to receive case updates;
ii. The appropriate course of action to take if the foreign Central Authority is not interested in receiving the same volume or detailed information as the Department regarding case updates; and
iii. The evidence necessary to demonstrate compliance to AE(s) that this new standard is met.

In response to Executive Orders (EOs) 13771 and 13777, NCFA recommended (and continues to recommend) a change to 96.52(a) which the Department declined to take. Instead, the changes made to this section significantly *increases* the amount of reporting required by ASPs. The cost of this added work on ASPs is not accounted for in the Department's cost calculations.

NCFA is supportive of the proposal in 96.52(a)(2) to inform USCIS of changes in suitability/eligibility.

NCFA appreciates the attempt at change in the proposed 96.52(b)(4), however, the same issue we raised in response to the Regulatory Reform Solicitation of Comments remains. Would the Department please specify if the Article 5 correspondence/confirmation from the U.S. to a foreign Central Authority is sufficient to meet this requirement? If so, *and* if the Department will begin sending such confirmation to ASPs, this could be resolved. But for what purpose – what problem is this solving? Even if the Article 5 letter is sufficient for meeting the purposes outlined here, there is no equivalent in non-Convention cases. What are the expectations in these cases? NCFA continues to recommend the Department strike this unnecessary regulation in its entirety.

96.52(d)

It would be helpful if the Department explains what they expect to be different about this standard by adding the word "original". The standard, including the proposed changes, seems to be based on an outdated practice in adoption that was common a few decades ago – where the actual original hard-copy documents were difficult to replace. In reality, this standard is not relevant to current practice. Why not allow for flexibility to assess the situation and determine the best course of action? For example, if the transfer of a child does not happen, perhaps it would be best to leave the original home study with the foreign central authority so that the adoption officials can continue to seek a match for the PAPs? Currently, that would not be permissible under both the existing and proposed standard. In other circumstances, the best way to protect confidential information may be for the foreign officials, the ASP, or foreign supervised providers (FSPs), to destroy the original documents, instead of putting them in the mail.

In practice, ASPs report that this is not a common occurrence, but that there is not a prescriptive means of uniformly determining the best course of action. Variables such as the foreign country involved, the desire of the parents to continue pursuing an adoption, and the likelihood of a future match would be relevant in making a decision on appropriate next steps.

Why does this standard just apply to home study and child background reports, but not any of the other sensitive information related to the adoption (e.g., medical reports, financial records, etc.)?

96.52(e)

It would be helpful if the Department can explain what new or unique regulation this standard imposes on agencies. It seems to imply that agencies should do what the regulations require of them – but a separate regulation is not needed for that. The current (and proposed changes to) the substantial compliance system (SCS) are such that if an agency has been found in non-compliance with a different standard, they'd then have that violation counted against them here as well. Wouldn't every deficiency be an indication the ASP did not "…take all necessary and appropriate measure to perform any tasks… consistent with this part…" and therefore a violation of 96.52(e)? Having a catch-all regulation such as this is not appropriate. NCFA continues to recommend (as we did in response to solicitation of comments on regulatory reform) that the Department strike 96.52(e) in its entirety. Alternatively, a suggested solution would be to note that only those things the Department has specified directly to an ASP in writing, which the ASP has failed to do, would be a violation of this standard.

96.54 – Placement Standards in Outgoing Convention Cases

96.54(a)

The Department should be informed that their proposed changes to the regulations will essentially end the practice of outgoing adoptions from the United States, reducing the choices that birthparents have in who the adoptive parents will be. The removal of exceptions to 96.54(a) means that (aside from relative placements) birthparents would not be able to make the choice of who the adoptive parents will be – even in cases where there may be an existing relationship or compelling reason why birthparents are choosing an outgoing placement. This raises serious and concerning questions about the Constitutional rights of these parents being violated.

Additionally, the Department's proposed regulations include a "background/context" section where they refer to the Universal Accreditation Act (UAA) by saying, "*Effective in 2014, the Intercountry Adoption Universal Accreditation Act (UAA) extended the standards in this regulation to all adoption service providers providing intercountry adoption services.*" NCFA notes that this is not accurate information, as the UAA only applies to incoming cases. ASPs are not obligated to have accreditation if they are sending U.S. children to non-Convention countries. NCFA believes that this should be rectified with a change in law so that these providers would also be accredited. NCFA notes that the Department has not considered the impact of their changes on how service providers may not seek to make placements in non-Convention countries.

96.54(c)

Instead of framing this in the negative "If the child is *not* placed for adoption in the United States…" this should be framed positively, "for children placed in an outgoing intercountry adoption…". This is because there are alternate options (e.g., the expectant/birth parents choose to continue parenting) that fall into the category of "if the child is not placed for adoption in the U.S." that the Department has no authority to regulate. Additionally, it is recommended to change "...satisfaction of the State court with jurisdiction..." to "...satisfaction of the accrediting entity with jurisdiction...".

96.55 Performance of Convention Communication and Coordination Functions in Outgoing Convention Cases

96.55(a)

There was not a proposed change to this standard, however, NCFA notes that the same issues addressed above in 96.52(a) are present in 96.55(a).

96.55(c)

NCFA notes that the comments in relation to 96.52(d) are applicable here.

96.57 – 96.79

The Department's proposed regulations do not address the following subparts, despite the continued concerns expressed to the Department of the lack of due process that accrediting entities afford to ASPs. Why do these remain entirely unaddressed?

Subpart G – Decisions on Applications for Accreditation or Approval
Subpart H – Renewal of Accreditation or Approval
Subpart I – Routine Oversight by Accrediting Entities
Subpart J – Oversight Through Review of Complaints
Subpart K – Adverse Action by the Accrediting Entity

If the Department is interested in real change in intercountry adoption service provision, the costs of adoption, or retention of adoption service providers, then change in how AEs oversee, review/investigate, and enforce regulations should be taken seriously. Please also see note in the next section regarding Congressional intent for a due process to be given by AEs to ASPs.

96.83 – Suspension or Cancellation of Accreditation or Approval by the Secretary

NCFA supports the proposed changes in 96.83(b). This represents an established course of action that may allow ASPs to have due process. NCFA notes, however, that such due process is not afforded to ASPs in their work with AEs and calls upon the Department, in the final rule, to enshrine the same

protections in the proposed 96.83(b) regarding suspension, cancellation, or other adverse actions taken by AEs. It is an extremely rare occurrence for the Department to take these enforcement actions against ASPs; so, why does the Department propose establishing due process for ASPs in this section, but not ensure the regulations provide for due process in the vast majority of enforcement actions? NCFA notes that the Senate Committee on Foreign Relation's report on the Intercountry Adoption Act clearly calls for ASPs to have due process regarding enforceable actions taken by an AE, and that these should be within the regulations:

> *The Committee expects that the Secretary of State will provide guidance in regulations for the exercise of the enforcement authorities provided in this subsection. Such regulations should set out clear guidance for accrediting entities to ensure that agencies and persons affected by enforcement decisions are afforded due process.*

Unfortunately, over twenty years after this Congressional report, there are still not regulations providing clear guidance to ensure due process. The Department is urged to rectify this with expediency.

In 96.83(c), the Department proposes notifying additional authorities regarding suspensions and cancellations. NCFA does not oppose this, but asks that the Department not notify such authorities until ASPs have been afforded due process to defend themselves against allegations of wrongdoing. This will prevent erroneous reports of wrongdoing.

96.88 – Procedures for Debarment with Prior Notice

While NCFA is supportive of the Department's decision to put procedures in place for a debarment hearing, we ask the Department to explain why in 96.88(c)(3), ASPs would not be entitled to conduct discovery. Is the Department not concerned that the ASP may be prevented from finding out evidence of its blamelessness or other information relevant to the allegations? Additionally, in 96.88(c)(6), the Department leaves it to the discretion of a hearing officer regarding whether or not to accept teleconference testimony; but, since the Department may also be in a position to deny the possibility of in-person testimony (by denying a visa to a foreign citizen willing to testify) it may put an ASP in a position whereby they are unable to offer testimony in their defense. Finally, NCFA recommends that any statement given to an ASP with written notice of a debarment hearing include an explanation as to why the AE with jurisdiction over the ASP is not taking action in the case, to ensure the intent of Congress is kept as stated in Senate Report 106-276:

> "…the Secretary may take enforcement actions against agencies and person only after the established avenue of enforcement—that is, by the accrediting entity—has been found wanting."

96.90 – Review of Suspension, Cancellation, or Debarment by the Secretary

NCFA opposes the Department's unlawful attempt to limit an ASP's right to judicial review, noting that the Department does not have authority in regulations to limit judicial review granted to ASPs by

Congress in the IAA. The Department proposes in 96.90(b) to require agencies to first exhaust procedures in 96.84(b) – but at that point of seeking reinstatement, the agency would have already received a suspension or cancellation. The Department should not take the serious action of suspending or cancelling an agency unless it has evidence and is prepared to defend their decision in a court of law.

96.92 – Dissemination of Information to the Public about Accreditation and Approval Status

The Department has proposed making reporting requirements less stringent on AE(s) by eliminating the requirement for AEs to provide information to individual members of the public upon request which is the existing standard at 96.91(b). NCFA notes that AE(s) will make available such information publicly at least once a month so we anticipate the net impact will be the same upon relevant stakeholders, though the change may somewhat delay members of the public from timely/relevant information.

96.94 – Reports to the Secretary about Accredited Agencies and Approved Persons and their Activities

NCFA notes that there are a number of changes and additions proposed for 96.94, all of which seem like reasonable requests that will lead toward better information about intercountry adoption practice.

96.100 – Relative Adoptions

We appreciate the opportunity to provide comment and feedback on the proposed regulations in proposed subsection R and welcome the decision by the Department to offer a separate process for relative adoption. However, accredited agencies who currently assist with relative adoptions have raised serious concerns that the proposed rule will not accomplish the stated intent. Accredited agencies that currently assist with relative placements report that they do not believe the proposed changes will result in much, if any, reduced cost for the adoptive parents, as the primary change is simply a briefer service plan. According to these agencies, the proposed regulations are by-and-large a description of their current work and will not likely result in much change in either the cost or speed for relatives to adopt.

It makes sense that the ASP would not be identifying the child, but they may play a role in arranging the adoption, especially given the recent (dubious) interpretation of "arranging an adoption" by the current AE. The proposed rule says they are not required to provide that service, but if they do provide it, it would be subject to the regulations. Given the Department's and current AE's expanding interpretation of what constitutes "arranging an adoption" in recent years, this change seems unlikely to provide any relief and would likely be more confusing or lead toward more compliance issues. ASPs would undoubtedly be concerned of the AE later determining that the ASP did actually provide one of these services without planning for it and being subject to adverse action.

The following recommendations are made to facilitate relative placements:

***Eliminate requirement for adoption services 5 and 6*:** The Department's description of the need for relative adoptions included the desire for ASPs "willing to work in a country where it has little if any expertise". In such circumstances, and when the actual adoption proceeding is handled by the adoptive parents directly, it is unrealistic to expect that an agency would have the capacity, knowledge, or relationships to effectively monitor a placement and/or support the parties involved in a disrupted placement. If the proposed regulations remain in place in the final rule, ASPs believe it will maintain the status quo, which the Department, NCFA, and accredited agencies all agree should be fixed.

***Adjust training requirements*:** NCFA fully agrees with the Department that families who adopt relatives should not be exempted from training requirements – however, we believe that the current training requirements are not the best fit for training and preparing kinship families. For example, training parents on the reasons why children are orphaned is not as relevant for a kinship placement. Additionally, the trainings on culture and country of origin are often unnecessary for this population. Instead, other topics are suggested: Kin relations, adjustments/transitions, grief/loss, trauma, discipline, openness about adoption, etc.

Provider clarity on arranging an adoption: Unfortunately, in recent years the current AE and the Department have expanded the understanding of the first listed adoption service as anything that might facilitate or advance any aspect of any adoption. This is not at all what the IAA or the regulations say and there is not a proposal from the Department to move in that direction. The Department should issue clear guidance that the first adoption service requires identifying *and* arranging an adoption. The guidance should be clear that arranging an adoption involves matching and case management, not ancillary facilitation of facets related to a placement.

***Reduce expenses in relative adoptions*:** If the Department would like to see a reduction in fees charged by primary providers to those seeking relative adoption cases, reducing requirements of 96.39 and 96.40 would allow agencies to streamline the process they take families through.

Important Note on Relative Adoptions: The Department noted in the introduction of the proposed regulations that, "Often in such cases, when the family cannot find an ASP to serve as primary provider in their case, they end up having to make alternative arrangements for the child, which may not be in the child's best interest." The Department's recognition that this has led toward situations that are not in the child's best interest is an unacceptable response to the tragedy of a child without parents because the IAA clearly gives:

1) The Department the authority to assist these parents directly;
2) The Department the authority to waive requirements of the IAA and federal regulations in the interests of justice or to prevent grave physical harm to a child; and
3) PAPs and adoptive parents the authority to act on their own behalf to complete adoption services.

NCFA and other advocacy stakeholders have raised this issue (in-person and in writing) to the Department for a long time without any change or substantive response from the Department.

Additional Comment about the Use of the Word/Term "Counseling"

Counseling – Both the proposed and existing regulations use the term "counseling" multiple times. Since the initial regulations were promulgated, it has become clear that this term can be problematic as the provision of "counseling" is highly regulated by states and ASPs provision of counseling may often be prohibited across state lines. NCFA notes that many ASPs prefer terms such as "consult," "educate," "provide resources/referrals," "coach," "assess," and/or "support" as the context/situation arises.

The Department's Rulemaking Process was Improper

NCFA believes that the Department's failure to follow the required rulemaking process will impede the needed changes that are necessary for improving intercountry adoption service provision. The Department's failure to following rulemaking process casts doubt on the legality of implementing needed regulatory change. Although some of the Department's failures to follow rulemaking problems have already been addressed, the following section will briefly outline the concerns about the following issues:

- The Department Prevents the Public from Receiving Information Relevant to this NPRM
- The Department Declines to Receive Input from the Public, Stakeholders, and Experts on the Impact of Proposed Changes
- The Department's Unified Agenda Report Lacked Key Elements
- Incompatibility with Executive Order 13771
- The Department's Cost Calculations are Mathematically Flawed and Incomplete
- The Department Fails to Consider Risks of Harm
- Failure to Consider Alternative Approaches

The Department Prevents the Public from Receiving Information Relevant to this NPRM

FOIA: The Department has received over a dozen freedom of information act (FOIA) requests related to intercountry adoption, but has not processed/responded to these requests within the required statutory timeframes – including FOIA requests many years beyond the Department's statutory requirement. This refusal by the Department to follow the law has disenfranchised the public from information relevant to these proposed regulations, as the FOIA requests seek information directly related to many of the topics addressed in these proposed regulations, including the work of AEs, complaints, the work of ASPs, FSPs, and the Department's oversight.

Incorrect Contact Info: The Department listed inaccurate information in the NPRM for contacting personnel for further information.

The Department Declines to Receive Input from the Public, Stakeholders, and Experts on the Impact of Proposed Changes

Section 203(a)(2) of The Intercountry Adoption Act of 2000 specifically calls upon the Department to work with others in the creation of regulations: "…*the Secretary shall consider any standards or procedures developed or proposed by, and the views of, individuals and entities with interest and expertise in international adoptions and family social services, including public and private entities with experience in licensing and accrediting adoption agencies*."

In pursuit of such cooperation, NCFA sent written correspondence to the Department on December 18, 2018, asking the designated contact (Carine Rosalia) listed in the Unified Agenda for an opportunity to discuss proposed regulations listed in reference to RIN 1400-AE39. The Department did not accept this opportunity. After the proposed rule was published in the federal register, the Department also declined opportunities to receive feedback or provide requested information about the proposed rule.

The Department's failure to work in collaboration with interested parties with expertise in international adoption, and the Department's failure to properly list contacts, puts the Department's proposed rule in contradistinction to the clearly articulated language of the IAA.

NCFA regrets that we and the public did not have additional time to study and respond in more depth. We requested an extension on the comment period, due to our concern that many ASPs and other stakeholders would have inadequate time to review the extensive changes since the proposed rule was given at the beginning of the holiday season, during an international pandemic, during a tumultuous political timeframe, and while multiple ASPs were pursuing their re-accreditation with the current AE. Unfortunately, the Department declined to extend the comment period.

The Department's Unified Agenda Report Lacked Key Elements

NCFA exercised its right to participate in an EO12866 meeting to provide feedback to the Office of Information and Regulatory Affairs (OIRA). Unfortunately, since the Department's description in the Unified Agenda did not specify many of the topics/regulations found in these proposed regulations, NCFA and other stakeholders were not able to inform OIRA officials on the impact these proposed changes would have. NCFA believes the Department's actions in this regard violates Executive Order 12866 and Executive Order 13777.

Incompatibility with Executive Order 13771

The Department's preamble states that this proposed rule is to be an Executive Order 13771 regulatory action. However, the proposed rule does not meet the requirements of this Executive Order for the following reasons:

- The proposed rule includes regulations that were not listed in the Unified Regulatory Agenda (see Sec. 3 of the EO).
- The proposed rule does not include any data indicating there would be an offset to the increased incremental costs associated with the regulatory changes.
- The proposed rule does not provide the Department's best approximation of the total costs or savings associated with *each* new regulation or repealed regulation.

The Department's Cost Calculations are Mathematically Flawed and Incomplete

The Department's cost estimates are fundamentally flawed:

- The Department has proposed numerous regulatory changes without any correlating expense on ASPs, though ASPs will undoubtedly need to work to achieve compliance.
- The Department's analysis includes errors that result in underestimating expenses.
- The Department misapplies statistical concepts in their reasoning.
- The Department significantly underestimates the time it will take to comply with regulatory change. In many cases, the Department only accounts for time to update a policy, but not for implementation of the ongoing work necessary to maintain compliance.
- The Department's NPRM does not comply with required provisions of the Regulatory Flexibility Act.

The Department provided cost estimates by estimating staff worker rates and providing calculations based on these presumed rates for the number of hours each task will take. The Department clearly articulated how they estimated staff worker rates but gave no evidence as to how they determined the number of hours needed for these tasks. The Department's failure to provide this information to the public in the NPRM is a serious omission. The Department said in the preamble: "The Department requests public comment on the method used to estimate the cost of compliance with the amendments to this regulation…" and in response, NCFA wrote to the designated contacts requesting information about the Department's methodology for estimating work hours in their cost estimation. The Department declined to provide this information. How can the Department expect public comments about the method if their method is withheld from the public?

NCFA notes that the Department's designated AE have actual data that could have been used – and the Department could have engaged in further information collection – to determine more accurate cost calculations. Why did the Department not avail themselves of extant data or seek to obtain data directly from accredited ASPs? Why did the Department not work with accredited ASPs to gauge estimates on the time it would take to achieve compliance?

NCFA surveyed accredited ASPs on both worker rates (actuals) and the ASPs' estimates for time to complete various tasks. Appendix A to this submission includes the questions we asked accredited ASPs and provides both the Department's estimates and the average of ASPs' responses. In Appendix A, it

shows that nearly every time estimate given by the Department (at the highest end of their range) was less than half the amount of time estimated by ASPs.

In justifying cost calculations, the Department's preamble references "the well-known statistical notion of regression toward the mean" but then misapplies this concept in their description. The concept of "regression toward the mean" would only be relevant if there were multiple measures of the same subject – not as a means of understanding distribution amongst a population (in this case, accredited ASPs). The Department's mistaken use of this statistical concept is used to justify and bolster the Department's claim that they are really not having a significant financial impact on small firms.

The Department has a mathematical error which makes it look as though the expenses upon agencies will have less of an impact on ASPs than the Department's actual estimate. In Appendix A, 7.3.1, the Department estimates it will take 20 hours to complete a task, but in their math calculations, the Department provides low end cost estimates for 5 hours and high end cost estimates at 15 hours.

The Department has some time estimates that do not correlate with some ASPs' realities. For example, in Appendix 3.3.2.P.1, the Department has a high-end estimate based on an ASP having 10 foreign programs. This does not account for ASPs that have more than 10 programs. It's an obvious inaccuracy to have high end estimates lower than some ASPs' actuals. The Department and AE (and anyone with internet access) can determine that there are ASPs with more than 10 programs. (There are multiple instances like this in the Department's cost estimates, 3.3.2.P.1 was simply an example.)

The Department's example that small ASPs can "use paper spreadsheet method to keep track of client funds" at a cost of "closer to zero dollars annually" is not accurate. What about the time it takes personnel to utilize, track, and report to an AE using paper spreadsheets? (Please see our note above, encouraging the Department to rescind its statement about tracking expenses on a paper spreadsheet.)

The Department failed to follow established procedures necessary for the Regulatory Flexibility Act by not properly accounting for the impact on small agencies, not including the advice and recommendations of small entities related to these issues, not working with the impacted stakeholders to understand the financial impact on small entities, failing to consider reasonable alternatives that would result in reduced financial impact on agencies, and failing to demonstrate how they made their calculations.

Although the above reasons are more than enough to demonstrate the Department's cost calculations are fundamentally flawed, the single largest problem with the Department's cost calculations is that the Department has failed to account for many costs that would be incurred for ASPs. The Departments' cost calculations indicate they believe the primary changes involve updating policies and training relevant staff. With only a few exceptions, the Department does not account for the on-going work that ASPs personnel will need to provide for maintaining compliance with the proposed changes.

There are many cost calculations missing, including but not limited to:

- The cost of responding to additional complaints and reporting on additional complaints.
- The cost of ongoing, additional record retention, preservation, and disclosure.
- The provision of additional post-placement and post-adoption support services.
- The cost of training members of the Board of Directors regarding new standards.

The Department's estimates indicate disproportionately higher costs as a percentage of overall revenue on small-sized ASPs compared to larger-revenue ASPs. NCFA is concerned for the financial viability of these small firms, as we believe the Department's cost calculations drastically underestimate actual expenses on ASPs, but even if they were accurate, the Department has not indicated or shown they've taken into account the impact of expenses of over $14,000 in the first year of compliance. Given that many ASPs are financially impacted due to the COVID-19 pandemic, and given that there are strict financial reserve requirements on ASPs, it is necessary for the Department to demonstrate that they have considered the impact this will have on ASPs in both the short and long-term. Many ASPs are not in position to simply increase fees on new clients within the timeframe that would be necessary to achieve compliance. The Department offers no indication they have evaluated ASPs' finances to see if they have an additional $14,000 in reserves that can be used to achieve and maintain compliance with the proposed regulations.

The Department Fails to Consider Risks of Harm

Nowhere in the Department's preamble do they show consideration for the impact that making the process more costly, complex, and difficult will have on reducing the number of adoptions, which has the obvious result of reducing the number of orphaned children in need of a family. Additionally, the Department fails to adequately consider how their proposed regulations will lead toward fewer accredited ASPs, reducing the number of service providers throughout the country, harming small nonprofits, and risking availability of service provision in other countries.

An experienced adoption professional, Ellen Warnock, communicated the following to NCFA in response to the Department's proposed regulations:

> *Our agency, Catholic Charities of Baltimore, has been Hague-accredited since 2008 and providing ethical international adoption services since 1979, but we have decided not to seek re-accreditation because we believe the Department has created an environment that is too hostile for agencies. Over the past few years, I regret to see that the Department has made the process more complex, difficult, and costly. Having studied the Department's proposed regulations, it's my professional opinion that this will only compound the cost and complexity of adoption – negatively impacting children in need of families, prospective adoptive parents, and adoption agencies. Absent the current hostile regulatory environment, we would still be assisting families.*

I'm saddened to think of the children that would be prevented from finding families, if the Department's proposed changes happen.

Failure to Consider Alternative Approaches

The Department's proposed regulations fail to demonstrate their obligation to consider alternative policy approaches in the promulgation of regulations. They should have demonstrated that they have "comparison shopped" to determine the best possible regulatory solution, producing the greatest benefit relative to the associated costs and demonstrating they considered and sought to find a cost-effective solution to minimize financial hardship upon impacted businesses. The Department's failure to maximize net benefits in this regard is both unlawful and demonstrates disrespect for the children, families, and businesses impacted. Despite offering scores of regulatory changes, the Department only offers three alternative policy approaches – though even then, none of these three are serious attempts at seeking alternatives. All three follow the same model, proposing no change, proposing a ridiculous change, or finally the Department's proposed solution. For the Department of offer the status quo of "no change" does not demonstrate a true policy alternative in their consideration. So, in fact, for the three areas they have addressed, they've only offered one alternative for each and all three are strawman arguments, not serious policy considerations.

For example, the Department's alternative policy solution for greater fee transparency is to, "*Create a draconian list of detailed fee information linked to strong sanctions for failure to comply*." Likewise, when offering an alternative policy approach for relative adoptions, the Department suggested an approach where the ASP "*was not required to provide <u>any</u> adoption services in the case*."

The Department could, and should, have considered many different means of fee transparency, including providing data on what past clients have paid, providing information from ASPs' audited financial statements, etc. The same is true for relative adoptions, where the Department chose hyperbolic language instead of serious engagement; in this case, the Department's failure to consider requiring fewer or different (instead of no) adoption services is a clear and simple example of an alternative approach that was not considered.

The vast majority of the proposed regulatory changes have no demonstrated alternative policy considerations, including (but not limited to) no alternative proposals for:

- Procedures for responding to complaints.
- Use of supervised providers.
- Information disclosure.
- Preparation of home studies.
- Outgoing adoptions.
- Compensation requirements.
- Prohibition on foreign supervised provider billing.

- The Department's debarment procedures.
- Etc.

Given that the Department has failed to properly evaluate policy alternatives, the Department is not in compliance with the required rulemaking process.

The Department's Note that Demographics of Adopted Individuals Have Changed

NCFA agrees with the Department that there has been a huge demographic shift in who is being placed for intercountry adoption since the existing regulations were produced in February 2006. In fact, we believe the shift has been even more dramatic than the Department's preamble indicates, with now the vast majority of intercountry adoption placements being children with medical and/or cognitive special needs, over age five years, or part of a larger sibling group. It is now quite rare for a child under two years and without a known special needs condition to be placed for intercountry adoption. NCFA believes this, more than anything, should be driving the changes to the regulatory process, and yet with few and meager exceptions, it is unclear where the Department is connecting this observation to the regulations they have proposed. Instead of focusing on preparing parents for children with special needs, the Department's regulatory changes add significantly more regulatory burden on ASPs' processes, without specific evidence for solving the problems at hand.

Conclusion

With many of the Department's proposed changes being too vague and ambiguous to know the real impact upon ASPs – and the lack of information/data upon which to comment – NCFA is concerned that the public comment period will not allow for useful feedback on the proposed rule. The lack of clarity means that ASPs will also not know how to demonstrate service provision and documentation consistent with the Department's and AEs' expectations. There is insufficient clarity throughout the proposed regulations to make adequate comments – and even less clarity for an ASP who seeks to comply. The stakes are high for getting this right – the lives of children are at stake – and experts agree that intercountry can be a vital means of meeting children's needs.[3]

Regulations should demonstrably improve a field of practice in order to accomplish the overarching goals set forth by the governing legislation. In their current state, on balance, the Department's proposed regulations fail to do that. But NCFA believes that there is significant potential to improve intercountry adoption regulations if the Department implements feedback from and participates in dialogue with experienced practitioners and other individuals with the perspective, knowledge, expertise, and

[3] Palacios, J., Adroher, S., Brodzinsky, D. M., Grotevant, H. D., Johnson, D. E., Juffer, F., Martínez-Mora, L., Muhamedrahimov, R. J., Selwyn, J., Simmonds, J., & Tarren-Sweeney, M. (2019). Adoption in the service of child protection: an international interdisciplinary perspective. *Psychology, Public Policy, and Law*, *25*(2), 57-72, https://doi.org/10.1037/law0000192

experience to help ensure that the goals of the IAA and the Hague Convention on Adoption are achieved.

To this end, NCFA recommends the Department re-propose the rule after working with stakeholders, providing more clarity on the vague/ambiguous sections, fixing mistakes/contradictions, and provide a cost-neutral approach on small-business ASPs. NCFA believes that working with multiple stakeholders, as we have done, will allow the Department to identify and evaluate policy alternatives so that we can ensure we are choosing the best policy options for the furtherance of all involved with an adoption placement. The regulations do need updating and change for improved practice – NCFA commits to working with the Department and other relevant stakeholders to achieve that goal.

Appendix A: The Department's Cost Estimates Examined

The following questions were asked via survey of accredited ASPs. NCFA obtained the names of the agency and individual completing the survey responses to ensure there was not more than one response per accredited ASP.

Question: What is the average hourly rate you pay to your staff for updating agency policies and procedures? (What the proposed regulations call "Social Worker hours")

Department Estimate: $31

Agency Average: $26.23

Question: What is the average hourly rate you pay to staff who revise materials for public, including information on website? (What the proposed regulations refer to as "country program officer/social worker")

Department Estimate: $31

Agency Average: $35.1

Question: What is the average hourly rate you pay to staff who update existing staff training and other internal or external training? (What the proposed regulations call "Training and development specialist")

Department Estimate: $32

Agency Average: $27.5

Question: What is the average hourly rate you pay to individual who will analyze information received for trends and misuse of funds, and/or research and analysis relating to how well the segregation of funds is working? (What the proposed regulations call "Auditor" and "auditing professional")

Department Estimate: $38

Agency Average: $50.11

Question: What is the average hourly rate you pay for an individual to collect submitted financial records, analyze them, and archive them? (What the proposed regulations refer to as "Financial Clerk")

Department Estimate: $21

Agency Average: $24.94

Question: What is the average hourly rate you pay for adapting financial management practices/systems to segregate client funds? (what the proposed regulations refer to as "Financial Manager")

Department Estimate: $71

Agency Average: $27.33

Question: What is the average hourly rate you pay for staff to keep funds not yet expended segregated from operating funds? (what the proposed regulations refer to as "Bookkeeping/accounting/auditing financial clerical staff")

Department Estimate: $21

Agency Average: $26.38

Question: What is the average hourly rate you pay for "chief executive time" (for a task such as "reviewing the details and direction of the ASP's child welfare program").

Department Estimate: $97

Agency Average: $40.58

Question: Please estimate the number of hours it will take for an Auditor to develop scope of information collected and the process of analyzing the information in the first year only § 96.36(b). (Appendix A, 4.3.2.P1)

Department Estimate: 1-10 hours

Agency Average: 34 hours (note: approximately half of respondents left this blank)

Question: Please estimate the number of hours per month it will take for a financial clerk (or similar position) to maintain running updates on fees schedules across various programs, including surveying PAPs on actual cost experiences to comply with §96.40. (Appendix A, 6.3.2)

Department Estimate: 5-10 hours

Agency Average: 22.54 hours

Question: Please estimate the number of hours for social worker staff (or similar position) to revise ASP information sheets, website information to comply with proposed changes to §96.40(c)(4). (Appendix A, 7.3.1)

Department Estimate: 5-15 hours

Agency Average: 36.81 hours

Question: Please estimate the number of hours for agency's training and development staff (or similar position) to update internal training and develop training for foreign supervised providers and others as relevant to compliance with proposed changes to §96.40(c)(6). (Appendix A, 8.3.2)

Department Estimate: 1-15 hours

Agency Average: 31.75 hours

Question: Please estimate the number of hours for Financial Manager (or similar position) to adapt ASP management practices to segregate client funds not yet expended from ASP operating and reserve funds, if the ASP does not already have such a process - to be in compliance with proposed changes to §96.40(f). (Appendix A, 9.3.1)

Department Estimate: 1-10 hours

Agency Average: 16.22 hours

Question: Please estimate the number of hours it will take training and development specialist to update internal and external training to be in compliance with the proposed changes to §96.50. (Appendix A, 10.3.2)

Department Estimate: 10-25 hours

Agency Average: 30.27 hours

Question: Please estimate the number of hours it will take social work staff to update policies and procedures to be in compliance with the proposed changes to §96.51. (Appendix A, 11.3.1)

Department Estimate: 1-10 hours

Agency Average: 35.46 hours

Question: Please estimate the number of hours it will take social work staff to update policies and procedures to be in compliance with the proposed changes to §96.41. (Appendix A, 12.3.1)

Department Estimate: 1-10 hours

Agency Average: 33.83 hours

Question: Please estimate the number of hours it will take country program officer/social worker to update materials for the public, including the website and updating existing staff training to reflect the new record retention in compliance with the proposed changes to §96.32(c). (Appendix A, 15.3.2)

Department Estimate: 2-20 hours

Agency Average: 46.4 hours (approximately 1/3 of respondents left this blank