

individuals or agencies that offer or provide adoption services in connection with a Convention adoption without either (a) becoming accredited or approved in accordance with these regulations, or (b) acting under the supervision and responsibility of an accredited agency or approved person are subject to civil money penalties of \$50,000 for the first violation and \$100,000 for succeeding violations under section 404(a) of the IAA. Under section 404(c), the knowing or willful failure to become accredited or approved or to act under supervision and responsibility, as required, carries a penalty of imprisonment for not more than five years or fines of up to \$250,000, or both. In promulgating these regulations, the Department believes that it is critical to alert all agencies and persons that the failure to obtain accreditation or approval or to act under the supervision and responsibility of an accredited agency or approved person could cause the imposition of the IAA's severe civil or criminal penalties. Subpart C of the regulations, which contains the rules on who must meet the accreditation and approval requirements and incorporates the narrow statutory exemptions from accreditation or approval, should be consulted and carefully studied for guidance.

C. Distinction Between "Agency" and "Person"

The Convention effectively differentiates between non-profit bodies and for-profit entities and individuals. The Convention favors the use of non-profit bodies, and Article 11 of the Convention requires that "accredited" bodies "pursue only non-profit objectives"—a requirement incorporated into these regulations by reference to non-profit tax treatment under section 501(c)(3) of the Internal Revenue Code or relevant State law. Notwithstanding this preference, the Convention in Article 22 also permits other bodies and persons—herein referred to as "for-profits"—to provide Convention adoption services. Persons (for-profit entities and individuals) must, however, meet the requirements of Article 22(2) of the Convention, which are not applicable to non-profit agencies. Article 22(2) requires persons to have the integrity, professional competence, experience, accountability, ethical standards, and training or experience to work in the field of intercountry adoption. Moreover, Article 22(4) of the Convention explicitly allows party states to declare that the adoption of their children may take place only if the functions of Central Authorities are performed by public authorities or

accredited agencies (effectively, for U.S. purposes, private non-profits) and not by approved persons (effectively, for U.S. purposes, "for-profits").

These regulations reflect the Convention distinction by utilizing different terms to describe non-profit agencies versus for-profit entities and individuals. Under these regulations, agency means a private, non-profit organization licensed to provide adoption services in at least one State. It does not include individuals or for-profit entities. Person means an individual or for-profit entity (including a corporation, company, association, firm, partnership, society, or joint stock company) providing adoption services—consistent with the definition in section 3(14) of the IAA. To be consistent with the Convention's requirement that only non-profit agencies be accredited, the IAA provides for the accreditation solely of agencies and uses a different term—approval—to describe the status of individuals and for-profit entities. (See Pub. L. 106–279, section 203). Therefore, under the IAA's rubric, agencies are eligible to seek accreditation while persons (individuals and for-profit entities) are eligible only to seek approval.

The Department has made every attempt within the given statutory framework to ensure that persons adhere to the same requirements as non-profit agencies. Thus, the standards in subpart F of part 96 (with limited exceptions to recognize the special circumstances of private individuals) apply both to agencies seeking accreditation and to persons seeking approval. Sections 96.31 and 96.35 also contain provisions unique to persons seeking approval. They mainly provide standards tailored to the different corporate structures used by such persons or contain more rigorous provisions than those applicable to agencies in light of the additional Article 22(2) provisions on professional competence that apply only to persons. Also, the Convention allows only accredited agencies, not persons, to assume responsibility for preparing a home study or a child background study. The proposed rules, therefore, provide that, when an approved person or a non-accredited agency, rather than an accredited agency, completes a home study or child background study, it must have the home study or child background study approved by an accredited agency. The approval requirement is included so as to comply with Article 22(5) of the Convention which requires that home studies and child background studies be prepared

under the responsibility of accredited agencies or public authorities.

Although the IAA allows approved persons to provide adoption services in Convention cases, some State laws do not. These regulations are not intended to affect any State laws that may prohibit such persons—either individuals or for-profit entities—from providing adoption services in a particular State. If a State does not allow persons (whether the prohibition is against individuals or for-profits or both) to operate in a particular State, these regulations do not in any way preempt such State law. The Department welcomes comments on the interplay between State law and the IAA provision for approval of persons. The Department's goal is to follow the IAA and allow persons to be approved without preempting State laws that may prohibit individuals or for-profit entities from providing adoption services in a particular State.

Persons seeking approval should note that these regulations require them to be licensed or otherwise authorized to provide adoption services in at least one State. If in the future all States were to prohibit for-profit entities from providing adoption services, then no for-profits could become approved under these regulations. Similarly, if in the future all States prohibited individuals from providing adoption services, then no individuals could become approved under these regulations.

According to Article 22(4) of the Convention, Convention countries may declare that adoptions of children habitually resident in their territory may take place only if the functions of the Central Authority in the receiving country are performed by public authorities or by non-profit accredited bodies. Thus, individual Convention countries may refuse altogether to work with approved persons and may be willing to work only with accredited agencies.

D. Federalism Issues

The Convention and the IAA for the first time require Federal regulation of agencies and persons for purposes of intercountry adoptions. Historically, State law alone regulated agencies and persons. The IAA contains a specific provision disfavoring preemption of State law unless State law provisions are inconsistent with the Convention or the IAA. (Pub. L. 106–279, section 503(a)). The Department throughout the regulations has been careful to defer to State law, especially in the case of U.S. emigrating children whose adoptions will continue to be covered mainly by