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I. Legal Authority

The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, S. Treaty Doc. 105-51 (1998); 1870 U.N.T.S. 167 (Reg. No. 31922 (1993)), 32 I.L.M. 1134 (1993); Intercountry Adoption Act of 2000, 42 U.S.C. 14901-14954.

II. Preservation of Convention Records

The Convention governs intercountry adoptions between countries that are parties to the Convention. The IAA provides for U.S. implementation of the Convention. The Convention's main purpose is to establish safeguards to ensure that an intercountry adoption takes place in the best interests of the child. The IAA's purpose is primarily to ensure that adoptions between the United States and other countries party to the Convention take place in accordance with the Convention. Together, the Convention and the IAA seek to protect the rights of children, birth families, and adoptive parents involved in adoptions (or prospective adoptions) covered by the Convention. Another purpose of the IAA is to improve the ability of the Federal government to assist United States citizens seeking to adopt children from Convention countries and residents of Convention countries seeking to adopt children from the United States. More detailed information about the Convention and the IAA may be found in the Supplementary Information published in the proposed rules for part 96 of title 22 of the Code of Federal Regulations (CFR), which are published today as well in the **Federal Register**.

Both the Convention and the IAA contain specific provisions requiring that competent authorities preserve records concerning a child's intercountry adoption. The purpose of this proposed regulation is to enable the Department and DHS (the successor agency to the Immigration and Naturalization Service (INS)) to comply with the Convention and the IAA

requirements for the preservation of Convention records. (The Secretary of DHS will assume certain functions vested in the Attorney General and the INS by the IAA relating to the Immigration and Naturalization Service's responsibilities, pursuant to the Homeland Security Act of 2002, Public Law 107-296, Nov. 25, 2002, as amended by section 105 of the Homeland Security Act Amendments of 2003. (See Consolidated Appropriations Resolution, Public Law 108-7, Feb. 20, 2003)). This Preamble uses terms, such as the Secretary, the Department of Homeland Security, Case Registry, Convention, Convention country, adoption record, agency, person, and public body that are defined in § 96.2 of the proposed regulations for part 96 of title 22 of the CFR, which as noted are also being published on the same day as this proposed rule in the **Federal Register**. This proposed rule defines Convention records, and carries forward for the convenience of the public the same definition of Convention contained in the proposed regulations for part 96.

Article 30 of the Convention generally requires that each Convention country ensure that information concerning any child whose adoption is subject to the Convention be preserved. The IAA mandates that the Department issue regulations to comply with the Convention's requirement that a child's records be preserved. Specifically, section 401(a) of the IAA requires that the Department, in consultation with INS (now part of DHS), issue regulations that establish procedures and requirements for the preservation of Convention records. As required by the IAA, the Department has consulted with DHS to prepare this regulation.

The term Convention record is defined in these proposed regulations as including only records pertaining to adoptions under the Convention that are generated or received by two Federal agencies—the Department or DHS. The term Convention record does not include records generated or received by adoption service providers or State public bodies. The definition for Convention record in part 98 thus mirrors the IAA definition for the same term.

The Convention also imposes an obligation for the preservation of adoption records. The term adoption record, rather than the term Convention record, is used to cover records generated or received by agencies or persons or State public bodies. The term adoption record is defined in § 96.2 of the proposed regulations for part 96 of title 22 of the CFR. The proposed

regulations on the preservation of adoption records—that is, records held by non-Federal entities, including agencies, persons, and State public bodies—are contained in the proposed regulations for part 96 of title 22 of the CFR. The retention of such records is not addressed by this proposed new rule for part 98. Nor does this proposed regulation address access to adoption records. State law will continue, entirely unaffected by part 98, to govern access to adoption records held by agencies, persons, or public bodies including State courts as provided for by section 401(c) of the IAA.¹

As required by section 401(a) of the IAA, the proposed regulations in part 98 address the preservation of Convention records generated or received by the Department and DHS. The proposed regulations are not required to, and do not, address access by birth parents, adoptive parents, or adoptees to Convention records. Access to Convention records retained by the Department or DHS will be controlled by Federal law governing access to records held by Federal agencies, particularly by the Freedom of Information of Act (5 U.S.C. 552 (1966)) and the Privacy Act (5 U.S.C. 552(a) (1974)).

Because the Convention is not yet in force for the United States, no records currently held by the Federal government pertain to a Convention adoption. Once the Convention has entered into force for the United States, there will be Convention records. A Convention record will include DHS's "A" files and may include other records held by the Department and DHS, including entries in the planned Case Registry.

¹ The report of the Senate Committee on Foreign Relations, S. Rep. No. 106-276 (2000) at page 11 contains a statement with regard to section 401(c) of the IAA that includes the following:

[T]he Committee does not intend this legislation to affect the scope of access to adoption records under existing Federal or State law. Under current law, Federal records that contain information regarding intercountry adoptions are subject to Federal laws regarding disclosure and access to information maintained by the Federal Government (primarily the Privacy Act and the Freedom of Information Act). Records regarding intercountry adoptions held by States or in the files of adoption agencies are governed by any State law that may apply to such records. * * * Under section 401, Federal records will continue to be governed by applicable Federal law, while non-Federal records, including records of adoption proceedings conducted in the United States, will continue to be governed by applicable State law. No State is required by this provision to change its laws regarding access to, and disclosure of, adoption records.

The report of the House Committee on International Relations, H.R. Rep. No. 106-691(2000) at page 30, contains almost identical language relating to section 401(c).