



**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Administration for Community Living**

**45 CFR Parts 1321, 1322, 1323, and 1324**

**RIN: 0985-AA17**

**Older Americans Act: Grants to State and Community Programs on Aging; Grants to Indian Tribes and Native Hawaiian Grantees for Supportive, Nutrition, and Caregiver Services; Grants for Supportive and Nutritional Services to Older Hawaiian Natives; and Allotments for Vulnerable Elder Rights Protection Activities**

**AGENCY:** Administration for Community Living (ACL), Department of Health and Human Services (HHS or “the Department”).

**ACTION:** Final rule.

**SUMMARY:** ACL is issuing this final rule to modernize the implementing regulations of the Older Americans Act of 1965 (“the Act” or OAA). These changes advance the policy goals of the Act as articulated by Congress, including equity in service delivery, accountability for funds expended, and clarity of administration for ACL and its grantees. This final rule ultimately facilitates improved service delivery and enhanced benefits for OAA participants, particularly those in greatest economic need and greatest social need consistent with the statute.

**DATES:** *Effective date:* This final rule is effective on [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

*Compliance date:* October 1, 2025.

**FOR FURTHER INFORMATION CONTACT:** Amy Wiatr-Rodriguez, Director of Regional Operations, Administration for Community Living, Department of Health and Human Services, 330 C Street SW, Washington, DC 20201. Email: [amy.wiatr-rodriquez@acl.hhs.gov](mailto:amy.wiatr-rodriquez@acl.hhs.gov), Telephone: (312) 938-9858. Alice Kelsey, Deputy Director for the Administration on Aging, Administration for Community Living, Department of Health and Human Services, 330 C Street SW,

Washington, DC 20201. Email: [alice.kelsey@acl.hhs.gov](mailto:alice.kelsey@acl.hhs.gov), Telephone: (202) 795-7342.

**Assistance to Individuals with Disabilities in Reviewing the Rulemaking Record:** Upon request, the Department will provide an accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for the regulations. To schedule an appointment for this type of accommodation or auxiliary aid, please call (312) 938-9858 or email [amy.wiatr-rodriguez@acl.hhs.gov](mailto:amy.wiatr-rodriguez@acl.hhs.gov).

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#### **I. Background**

Congress passed the OAA in 1965 to expand and enhance community social services for older persons.<sup>1</sup> The original legislation established authority for grants to State agencies for community planning and social services, research and development projects, and personnel training in the field of aging. Subsequent reauthorizations expanded and enhanced the reach of the Act, including through the authorization of the Long-Term Care Ombudsman Program (LTCOP or Ombudsman program). The Act created the Administration on Aging (AoA) within the Department of Health, Education and Welfare, now the Department of Health and Human Services (HHS), to serve as the principal agency designated to carry out the provisions of the OAA and as the Federal focal point on matters concerning older persons.<sup>2</sup> It designated a Commissioner on Aging, now Assistant Secretary for Aging, to lead the activities of AoA and administer the OAA.<sup>3</sup> Since 2012, AoA has been housed in ACL.<sup>4</sup>

Title III of the OAA authorizes grants to State agencies on aging (State agencies), who in turn provide funding to area agencies on aging (AAAs or area agencies) to serve as advocates on behalf of older persons and create comprehensive and coordinated community-based continuums of services and supports.<sup>5</sup> In 2022 the national aging network included 56 State agencies (including the District of Columbia and five Territories), over 600 AAAs, and over 20,000 local service providers.<sup>6</sup>

Title III authorizes the largest OAA programs by population served and Federal funds expended as administered by ACL. These include supportive, nutrition, evidence-based disease

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<sup>1</sup> Pub. L. 89–73, 79 Stat. 218 (1965). 42 U.S.C. 3001 *et. seq.*

<sup>2</sup> Section 201 of the OAA; 42 U.S.C. 3011.

<sup>3</sup> Section 202 of the OAA; 42 U.S.C. 3012. Title V of the OAA added in the 1978 reauthorization is administered by the Dep't of Labor.

<sup>4</sup> 80 FR 31389, 31391 (June 2, 2015).

<sup>5</sup> Title III of the OAA; 42 U.S.C. 3021 *et. seq.*

<sup>6</sup> Cong. Research Serv., R43414, Older Americans Act: Overview and Funding (May 17, 2023), <https://crsreports.congress.gov/product/pdf/R/R43414>.



prevention and health promotion, caregiver, legal, and other services.<sup>7</sup> Title III programs served 10.1 million older persons in 2020 (the most recent year for which data is available).<sup>8</sup> Title III accounted for nearly three quarters of the of the \$2.378 billion OAA 2023 budget and funding for these programs is based on a statutory formula that determines yearly allocations to individual Territories and States.<sup>9</sup>

Title III services are available to persons aged 60 and older and family caregivers; however, they are prioritized to serve those with the greatest economic need and greatest social need, particularly low-income minority older individuals, older persons with limited English proficiency (LEP), older persons residing in rural areas, and older persons with disabilities.<sup>10</sup>

First included as a part of the 1978 reauthorization of the Act, Title VI authorizes funds for nutrition, supportive, and caregiver services to older Native Americans. The purpose of Title VI programs is to support the independence and well-being of Tribal elders and caregivers living in their communities consistent with locally determined needs. ACL awards funding directly to Federally recognized Tribal organizations, including Native Alaskan organizations, and a designated not-for-profit group representing Native Hawaiians. To be eligible for funding, a Tribal organization or Hawaiian Native grantee must represent at least 50 Native Americans aged 60 and older who reside in the service area. In FY2023, grants were awarded to 290 Tribal organizations representing approximately 400 Indian Tribes and Alaskan Native entities and one organization serving Native Hawaiian elders.<sup>11</sup>

Title VII authorizes the Ombudsman program, programs for elder abuse, neglect, and exploitation prevention, and a requirement for State agencies to provide a State Legal Assistance

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<sup>7</sup> Title III of the OAA; 42 U.S.C. 3021 *et seq.*

<sup>8</sup>Admin. for Cmty. Living, Overview of Older Americans Act Title III, VI, and VII Programs: 2020 Summary of Highlights and Accomplishments, p. III-2 (2022), [https://acl.gov/sites/default/files/news%202022-09/2020%20OAA%20Report\\_Complete%20Product%209-1-22\\_508.pdf](https://acl.gov/sites/default/files/news%202022-09/2020%20OAA%20Report_Complete%20Product%209-1-22_508.pdf).

<sup>9</sup> Admin. For Cmty. Living, FY 2022 OAA Title III Annual Grant Awards (without transfers) (Apr. 27, 2022), <https://acl.gov/sites/default/files/about-acl/2022-05/Title%20III-2022.pdf>.

<sup>10</sup> Title III of the OAA; 42 U.S.C. 3021 *et seq.*

<sup>11</sup>U.S. Dep't of Health & Human Servs., Tracking Accountability in Government Grants System (TAGGS), <https://taggs.hhs.gov> (last visited Oct. 13, 2023).

Developer.<sup>12</sup> States' Ombudsman programs investigate and resolve complaints related to the health, safety, welfare, and rights of individuals who live in long-term care facilities. Begun in 1972 as a demonstration program, Ombudsman programs today exist in all States, the District of Columbia, Puerto Rico, and Guam, under the authorization of the Act.<sup>13</sup> These States and Territories have an Office of the State Long-Term Care Ombudsman (the Office), headed by a full-time State Long-Term Care Ombudsman (the Ombudsman). In FY 2022, the program had a budget of \$19.9 million.<sup>14</sup> That same year, Ombudsman fielded 182,000 complaints and provided more than 569,000 instances of information and assistance to individuals and long-term care facilities.<sup>15</sup> Title VII also authorizes grants to State agencies for program activities aimed at preventing and remedying elder abuse, neglect, and exploitation.

### **A. Statutory and Regulatory History**

This final rule is published under the authority granted to the Assistant Secretary for Aging by the Older Americans Act of 1965, Pub. L. No. 89–73, 79 Stat. 218 (1965), as amended through the Supporting Older Americans Act of 2020, Pub. L. No. 116–131, 134 Stat. 240 (2020), sections 201(e)(3), 305(a)(1), 306(d)(1), 307(a), 307(d)(3), 331(a), 614(a), 624(a) and 712–713 (42 U.S.C. 3011(e), 42 U.S.C. 3025, 42 U.S.C. 3026(d), 42 U.S.C. 3027(a), 42 U.S.C. 3027(a), 3027(d), 42 U.S.C. 3057e, 42 U.S.C. 3057j, and 3058g–3058h, respectively). These provisions authorize the Assistant Secretary for Aging to prescribe regulations regarding designation of State agency activities; development and approval of State plans on aging; and funding for supportive, nutrition, evidence-based disease prevention and health promotion, family caregiver support, and legal services under Title III of the Act; funding for Indian Tribes, Tribal organizations, and a Hawaiian Native grantee to serve Hawaiian Native and Tribal elders

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<sup>12</sup> Title VII of the OAA; 42 U.S.C. 3058 *et seq.*

<sup>13</sup> Cong. Research Serv., R43414, Older Americans Act: Overview and Funding (May 17, 2023), <https://crsreports.congress.gov/product/pdf/R/R43414>.

<sup>14</sup> Admin. For Cmty. Living, Fiscal Year 2023 Justification of Estimates for Appropriations Committees, 132, <https://acl.gov/about-acl/budget>.

<sup>15</sup> *National Ombudsman Reporting System (NORS), Data at a Glance*, Admin. for Cmty. Living (last visited Jan. 18, 2023).

and family caregivers under Title VI of the Act; and allotments for vulnerable elder rights protection activities, including the Long-Term Care Ombudsman Program under Title VII of the Act.

The OAA was passed in 1965 and vested authority for carrying out the purposes of the Act, including through the issuance of regulations, in the Assistant Secretary for Aging (then the Commissioner for Aging). Since its initial passage, the OAA has been amended a total of eighteen times. Regulations for programs authorized under the Act date from 1988.<sup>16</sup> Title III, except regarding the Ombudsman program, and Title VI implementing regulations have not been revised since that time, while Title VII regulations 45 CFR Part 1324 *Allotments for Vulnerable Elder Rights Protection Activities, subpart A* and portions of 45 CFR Part 1321— *Grants to State and Community Programs on Aging* regarding the Ombudsman program were published in 2015.<sup>17</sup>

There have been substantial statutory changes since 1988, as detailed by the Congressional Research Service in several summary publications.<sup>18</sup> *Title VII: State Long-Term Care Ombudsman and Vulnerable Elder Rights Protection* was added to the Act by the 1992 amendments (Pub. L. 102-375; 42 U.S.C. 3058g-3058i), which consolidated and expanded existing programs focused on protecting the rights of older persons. Title VII incorporated separate authorizations of appropriations for the Ombudsman program; the program for the prevention of elder abuse, neglect, and exploitation; elder rights and legal assistance development; and outreach, counseling, and assistance for insurance and public benefit programs. The 1992 amendments also strengthened requirements related to focusing Title III funding and services on populations in greatest need with particular attention to older low-income minority individuals. Other elements of the 1992 amendments authorized programs for

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<sup>16</sup> 53 FR 33758 (Aug. 31, 1988).

<sup>17</sup> 80 FR 7704 (Feb. 11, 2015).

<sup>18</sup> Cong. Research Serv., R46439, *Older Americans Act: A 2020 Reauthorization* (July 1, 2020), <https://crsreports.congress.gov/product/pdf/R/R46439>; Cong. Research Serv., R43414, *Older Americans Act: Overview and Funding* (May 17, 2023), <https://crsreports.congress.gov/product/pdf/R/R43414>.

assistance to caregivers of the frail elderly, clarified the role of Title III agencies in working with the private sector, and required improvements in AoA data collection.

The National Family Caregiver Support Program under Title III and Native American Caregiver Support Program under Title VI were authorized by the 2000 amendments (Pub. L. 106-501), which also permitted State agencies to impose cost-sharing, subject to limitations, for some Title III services certain older persons receive while retaining authority for voluntary contributions toward the costs of services. The 2006 amendments (Pub. L. 109-365) authorized the Assistant Secretary for Aging to designate an individual within AoA to be responsible for prevention of elder abuse, neglect, and exploitation and to coordinate Federal elder justice activities. In addition, the 2006 amendments expanded the reach of Aging and Disability Resource Centers (ADRCs), brought increased attention to services and supports related to mental health and mental disorders, required State agencies to conduct increased planning efforts related to the growing number of older people in coming decades, and focused attention on the needs of older people with LEP and those at risk of institutional placement.

The 2016 amendments (Pub. L. 114-144) provided additional flexibility to State agencies, AAAs, and social services providers in addressing the modernization of senior centers, falls prevention, and behavioral health screening, and codified existing practices, such as requiring “evidence-based” disease prevention and health promotion services. For the Ombudsman program, they clarified conflicts of interest (COI) provisions, strengthened confidentiality and Ombudsman training requirements, and improved resident access to representatives of the Office. They addressed coordination among ADRCs and other home and community-based service (HCBS) organizations providing information and referrals.

The Supporting Older Americans Act of 2020 (Pub. L. 116-131) added new definitions, including *person-centered* and *trauma-informed*. The legislation amended the Act to address a range of disease prevention and health promotion activities, such as chronic disease self-management and falls prevention, as well as address the negative effects of social isolation

among older individuals. Congress focused on other reauthorization issues as well, including changes to nutrition services programs and to programs that provide support to family caregivers.

We issued a Request for Information (RFI) on May 6, 2022 seeking input from the aging network, Indian Tribes, States, and Territories on challenges they face administering services, as well as feedback from individuals and other interested parties on experiences with services, providers, and programs under the Act.<sup>19</sup> Most of the comments we received focused on: equitably serving older adults and family caregivers from underserved and marginalized communities, the Ombudsman program, area plans on aging, and flexibilities within the nutrition and other programs.

On June 16, 2023, the *Federal Register* published a notice of proposed rulemaking (NPRM) regarding OAA Titles III, VI, and VII (88 FR 39568). Through this NPRM, ACL sought feedback regarding ACL's proposal to modernize the implementing regulations of the OAA, which have not been substantially altered since their promulgation in 1988. The NPRM addressed supportive, nutrition, evidence-based disease prevention and health promotion, caregiver, legal, long-term care ombudsman, and other services provided by State agencies, Tribal organizations and a Hawaiian Native grantee, AAAs, and service providers under the OAA. The 60-day comment period for the NPRM closed on August 15, 2023.

## **B. Overview of the Final Rule**

This final rule adopts the same structure and framework as the proposed rule. Part 1321 addresses programs authorized under Title III of the Act and includes subpart A (basis, purpose, and definitions), subpart B (State agency responsibilities), subpart C (area agency responsibilities), subpart D (service requirements), and subpart E (emergency and disaster requirements). Part 1322 addresses programs authorized under Title VI of the Act and includes subpart A (basis, purpose, and definitions), subpart B (application), subpart C (service requirements), and subpart D (emergency and disaster requirements). Part 1324 includes

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<sup>19</sup> 87 FR 27160 (May 6, 2022); section 2013A of the OAA, 42 U.S.C. 3013a.

programs authorized under Title VII of the Act and includes subpart A (State Long-Term Care Ombudsman Program), subpart B (programs for prevention of elder abuse, neglect, and exploitation), and subpart C (State legal assistance development).

ACL has made changes to several of the proposed rule's provisions based on public comments. Our final rule is a direct response to feedback from interested parties and reflects the evolving needs of both grantees and OAA program participants. In response to robust comment, we have clarified the flexibilities available during a major disaster, increased the amount of funds under Title III, part C-1 of the Act that may be used for shelf-stable, pick-up, carry-out, drive-through, or similar meals, and provided more information about implementing the definition of “greatest social need” in State and area plans, among other clarifications.

### **C. Severability**

To the extent that any portion of the requirements arising from the final rule is declared invalid by a court, ACL intends for all other parts of the final rule that are capable of operating in the absence of the specific portion that has been invalidated to remain in effect. While our expectation is that all parts of the final rule that are operable in such an environment would remain in effect, ACL will assess at that time whether further rulemaking is necessary to amend any provisions subsequent to any holding that ACL exceeded its discretion, or the provisions are inconsistent with the OAA, or are vacated or enjoined on any other basis.

## **II. Provisions of the Final Rule and Analysis and Responses to Public Comments**

We received 780 public comments from individuals and organizations, including State agencies, Tribes and Tribal organizations, AAAs, service providers, Ombudsman programs, advocacy groups, and private citizens. We thank commenters for their consideration of the proposed rule and appreciate all comments received. We particularly are grateful for the OAA program participants who wrote to share their experience of OAA services and their thoughts on what they enjoy and would like to see in the future regarding OAA programming. In the subsequent sections, we summarize the rule’s provisions and the public comments received, and

we provide our response.

## **General Comments on the NPRM**

### ***General support***

*Comment:* Commenters overwhelmingly supported most provisions in the proposed rule. Many commenters expressed general support for our updates to modernize the regulations. Other commenters appreciated the flexibilities in the rule and noted that they would like to work with their State and local leaders to identify other creative approaches to expanding services to older adults. A significant number of commenters requested additional funds to provide services under the Act.

*Response:* ACL appreciates these comments. We encourage collaboration at the State and local levels to identify solutions that are responsive to the needs and resources in local communities. Requests for funding are outside the scope of this rule.

### ***Technical corrections; recommendations for sub-regulatory guidance***

*Comment:* A number of commenters identified technical corrections, including citation errors and a misnumbered preamble provision. Commenters also provided suggestions and raised questions that could be addressed in future sub-regulatory guidance on a variety of topics.

*Response:* We appreciate these comments and have made the recommended technical corrections. We have also clarified the regulation text to remove references to sub-regulatory guidance that has not yet been issued, and we have revised the regulation title to accurately reflect program titles. We look forward to providing technical assistance and guidance on a number of topics subsequent to promulgation of the final rule.

### ***LGBTQI+ older adults and older adults living with HIV***

*Comment:* A significant number of comments focused on the importance of serving those in greatest economic need and greatest social need, including older adults and family caregivers who are lesbian, gay, bisexual, transgender, queer, intersex and/or have other sexual orientations, gender identities and expressions, and sex characteristics (LGBTQI+). Many commenters

expressed support overall, and for specific provisions, concerning LGBTQI+ older adults and older adults with HIV. Specifically, commenters voiced support for full legal protections, protection of rights and privacy, and protection from discrimination when accessing services or meeting with providers. Commenters also supported quality, inclusive, and equitable legislation, regulations, aging policies, programs, services, and initiatives. Many commenters also suggested that staff and professionals working with older adults be trained in sensitivity, cultural competency, and needs specific to LGBTQI+ older adults and older adults with HIV. Specifically, commenters expressed the importance of ensuring that providers foster a welcoming, safe, and respectful environment. Several commenters noted the importance of considering other noneconomic factors, such as geographic location (e.g., rural), disabilities, ethnicity, and the intersectional challenges of multiply marginalized populations. Several commenters noted the specific concerns of this community related to services funded under Title VII of the Act, such as the Ombudsman program and prevention of elder abuse, neglect, and exploitation.

A few commenters specifically recommended engaging State agencies, AAAs, and service providers in providing funding, outreach, and services specific to older adults with HIV. Additionally, a few commenters noted the importance of hiring LGBTQI+ service provider employees and professionals. Several commenters referenced support for and access to high quality and culturally competent medical and mental health care. Some commenters noted the importance of recognition of and respect for partners, friends, and families. One commenter suggested requiring inclusive language and graphics in marketing materials as a matter of compliance. One commenter observed that LGBTQI+ individuals and people with HIV have a greater need to overcome isolation. Several commenters expressed concerns about finding affordable senior supported living options.

*Response:* ACL appreciates these comments expressing concern for older adults and family caregivers who are LGBTQI+, as well as older adults and family caregivers with HIV. A



majority of these comments are beyond the scope of this regulation because they do not relate to the substance of the rule, and in some cases address areas that are outside of ACL's statutory authority. However, we appreciate the numerous comments in support of these communities and believe the provisions at § 1321.3 (defining "*Greatest social need*"), § 1321.11 (*Advocacy responsibilities*), § 1321.27 (*Content of State plan*), § 1321.61 (*Advocacy responsibilities of the area agency*), § 1321.65 (*Submission of an area plan and plan amendments to the State agency for approval*), § 1321.75 (*Confidentiality and disclosure of information*), and § 1321.93 (*Legal assistance*) will improve services to these populations.

ACL funds the National Resource Center on LGBTQ+ Aging (<https://www.lgbtagingcenter.org>), which provides training and technical assistance to aging services providers, including those funded under the OAA, in their work to support and include LGBTQI+ older adults and family caregivers. In a partnership with the Office of the Assistant Secretary for Health, ACL has worked to support the development of innovative efforts that improve health outcomes and quality of life for people aging with HIV and long-term survivors in both rural and urban areas, particularly among underserved communities, including on the basis of race, ethnicity, and LGBTQI+ status.<sup>20</sup> We expect to build on these efforts and anticipate providing training and technical assistance following promulgation of the final rule to support effective implementation of these provisions.

### ***Collaboration between State agencies and area agencies***

*Comment:* ACL received many comments expressing concern that the rule allows State agencies to exert too much control in a variety of areas (e.g., which programs AAAs implement under the Act, how AAAs implement programs, minimum expenditures for certain services, prioritization of services, voluntary contributions). Commenters also expressed concern that the extent of control afforded to State agencies by the rule will stifle AAAs' abilities to tailor

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<sup>20</sup> *HHS Selects Phase 2 Winners of National HIV and Aging Challenges*, HIV.gov, <https://www.hiv.gov/blog/hhs-selects-phase-2-winners-of-national-hiv-and-aging-challenges/> (last updated Sept. 21, 2023).

programs to the needs of their respective planning and service areas (PSAs).

*Response:* Section 305 of the Act requires designated State agencies to “[...] be primarily responsible for the planning, policy development, administration, coordination, priority setting, and evaluation of all State activities related to the objectives of this Act[.]”<sup>21</sup> As the grantees under the Act, State agencies are responsible to ACL for monitoring the compliance of activities initiated under Title III with all applicable requirements to ensure grant awards are used for authorized purposes and are in compliance with Federal law. In light of these responsibilities, we believe the rule affords State agencies appropriate authority over the administration and implementation of the Act within their states.

Notwithstanding these State agency obligations, AAAs have a critical role in the development of State agency policies and procedures. Section 1321.9(a) requires that the policies and procedures be developed by State agencies in consultation with AAAs, program participants, and other appropriate parties in the State. As set forth in § 1321.61 (*Advocacy responsibilities of the area agency*), AAAs also have an obligation to monitor, evaluate, and comment on policies, programs, hearings, levies, and community actions which affect older persons and family caregivers; this includes regarding the policies and procedures developed and implemented by State agencies. Further, except for the Ombudsman program as set forth in 45 CFR part 1324, subpart A and where otherwise indicated, the State agency policies may allow for such policies and procedures to be developed at the AAA level. Accordingly, the final rule provides tools for State and area agencies to work in tandem with one another and to address the concerns raised by these comments.

The OAA is clear that State agencies and AAAs should work together to achieve the mission set forth in the Act. AAAs and State agencies have distinct but related roles that are all vitally important in providing services to older adults and family caregivers. ACL is available to provide technical assistance and support to State agencies and AAAs in maintaining positive

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<sup>21</sup>42 U.S.C. 3025(a)(1)(C).

working relationships, fulfilling their roles, and meeting the expectations of the OAA.

***Housing, housing instability, and homelessness***

*Comment:* Many commenters expressed support for addressing housing, housing instability, and homelessness, including information and assistance/referral (I&A/R), partnerships with the U.S. Department of Housing and Urban Development (HUD), assistance with paying for housing costs and shared living options, advocacy regarding rising housing costs and development which displaces older residents, and legal assistance to assist with housing problems, including evictions.

*Response:* ACL appreciates these comments expressing concern for older adults and family caregivers who experience challenges with housing, housing instability, and homelessness. ACL notes the OAA's long-standing role in support of this topic, including State agency and AAA development of a comprehensive and coordinated network of services and supports; instances of co-location of congregate meal programs under Title III, part C-1 of the Act in affordable housing facilities; and the provision of legal assistance under the Act to respond to various housing and housing-related concerns. While regulating the provision of housing, including paying for housing costs, is beyond the scope of the Act, we believe the provisions at § 1321.3 (defining "*Access to services or access services*," "*In-home supportive services*," and "*Greatest social need*"), § 1321.27 (*Content of State plan*), § 1321.61 (*Advocacy responsibilities of the area agency*), § 1321.65 (*Submission of an area plan and plan amendments to the State agency for approval*), § 1321.75 (*Confidentiality and disclosure of information*), § 1321.85 (*Supportive services*), and § 1321.93 (*Legal assistance*) will support the aging network in responding to issues relating to housing, housing instability, and homelessness. This includes local partnerships between AAAs and housing authorities or providers and enabling access to services and supports for older adults residing in HUD-assisted housing as well as the braiding of funding to support housing stability with service coordination and delivery.

ACL leads the Housing and Services Resource Center

(<https://acl.gov/HousingAndServices>), a partnership between HHS and HUD. We expect to build on these efforts and anticipate providing training and technical assistance following promulgation of the final rule to support effective implementation of these provisions.

### ***Accessibility and civil rights obligations***

*Comment:* Numerous commenters expressed concern with the elimination of the definition of “severe disability,” as well as the lack of a specific definition of disability, and the absence of specific incorporation of major sensory disabilities and accessibility in the definition of “greatest social need.” Many of these commenters reported instances in which OAA grantees and subrecipients had not respected the civil rights of people with sensory or mobility disabilities. Some shared specific accounts of AAAs and legal service providers failing to provide culturally competent, accessible services to older adult consumers who are blind, low-vision, deaf, hard-of-hearing, deafblind, or who have limited mobility. Many requested that we expand the definition of greatest social need to encompass these disability populations, codify the terms “accessibility” and “vision rehabilitation services,” require training in disability competency, and more clearly and forcefully require grantees to meet their civil rights obligations to older adults with disabilities.

Commenters also recommended that ACL direct resources specifically to research on aging and vision loss, treatment for diseases that result in vision loss, and supportive services for people with vision loss so that they may age in place – such as transportation and home care assistance.

*Response:* All recipients of Federal funding, including OAA grantees and subrecipients, must comply with the Americans with Disabilities Act,<sup>22</sup> Section 504 of the Rehabilitation Act,<sup>23</sup> Section 1557 of the Affordable Care Act,<sup>24</sup> and all other applicable laws that protect against

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<sup>22</sup> 42 U.S.C. 12101 *et seq.*

<sup>23</sup> 29 U.S.C. 794.

<sup>24</sup> 42 U.S.C. 18116.

discrimination, including against people with disabilities. These civil rights laws require OAA grantees and subrecipients to provide auxiliary aids and services to ensure effective communication and to ensure that no eligible person with a disability is denied access to OAA programs and services due to disability. Older adults with disabilities and advocates may file complaints with the HHS Office for Civil Rights if anyone is denied equitable access to OAA programs or services, including due to lack of effective communication.<sup>25</sup>

While we strongly recommend that OAA grantees and subrecipients train staff on cultural competency and disability accommodations as a best practice, training requirements in disability accommodation and cultural competency are beyond the scope of this rulemaking. We decline to adopt definitions of accessibility, vision rehabilitation services, and related terms, preferring to defer to existing definitions in relevant civil rights laws. However, we have reincorporated the definition of “severe disability” in this final rule. In addition, the definition of “greatest social need” already includes “physical and mental disabilities,” and this includes all severe disabilities and sensory and communication disabilities.

Directing resources for research on aging and vision loss is also outside the scope of this rule. However, we believe the provisions at § 1321.3 (defining “*Access to services or access services*” and “*Greatest social need*”), § 1321.27 (*Content of State plan*), § 1321.61 (*Advocacy responsibilities of the area agency*), § 1321.65 (*Submission of an area plan and plan amendments to the State agency for approval*), and § 1321.85 (*Supportive services*) will support the aging network in responding to issues relating to vision and hearing loss.

### ***Age discrimination in the workplace***

*Comment:* Several commenters expressed concern about age discrimination in the workplace.

*Response:* While addressing age discrimination in the workplace broadly is outside of the

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<sup>25</sup> *How to File a Civil Rights Complaint*, U.S. Dept. of Health and Human Serv., Office for Civil Rights, <https://www.hhs.gov/civil-rights/filing-a-complaint/complaint-process/index.html> (last visited Oct. 11, 2023).

scope of these regulations, ACL notes that supportive services provided under Title III of the Act may be helpful to those experiencing work-related concerns. For example, age discrimination is one of the priority areas that may be addressed by legal assistance provided under the Act (§ 1321.93 *Legal assistance*). While Title V, the Senior Community Service Employment Program, is outside the scope of these regulations because it is implemented by the Department of Labor, programs funded under Title III, VI, and VII of the Act are encouraged to have referral mechanisms among programs funded under all Titles of the Act.

***Administrative burden, implementation costs, implementation timeframe***

*Comment:* We received a significant number of comments related to concerns about the burden, cost, and amount of time regulated entities would need to implement the final rule (e.g., costs and time needed to review and update existing policies and procedures, to create new policies and procedures, create or update state regulations, and to train staff), as well as concerns about the ongoing costs of monitoring compliance with the final rule. Some State agencies commented that they anticipate that consultants and/or additional staff will need to be hired and/or that changes will need to be made to information technology systems. Some State agencies asserted that ACL has greatly underestimated both the cost, and the amount of time, needed to come into compliance with the rule.

*Response:* A limited number of substantive changes were made by the 2020 reauthorization to the implementation of programs under the Act, and much of this final rule codifies the policies and procedures that Title VI grantees, State agencies, AAAs, and service providers already have or should have in place to administer programs and deliver services under the Act. Similarly, State and area agencies should already be engaging in monitoring activities for compliance with the Act and implementing regulations. State and area agencies will have to review and revise their existing practices, policies, and procedures to ensure they comply with the final rule. For example, State agencies and AAAs will need to update definitions of greatest social need and greatest economic need. However, this final rule does not require States to have

regulations, and many of the new potentially burdensome aspects of the final rule are at the State agency's option to implement (for example, allowing shelf-stable, pick-up, carry-out, drive-through, or similar meals to complement the congregate meals program). We also note that public comments that provided State-specific cost estimates to implement and administer the final rule did not clearly differentiate between costs attributable to the statute and the incremental costs of implementing the final rule; accordingly, it is not feasible to incorporate this information into our analysis of the impact of the final rule. As more particularly discussed in the Regulatory Impact Analysis below, we anticipate that any costs to regulated entities associated with the final rule will not be onerous.

In consideration of comments related to the time required for implementation of the rule, we have decided to delay the compliance date of this rule until October 1, 2025. This should give all regulated entities sufficient time to come into compliance with these regulations. It will also allow time for State and area plans on aging that will be effective as of October 1, 2025, to incorporate the requirements of this final rule into new or amended plans.

Consistent with current practice, if State agencies encounter challenges implementing specific provisions of the rule, they should engage with ACL for technical assistance and support. In addition, State agencies that need additional time to comply with one or more provisions of the rule may submit a request to proceed under a corrective action plan. A request should include the reason the State needs additional time, the steps the State will take to reach full compliance, and how much additional time the State anticipates needing. The corrective action plan process is intended to be highly collaborative and flexible. Under a corrective action plan, States agencies and ACL will jointly identify progress milestones and a feasible timeline for the State agency to come into compliance with the provision(s) of the rule incorporated into the corrective action plan. State agencies must make a good faith effort at compliance to continue operating under a corrective action plan. Requests for corrective action plans will be reviewed after April 1, 2024, and ACL will provide guidance on this process after this rule takes effect.

## **Part 1321: Grants to State and Community Programs on Aging**

### **A. Provisions Revised to Reflect Statutory Changes or Provide Clarity**

The following provisions of this final rule reflect statutory changes (e.g., changing “Commissioner for Aging” to “Assistant Secretary for Aging” throughout), revisions for clarity, and direction in response to requests for technical assistance from grantees and other interested parties, RFI responses, listening sessions, Tribal consultation, and public comment received on the NPRM.

#### *Subpart A – Introduction*

##### *§ 1321.1 Basis and purpose of this part.*

Section 1321.1 sets forth the requirements of Title III of the Act to provide grants to State and community programs on aging. This final rule ensures consistency with statutory terminology and requirements, such as referring to evidence-based disease prevention and health promotion and caregiver services, specifying family caregivers as a service population, and listing the key roles of the State agency identified to implement Title III and Title VII of the Act.

*Comment:* Commenters expressed support for the priority given to services for those with the greatest economic and social need. One commenter requested § 1321.1(c)(4) also recognize the need for advocacy on behalf of family caregivers.

*Response:* We appreciate these comments and have revised § 1321.1(c)(4) to read, “Serve as an advocate for older individuals and family caregivers[.]”

*Comment:* One commenter stated that given the authority for the State agency to allocate funds to the Ombudsman program, they strongly recommend language be added at § 1321.1(c)(7) to reflect allocation of funds for the Ombudsman program.

*Response:* ACL appreciates this comment and has revised § 1321.1(c)(7) to remove “or” in (i), add “or” to the end of (ii), and add (iii) to read, “The Ombudsman program, as set forth in part 1324.”

##### *§ 1321.3 Definitions.*



The final rule updates the definitions of significant terms in § 1321.3 by adding several new definitions, revising several existing definitions, and deleting definitions of terms that are obsolete or no longer necessary. The additions, revisions, and deletions are intended to reflect changes to the statute, important practices in the administration of programs under the Act, and feedback we have received from a range of interested parties.

We add definitions of the following terms: “Access to services,” “Acquiring,” “Area agency on aging,” “Area plan administration,” “Best available data,” “Conflicts of interest,” “Cost sharing,” “Domestically produced foods,” “Family caregiver,” “Governor,” “Greatest economic need,” “Greatest social need,” “Immediate family,” “Local sources,” “Major disaster declaration,” “Multipurpose senior center,” “Native American,” “Nutrition Services Incentive Program,” “Older relative caregiver,” “Planning and service area,” “Private pay programs,” “Program development and coordination activities,” “Program income,” “Single planning and service area State,” “State,” “State agency,” “State plan administration,” “Supplemental foods,” and “Voluntary contributions.”

We retain and make minor revisions to the terms: “Altering or renovating,” “Constructing,” “Department,” “Direct services,” “In-home supportive services,” “Means test,” “Official duties,” “Periodic,” “Reservation,” “Service provider,” and “Severe disability.” We retain with no revisions the terms: “Act” and “Fiscal year” and we remove the terms: “Frail” and “Human services.”

*Comment:* We received many comments in support of these updated definitions.

*Response:* We appreciate these comments. ACL’s responses to comments of particular note follow.

“Access to services” or “Access services”

*Comment:* We received one comment requesting additional examples of access services.

*Response:* ACL appreciates this comment and acknowledges that service provision and technologies continue to evolve. In response to this comment, we have added “options

counseling” to the list of examples.

*“Acquiring,” “Altering or renovating,” and “Constructing”*

*Comment:* We received comments supporting the removal of the term “multipurpose senior center” from the definitions of “altering or renovating” and “constructing.” Other commenters expressed confusion related to these terms, because the rule only allows grantees to use OAA funding for “acquiring” and “constructing” multipurpose senior centers. Other commenters sought clarity as to whether these terms apply to minor home repairs or modifications provided to individual service participants under the Act.

*Response:* We only use these terms to clarify how grantees may use OAA funds on facilities where OAA services are provided or facilities that are otherwise necessary to satisfy the administrative requirements of the Act. These terms do not apply to “in-home supportive services” provided to individuals, such as minor modification of homes or individual residences.

*“Conflicts of interest”*

Recognizing the importance of ensuring the integrity of, and trust in, activities carried out under the Act, section 307(a)(7) of the Act requires State agencies to have mechanisms in place to identify and remove COI.<sup>26</sup> We include several provisions related to COI to provide clarity for State agencies, AAAs, and service providers: §§ 1321.3, 1321.47, and 1321.67. These provisions include a general definition of COI and specific requirements for State agencies and AAAs, respectively, which are discussed in more detail below. These provisions reflect the expanded potential for COI due to changes in the scope of activities undertaken by these entities since the Act was first passed and these regulations were first issued. The intent of the COI provisions is to ensure that State agencies, AAAs, and service providers carry out the objectives of the Act consistent with the best interests of the older people they serve.

*“Cost sharing”*

We clarify the definition of cost sharing to implement the intent of section 315 of the

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<sup>26</sup> 42 U.S.C. 3027(a)(7).

Act.<sup>27</sup> The term “cost sharing” generally refers to the portion of the cost of an item or service for which an individual is responsible in order to receive that item or service. However, this term is used differently in the Act than it is commonly used in other settings. There are many restrictions on how cost sharing may be implemented under the Act, including that an eligible individual may not be denied service for failure to make a cost sharing payment. The OAA allows for cost sharing from certain individuals for some services,<sup>28</sup> but State agencies that wish to allow the practice of cost sharing must comply with a number of requirements, which are described in § 1321.9(c)(2)(xi).

*“Cost sharing” and “Voluntary contributions”*

*Comment:* We received a mix of comments on these definitions; some commenters felt the definitions were clear as drafted, while others disagreed or asked for further clarification.

*Response:* We have revised the definition of “voluntary contributions” to read, “[...] means donations of money or other personal resources given freely, without pressure or coercion, by individuals receiving services under the Act.” For consistency, we have also revised this definition in part 1322. We intend to address other suggestions and requests for clarification through technical assistance.

*“Family caregiver”*

We define “family caregiver” to include the following subsets: adult family members or other individuals who are caring for an older individual, adult family members or other individuals who are caring for an individual of any age with Alzheimer’s disease or a related disorder with neurological and organic brain dysfunction, and “older relative caregivers”

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<sup>27</sup> 42 U.S.C. 3030c–2.

<sup>28</sup> 42 U.S.C. 3030c-2(a)(2) prohibits a State agency from implementing cost sharing for the following services: information and assistance, outreach, benefits counseling, or case management; ombudsman, elder abuse prevention, legal assistance, or other consumer protection services; congregate and home-delivered meals; and any services delivered through Tribal organizations. 42 U.S.C. 3030c-2(a)(3) prohibits cost-sharing for any services delivered through a Tribal organization or to an individual whose income is at or below the FPL. State agencies are prohibited from considering assets and other resources when considering whether a low-income individual is exempt from cost-sharing, when creating a sliding scale for cost sharing, or when seeking a contribution from a low-income individual.

(defined below). With this inclusive approach to defining “family caregiver,” we include those populations specified in the National Family Caregiver Support Program, as set forth in Title III, part E of the Act. For example, this includes unmarried partners, friends, or neighbors caring for an older adult.

*Comment:* We received one comment suggesting that individuals of working age who are not adults should be included in the definition of family caregiver.

*Response:* ACL appreciates this comment. Entities implementing services for family caregivers have the discretion to define an “adult” in this context or to consider such individuals as “other individuals” as used in the definition, so long as they comply with State agency policies and procedures, these regulations, and any other applicable Federal requirements.

*Comment:* We received many comments supporting an inclusive definition of family caregiver, as well as suggestions for expanded wording of the definition. One commenter recommended ACL consider alternatives to the term “informal” within the family caregiver definition to avoid minimizing their invaluable role and avoid inaccuracy due to some receiving financial compensation.

*Response:* ACL appreciates these comments and concurs that the definition includes non-traditional families and families of choice. We believe that the definition of “an adult family member, or another individual” and the subsequent preamble explanation that this “includes unmarried partners, friends, or neighbors” is sufficiently broad. To address family caregivers who may receive limited financial compensation, we have revised the definition to add, “For purposes of this part, family caregiver does not include individuals whose primary relationship with the older adult is based on a financial or professional agreement.” We have also revised this definition in part 1322.

*“Greatest economic need”*

One of the basic tenets of the Act is focusing OAA services on individuals who have the greatest economic need. The definition of “greatest economic need” in the Act incorporates

income and poverty status. The Act also permits State agencies to set policies, consistent with our regulations, that incorporate other considerations into the definition of “greatest economic need.”<sup>29</sup> Through its policies, the State agency may permit AAAs to further refine specific target populations of greatest economic need within their PSA.<sup>30</sup> A variety of local conditions and individual situations, other than income, could factor into an individual’s level of economic need. State agencies and AAAs are in the best position to understand the conditions and factors in their State and local areas that contribute to individuals falling within this category. Accordingly, this definition allows State agencies and AAAs to further refine target populations of greatest economic need.

*Comment:* We received multiple comments expressing support for focusing services on those in greatest economic need. One commenter stated that it would be beneficial to create a process of enabling local AAAs to set standards and definitions to reflect local needs.

*Response:* ACL appreciates these comments and notes that the preamble discussion supports local targeting. Furthermore, § 1321.27(d) and § 1321.65(b)(2) permit the State agency and AAAs to further refine specific target populations of greatest economic need based on local and individual factors.

*Comment:* Some commenters noted that the definition in § 1321.3 of “greatest social need” does not entirely align with the text at § 1321.27 and § 1321.65.

*Response:* We appreciate commenters raising this issue; we have revised these provisions for consistency.

*Comment:* Some commenters expressed concern that the expanded definition of greatest social need could diminish the focus on those in greatest economic need if the revised definition results in changing an intrastate funding formula (IFF).

*Response:* Changes to IFFs are one, but not an exclusive, method of targeting and

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<sup>29</sup> 42 U.S.C. 3026(a)(4)(A)(i)(I)(aa).

<sup>30</sup> 42 U.S.C. 3025(a)(1).

prioritizing services to those in greatest social need. We provide additional discussion on methods to target and prioritize services to those in greatest economic and greatest social need in the preamble discussion under § 1321.27.

*“Greatest social need”*

Focusing OAA services on individuals who have the greatest social need is one of the basic tenets of the Act. “Greatest social need” is defined in the Act as “need caused by noneconomic factors” including physical and mental disabilities, language barriers, and cultural, social, or geographic isolation, including isolation caused by racial or ethnic status that restricts the ability of an individual to perform normal daily tasks or threatens the capacity of the individual to live independently.<sup>31</sup> This definition allows for consideration of other noneconomic factors that contribute to cultural, social, or geographic isolation.

For example, in multiple places the Act requires special attention to the needs of older individuals residing in rural locations. In some communities, such isolation may be caused by religious affiliation. Isolation may also be related to sexual orientation, gender identity, or sex characteristics. For example, research indicates that LGBTQI+ older adults are at risk for poorer health outcomes and have lived through discrimination, social stigma, and the effects of prejudice, impacting their connections with families of origin, lifetime earnings, opportunities for retirement savings, and ability to trust health care professionals and aging services providers.<sup>32</sup> People aging with HIV are a growing population with distinct needs. The experience of HIV stigma may contribute to isolation and feelings of loneliness and be complicated by other stigmatized or marginalized components of an individual’s identity, including age, race, sexual orientation, and gender identity. Older people with HIV report poor mental and physical health at higher rates than their HIV negative counterparts, as well as difficulty accessing necessary

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<sup>31</sup> 42 U.S.C. 3002(24).

<sup>32</sup>Nat’l Resource Ctr. on LGBT Aging, Inclusive Services for LGBT Older Adults: A Practical Guide to Creating Welcoming Agencies (2020), [https://www.lgbtagingcenter.org/resources/pdfs/Sage\\_GuidebookFINAL1.pdf](https://www.lgbtagingcenter.org/resources/pdfs/Sage_GuidebookFINAL1.pdf).

supports and services like transportation, nutrition, and housing.<sup>33</sup>

Other chronic conditions may also result in isolation or stigma, as may housing instability, food insecurity, lack of access to reliable and clean water supply, lack of transportation, utility assistance needs, or interpersonal safety concerns, including abuse, neglect, and exploitation.

We received many comments through the RFI and the NPRM comment period urging ACL to set clear and consistent expectations regarding the populations to be included, and our intent is to do so in this definition. As with “greatest economic need,” the Act permits State agencies to set policies, consistent with our regulations, that further define the noneconomic considerations that contribute to populations designated as having the “greatest social need.”<sup>34</sup> Through its policies, the State agency may permit AAAs to further refine specific target populations of greatest social need within their PSAs.<sup>35</sup> State agencies and AAAs are in the best position to understand additional conditions and factors in their State and local areas that contribute to individuals falling within this category. Accordingly, this definition allows State agencies and AAAs to further refine target populations of greatest social need.

*Comment:* We received multiple comments expressing support for focusing services on those in greatest social need. One commenter stated it would be beneficial to create a process of enabling local AAAs to set standards and definitions to reflect local needs.

*Response:* ACL appreciates these comments and notes that the preamble discussion supports local targeting. Furthermore, § 1321.27(d) and § 1321.65(b)(2) permit the State agency and AAAs to further refine specific target populations of greatest social need based on local and individual factors.

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<sup>33</sup>State of Aging with HIV: Third National Survey, HealthHIV (2023) <https://healthhiv.org/stateof/agingwithhiv/?eType=EmailBlastContent&eId=883056c6-e9af-47dc-a653-022e1f4fb9fc>; Mark Brennan-Ing, *Emerging Issues in HIV and Aging*, prepared for the HIV and Aging Policy and Action Collation (May 11, 2020), <https://www.sageusa.org/wp-content/uploads/2020/07/emerging-issues-in-hiv-and-aging-may-2020.pdf>.

<sup>34</sup> 42 U.S.C. 3026(a)(4)(A)(i)(I)(aa).

<sup>35</sup> 42. U.S.C. 3025(a)(1).

*Comment:* Commenters suggested various additions to the list of non-economic factors, such as “solo older adults,” people living alone with cognitive impairments, older individuals who are experiencing abuse, neglect, self-neglect, and/or exploitation, and formerly incarcerated individuals. One commenter requested a modification from “normal” to “routine” in proposed (9)(i). Other commenters disagreed with the proposed definition and/or provided other suggestions. For example, some commenters raised the concern that the definition is inadequate regarding racial or ethnic status because it only mentions it in the context of isolation when impacts are far more extensive, including experiences of incarceration, higher rates of poverty and homelessness, health inequities such as being served in underperforming facilities, and lack of trust in external services and service providers. Commenters also requested clarification as to whether sensory loss or sensory impairment, including deafness, being hard of hearing, blindness, and having low vision, may be considered under “physical and mental disabilities” or “chronic conditions.”

*Response:* ACL appreciates these comments and recognizes that there are various additional factors that a State agency or a AAA may wish to include within the category of “[o]ther needs as further defined by State and area plans based on local and individual factors[.]” Such factors may be included in the target populations that a State agency or a AAA may define pursuant to § 1321.27(d)(1) and § 1321.65(b)(2)(i), respectively. Additionally, we acknowledge that the concepts included in our definition may be expressed using different words. For example, “solo older adults” or “older adults living alone” may be included as examples of experiences of cultural, social, or geographical isolation due to “any other status” under (3)(x) of this revised definition. We have added “routine” to (3)(x)(a) in addition to the statutory term, “normal.”

ACL recognizes the extensive impacts to older adults who may face cumulative effects of a lifetime of isolation caused by racial or ethnic status which restrict the ability of an individual to perform routine daily tasks or threaten the capacity of an individual to live independently,



such as experiences of incarceration, higher rates of poverty and homelessness, health inequities due to being served in underperforming facilities, and lack of trust in external services and service providers. Considerations relating to racial or ethnic status may be further defined under “(x) Other needs as further defined by State and area plans based on local and individual factors[.]”

ACL confirms that sensory loss or sensory impairment, including deafness, being hard of hearing, blindness, and having low vision, may be considered under “Physical and mental disabilities,” “Chronic conditions,” or separately defined as provided at “Other needs as further defined by State and area plans based on local and individual factors[.]” Older individuals who are experiencing abuse, neglect, self-neglect, and/or exploitation may be considered under “Interpersonal safety concerns,” as well as under several of the other population categories listed here, depending on the individual’s personal situation.

*Comment:* A commenter recommended including the concept of “lifesaving/preservation” (relating to the availability of necessities such as water, access to food supplies, and electricity) in the definition of greatest social need. This comment was raised in the context of Indian reservations where, for example, water may need to be manually hauled and electricity may be unavailable.

*Response:* ACL appreciates these comments. We acknowledge that access to these types of necessities is important, and we have revised the definition to include lack of access to reliable and clean water supply. We have also amended the regulatory definition to better align with the structure of the statutory provision.

ACL has determined that the definition as proposed, with the revisions noted here, provides an appropriate balance in meeting the intent of the Act and allowing for State and local agency customization.

*“Immediate family”*

*Comment:* We received one comment stating that the term “immediate family” should

include non-relatives that are socially connected, especially including clan relationships in Tribal communities.

*Response:* This term is used specifically in the context of COI policies at § 1321.47 and § 1321.67 requiring State agencies and AAAs, respectively, to have policies and procedures “[e]nsuring that no individual, or member of the immediate family of an individual, involved in administration or provision of a Title III program has a conflict of interest[.]” ACL declines to expand the definition of immediate family to avoid creating an overly broad application of COI provisions in Tribal communities. ACL notes that the definition of “family caregiver” set forth in § 1321.3 and used in § 1321.91 for provision of family caregiver support services includes “[...] an adult family member, or another individual [...]” which includes non-relatives that are socially connected and clan relationships in Tribal communities.

*“In-home supportive services”*

*Comment:* We received supportive comments regarding this provision, as well as comments requesting expansion of the in-home supportive services identified. We received comment asking for the definition to be altered or to otherwise remove the phrase “[...] and that is not available under another program” regarding the example of minor modification of homes for parity with the definition under part 1322, to allow for collaboration with other programs, and to avoid excessive burden in proving no other program is available.

*Response:* ACL appreciates these comments. We have revised (1) under this definition to read, “Homemaker, personal care, home care, home health, and other aides[.]” Recognizing that respite care of all types assists older adults in avoiding institutionalization, we have revised (4) under this definition to begin, “Respite care for families[.]” To facilitate consistency of definitions and avoid excessive burden, we have amended the phrase regarding minor modification of homes to state, “[...] and that is not readily available under another program.” We have similarly amended this definition in part 1322 for consistency.

*“Means test”*

*Comment:* We received several comments questioning how to prioritize participants without means testing.

*Response:* The definition of “means test” in the final rule is very similar to the previous regulatory definition. We updated the definition to be consistent with the statute by adding family caregivers and made other edits for clarity. Under the Act, service providers may not determine an older adult or family caregiver to be ineligible for services due to the participant's income, assets, or other resources.<sup>36</sup> However, service providers may determine that due to limited resources and requirements to focus providing services to those in greatest economic need and greatest social need, they are unable to provide immediate service to some individuals. In such situations, service providers may include prospective participants on a waiting list; make referrals to other service providers or services; offer to provide services under a private pay program, as set forth in § 1321.9(c)(2)(xiii); and/or advocate for additional resources. Service providers may ask for financial information from prospective participants to assess for needs, screen for other benefits or services that may be available, establish priority for receipt of services, and collect data for needs assessment, reporting, evaluation, and other appropriate purposes.

For example, a family caregiver seeking respite assistance may be assessed by a AAA and found to have some financial resources, several other family members providing care as back-up to the primary caregiver, and a care recipient who has fewer care needs. A second family caregiver seeking respite assistance from the AAA is caring for a care recipient with very high care needs and is from an underserved community, as identified in the State and area plan. This second family caregiver may be prioritized for respite services by the AAA, as they have very limited financial resources and no nearby sources of back-up caregiving. The first family caregiver would not be ineligible for services, but due to the respite program’s limited resources might be placed on a waiting list and referred to other services, including those under private pay

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<sup>36</sup> Section 315 of the OAA; 42 U.S.C. 3030c–2 (b)(3).

arrangements. While not receiving respite services, the first family caregiver could also participate in caregiver support group and education services provided by the AAA under the Act.

The AAA could use the data collected regarding waiting lists and unmet needs in its advocacy efforts. With successful advocacy efforts resulting in an increase in funding for family caregiver programs, the first family caregiver could then receive respite services when those additional resources become available.

*“Multipurpose senior center”*

*Comment:* We received comments requesting a change from “shall” to “may” in the definition as proposed. We received comments questioning the use of the term “multipurpose senior center” to reference a service. We also received comment disagreeing with the definition, including with the inclusion of “virtual facilities” to the definition. Other commenters expressed appreciation for the inclusion of “virtual facilities” to reflect a growing number of programs and services offered online after the pandemic, noting this may make programs more accessible and equitable.

*Response:* We appreciate these comments and have revised § 1321.3 (*Definitions*) to indicate “[...] as used in § 1321.85, facilitation of services in such a facility.” We have determined that the inclusion of virtual facilities allows for the option of various service modalities and that the use of the term “as practicable” allows for appropriate variation in local circumstances, while remaining true to the definition of “multipurpose senior center” as set forth in the Act and the intent for facilitation of such services. We have made a corresponding revision to this definition in part 1322.

*“Official duties”*

*Comment:* We received recommendations to clarify that representatives of the Office may be carrying out the duties “[...] by direct delegation from, the State Long-Term Care

Ombudsman” in addition to the proposed “[...] under the auspices and general direction of [...] the State Long-Term Care Ombudsman.”

*Response:* We appreciate the comments. We recognize that Ombudsman programs operate in a variety of organizational structures and that direct delegation is one way that programs are managed. We have modified the definition as recommended and made a corresponding revision to part 1324.

*“Private pay”*

*Comment:* We received a comment requesting private pay and commercial relationship be defined separately.

*Response:* We define private pay as a type of commercial relationship. As discussed in our response to comments on § 1321.9(c)(2)(xiv), we have declined to define “commercial relationship.”

*“Program development and coordination activities”*

This term explains certain activities of State agencies and AAAs to achieve the goals of the Act. This work includes the development of innovative ways to address the evolving social service, health, and economic climates in which they operate. Separate from administering programs to provide direct services, State agencies and AAAs plan, develop, provide training regarding, and coordinate at a systemic level, programs and activities aimed at the Act’s target populations. In addition to this definition, we include language in § 1321.27 to clarify requirements for these activities.

*“Severe disability”*

*Comment:* A number of commenters objected to our proposal to eliminate the definition of “severe disability” from the regulation. Commenters expressed concern that people with disabilities would no longer sufficiently be considered within the definition of greatest social need.

*Response:* We have reincorporated the statutory definition of “severe disability” into the

regulation. We reiterate that people with disabilities also meet the definition of the general term “physical and mental disabilities.” However, there are several statutory references that require specifically prioritizing people with “severe disabilities,” and so we have incorporated the statutory definition in this final rule.

*Comment:* We received other suggestions, program management recommendations, and implementation questions regarding the definitions in this provision.

*Response:* We decline to make further changes to this provision and intend to address other suggestions and requests for clarification through technical assistance.

### *Subpart B – State Agency Responsibilities*

#### *§ 1321.5 Mission of the State agency.*

Section 1321.7 of the existing regulation (*Mission of the State agency*) is redesignated here as § 1321.5 for clarity with respect to other relevant provisions. Section 1321.5 sets forth the State agency’s mission, role, and functions as a leader on all aging issues in the State, and it specifies that the State agency will designate AAAs in States with multiple PSAs to assist in carrying out the mission. We include minor revisions to align with reauthorizations of the statute, such as adding family caregivers as a service population per the 2000 amendments (Pub. L. 106-501). We also update regulatory references and revise language for clarity.

*Comment:* We received comments expressing support for the wording used in this section, including the additional detailed grant requirements for State agencies to develop comprehensive and coordinated systems of service delivery. We received several suggestions for other text to add to this section. Several commenters also recommended cultural humility and cultural competency training for the aging network, including regarding Tribal and disability issues.

*Response:* We appreciate these comments. We believe the text is sufficient as drafted and that further examples, explanation, and training opportunities may be addressed through technical assistance, as appropriate.

*Comment:* One commenter questioned the proposed change to “[...] shall be the lead on all

aging issues” recommending instead “be the leader,” recognizing that some aging issues may be led by other entities within the State.

*Response:* ACL appreciates this comment and has revised this statement to “[...] shall be a leader on all aging issues[.]”

*§ 1321.7 Organization and staffing of the State agency.*

Section 1321.9 of the existing regulation (*Organization and staffing of the State agency*) is redesignated here as § 1321.7. We make several changes to the provision on organization and staffing for consistency and for clarification. Minor changes at § 1321.7(a), (c), and (d) reflect consistent wording with the State agency’s obligations under 45 CFR part 1324 with respect to the administration of the Ombudsman program. The Ombudsman program is authorized under Title VII of the Act, and the implementing regulations for the program were promulgated in 2015 at 45 CFR part 1324. Section 1321.7(d) includes minor language changes to clarify the State agency’s existing obligations to carry out the Ombudsman program in accordance with the Act’s requirements, regardless of any applicable State law requirements.

Section 307(a)(13)<sup>37</sup> and section 731<sup>38</sup> of the Act require the State agency to ensure that there is a Legal Assistance Developer and other personnel, as needed, to provide State leadership in developing legal assistance programs for older individuals throughout the State. These staffing requirements are absent from the existing regulation regarding staffing; we add a new paragraph (e) to this provision that sets forth these requirements to assist State agencies to better understand their obligations under the Act related to staffing. The role of the Legal Assistance Developer is discussed more fully in the preamble, below.

*Comment:* We received comments of support for language recognizing the Ombudsman as the head of the Office of the State Long-Term Care Ombudsman and for including expectations for the Legal Assistance Developer. Other commenters expressed concern that provisions regarding

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<sup>37</sup> 42 U.S.C. 3027(a)(13).

<sup>38</sup> 42 U.S.C. 3058j.

State agency oversight of the Ombudsman program would create complexities within their State agency's current organizational structure.

*Response:* We appreciate these comments. Regarding concerns with oversight of the Ombudsman program, the updates included in the proposed rule did not differ significantly from current regulatory expectations. We have made a minor revision to proposed § 1321.7(c) for clarity. ACL will provide technical assistance to help State agencies understand and satisfy these requirements.

*Comment:* We also received a recommendation that State agencies be allowed to enter into a contract or other arrangement to designate an individual as Legal Assistance Developer.

*Response:* State agencies have the discretion to make human resources decisions about how to staff their agencies in order to fulfill their obligations under the Act.

*§ 1321.9 State agency policies and procedures.*

We retitle the provision contained in § 1321.11 of the existing regulation (*State agency policies*) to better reflect the intent of the provision and to redesignate it here as § 1321.9. We also incorporate provisions contained in § 1321.45 (*Transfer between congregate and home-delivered nutrition service allotments*), § 1321.47 (*Statewide non-Federal share requirements*), § 1321.49 (*State agency maintenance of effort*), § 1321.67 (*Service contributions*), and § 1321.73 (*Grant related income under Title III-C*) within this provision to consolidate and streamline applicable requirements.

Section 305 of the Act requires the designated State agencies to “[...] be primarily responsible for the planning, policy development, administration, coordination, priority setting, and evaluation of all State activities related to the objectives of this Act[.]”<sup>39</sup> Consistent with that obligation, this final rule requires State agencies to promulgate policies and procedures related to a range of topics that fall within the State agency's authority to oversee compliance with the State plan in § 1321.9(c)(1) (policies and procedures related to direct service provision) and §

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<sup>39</sup> 42 U.S.C. 3025(a).



1321.9(c)(2) (policies and procedures related to fiscal requirements). The policy development process includes the establishment of procedures, which set forth the steps to follow to implement policies. Accordingly, we have included minor revisions to clarify that the policy development and implementation process includes the establishment of procedures, as well as policies.

The language at § 1321.9(a) is intended to (1) reflect statutory updates (i.e., the LTCOP regulation (45 CFR part 1324) which was promulgated in 2015); (2) clarify that the State agency's obligations to develop policies and procedures extend to elder abuse prevention and legal assistance development programs; (3) confirm the ability of the State agency to allow procedures to be developed at the AAA level, except where specifically prohibited; and (4) clarify the State agency's responsibility for monitoring the compliance of activities initiated under Title III with all applicable requirements to ensure that grant awards are used for the authorized purposes and in compliance with Federal law.

The Act contains many programmatic and fiscal requirements of which State agencies must be aware and for which State agencies must have established policies and procedures. For clarity and ease of reference, we combine the areas for which State agencies must have established policies and procedures in this provision. The first area relates to data collection and reporting. Section 307 of the Act requires the collection of data and periodic (at a minimum, once each fiscal year) submission of reports to ACL regarding State agency and AAA activities.<sup>40</sup> ACL has implemented a national reporting system and reporting requirements that must be used by all State agencies to ensure timely and consistent reporting. Section 1321.9(b) sets forth the State agency's responsibility to have policies and procedures to ensure that its data collection and reporting align with ACL's requirements.

Section 1321.9(c)(1) describes policies and procedures that State agencies must establish to ensure that services provided under the Act meet the requirements of the Act and are provided

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<sup>40</sup> 42 U.S.C. 3027.

equitably and in a consistent manner throughout the State, as appropriate.<sup>41</sup> In response to the RFI and the NPRM comment period, this section addresses comments from AAAs and service providers that requested State agencies provide transparency and clarity to AAAs and service providers about the policies and procedures that they must follow, including setting requirements for client eligibility, assessment, and person-centered planning; specifying a listing and definitions of services that may be provided; detailing any limitations on the frequency, amount, or type of service provided; defining greatest economic need and greatest social need, and specific actions the State agency will use or require to provide services to those identified populations; how AAAs can provide services directly; how voluntary contributions are to be collected; and the grievance process for older adults and family caregivers who are dissatisfied with or denied services under the Act. As indicated in § 1321.9(a), except for the Ombudsman program and where otherwise indicated, the State agency policies may allow for procedures to implement specific policies to be developed at the AAA level. ACL strongly encourages State agencies to make their OAA policies and procedures available to the public, either by posting them online or by providing a point of contact at the State agency to respond to requests for this information. Doing so may help ensure accountability to the public regarding the implementation of OAA programs and services.

Under section 306(a)(4)(A)(i)(I)(aa), AAAs are responsible for setting specific objectives, consistent with State agency policy, for provision of services to older individuals with greatest economic need and greatest social need.<sup>42</sup> Identifying such populations at the State level facilitates consistent messaging and outreach, collaboration with other State level organizations and interested parties, and development of specific plans for the State agency, AAAs, and service providers to implement, as intended by the Act. Definitions of these populations at the State level are intended to provide statewide direction, while maintaining the opportunity for additional

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<sup>41</sup> 42 U.S.C. 3025(a)(2); 42 U.S.C. 3012(a)(9).

<sup>42</sup> 42 U.S.C. 3026(a)(4)(A)(i)(I)(aa).

definition of populations at greatest economic need and greatest social need specific to local circumstances as part of an area plan on aging as further set forth in § 1321.65. For example, a State agency might choose to define those at greatest economic need to include individuals or households with an income within a specific range (e.g., up to 125 percent of the Federal poverty level (FPL)), and another State agency may include older adults experiencing housing instability in their definition of greatest economic need. A State agency might also choose to define those at greatest social need to include people with low literacy, while another State agency may include grandparents raising grandchildren due to substance use disorder or loss of parents to COVID-19 in their definition of greatest social need. There are multiple circumstances where State level identification of needs may be further complemented at the AAA level, such as older adults experiencing economic need due to catastrophic flooding in a rural portion of a State, or a AAA including older refugees in the community in their definition of greatest social need.

The Act sets forth at section 307(a)(8)(A) that services will not be directly provided by a State agency or by a AAA, subject to certain conditions. AAAs must receive State agency approval to provide direct services. We clarify in this rule that the State agency must communicate how the area agencies may request approval to directly provide services.<sup>43</sup> This section also incorporates the requirement under section 307(a)(5)(B) of the Act that State agencies are required to issue guidelines applicable to grievance processes for any older adult or family caregiver who has a complaint about a service or has been denied a service.<sup>44</sup>

Section 1321.9(c)(2) requires State agencies to establish policies and procedures related to the fiscal requirements associated with being awarded funding for the Nutrition Services Incentive Program (NSIP),<sup>45</sup> Title III,<sup>46</sup> and Title VII<sup>47</sup> under the Act. Over the years, we have found that some State agencies may be unaware of certain requirements or may not understand

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<sup>43</sup> 42 U.S.C. 3027(a)(8)(A).

<sup>44</sup> *Id.* section 3027(a)(5)(B).

<sup>45</sup> 42 U.S.C. 3030a(e).

<sup>46</sup> 42 U.S.C. 3023.

<sup>47</sup> 42 U.S.C. 3058a.

their obligations under these requirements. Section 1321.9(c)(2) provides guidance on the following fiscal requirements: distribution of Title III<sup>48</sup> and NSIP<sup>49</sup> funds; non-Federal share (match) requirements;<sup>50</sup> permitted transfers of service allotments;<sup>51</sup> maximum allocation amounts for State, Territory, and area plan administration;<sup>52</sup> minimum funding expenditures for access to services, in-home supportive services, and legal assistance;<sup>53</sup> State agency maintenance of effort obligations;<sup>54</sup> requirements related to Ombudsman program expenditures and fiscal management;<sup>55</sup> minimum expenditures for services for older adults who live in rural areas;<sup>56</sup> reallocation of funds;<sup>57</sup> voluntary contributions, including cost-sharing at the election of the State agency;<sup>58</sup> use of program income;<sup>59</sup> private pay programs;<sup>60</sup> commercial relationships;<sup>61</sup> buildings, alterations or renovations, maintenance, and equipment;<sup>62</sup> prohibition against supplantation;<sup>63</sup> monitoring of State plan assurances;<sup>64</sup> advance funding;<sup>65</sup> and fixed amount subawards.<sup>66</sup> We provide further context for these fiscal requirements in the following paragraphs.

*Comment:* Many commenters, including but not limited to State and area agencies, expressed support for this section generally. One commenter expressed support for the proposed rule, specifically § 1321.9(a) and (b). Other commenters expressed support for specific portions of § 1321.9, including one commenter noted that the prohibition against means testing is a

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<sup>48</sup> 42 U.S.C. 3025(a)(2)(C).

<sup>49</sup> 42 U.S.C. 3030a(d).

<sup>50</sup> 42 U.S.C. 3024(d), 3028(a)(1), 3029(b), 3030s-1(h)(2).

<sup>51</sup> 42 U.S.C. 3028(a)(4), (5).

<sup>52</sup> 42 U.S.C. 3024(d)(1), 3028(a), (b)(1)-(2).

<sup>53</sup> 42 U.S.C. 3026(a)(2).

<sup>54</sup> 42 U.S.C. 3029(c).

<sup>55</sup> 42 U.S.C. 3027(a)(9)(A).

<sup>56</sup> *Id.* section 3027(a)(3)(B)(i).

<sup>57</sup> 42 U.S.C. 3024(b), 3058b(b).

<sup>58</sup> 42 U.S.C. 3030c-2.

<sup>59</sup> *Id.* section 3030c-2(a)(5)(c).

<sup>60</sup> 42 U.S.C. 3020c; 42 U.S.C. 3026(g).

<sup>61</sup> 42 U.S.C. 3026(a)(13)-(14).

<sup>62</sup> 45 CFR 75; 42 U.S.C. 3030b, 3030d(b).

<sup>63</sup> 42 U.S.C. 3026(a)(9)(B), 3030c-2(b)(4)(E), 3030d(d), 3030s-2, 3058d(a)(4).

<sup>64</sup> 42 U.S.C. 3025(a)(1)(A)-(C).

<sup>65</sup> 45 CFR 75.305.

<sup>66</sup> *Id.* section 75.353.

strength of the Act, and another expressed support for the requirement in § 1321.9(c)(2)(i) that State agency policies and procedures must provide for the prompt disbursement of Title III funds and NSIP funds. Commenters also supported the clarification in § 1321.9(c)(2)(vi) that excess State match reported on the Federal financial report does not become part of the maintenance of effort unless the State agency certifies the excess. Commenters additionally supported the requirement to have policies clarifying that funds awarded under certain sections of the Act cannot supplant existing Federal, State, and local funds (§ 1321.9(c)(2)(xvi)) and the requirement to have policies which address monitoring for compliance with assurances (§ 1321.9(c)(2)(xvii)).

*Response:* ACL appreciates the support for this provision, the purpose of which is to consolidate, and to make easier to locate, applicable requirements of the Act for which State agencies should have established policies and procedures.

*Comment:* A commenter sought guidance as to whether § 1321.9 requires State agencies to monitor the performance of Ombudsman programs.

*Response:* Regarding concerns with oversight of the Ombudsman program, the requirements in the final rule do not differ significantly from current regulatory expectations. ACL will provide technical assistance to help State agencies understand and sufficiently meet these requirements.

§ 1321.9(b).

*Comment:* ACL received several comments requesting additional guidance and direction with respect to the collection of data (such as data on sexual orientation and gender identity, data regarding populations experiencing greatest economic need and greatest social need, and data stratification). Some commenters expressed concern as to additional data collection that may be required in connection with the expansion of the definitions of greatest economic need and greatest social need. Other commenters were concerned about potential costs associated with changes to data collection expectations. We also received various comments asking for improvements in ACL's data collection efforts, including specific data collection on sexual

orientation and gender identity.

*Response:* Section 307(a)(4) of the Act requires the collection of data and periodic submission of reports to ACL regarding State agency and AAA activities.<sup>67</sup> ACL has developed a system for these purposes and has implemented reporting requirements that must be used by all State agencies to ensure timely and consistent reporting, as well as the quality and accuracy of the data reported. These reporting requirements include, among other things, data that must be collected by all State agencies (at a minimum, once each fiscal year). Specific details on the reporting system and its related requirements are outside the scope of the final rule. ACL is available to provide technical assistance to State agencies regarding data collection and reporting.

*Comment:* Some commenters suggested that certain requirements be added to the proposed rule related to abuse and neglect of older adults. One commenter noted that the Ombudsman program is required to serve all residents and does not prioritize clients based on greatest social need or greatest economic need and requested the proposed rule be clarified to acknowledge this distinction.

*Response:* ACL declines to add any requirements to part 1321 of the rule related to abuse and neglect of older adults. The Ombudsman program and programs for the prevention of elder abuse, neglect, and exploitation are established pursuant to Title VII of the Act.<sup>68</sup> ACL believes that Title VII of the Act and its accompanying regulation (45 CFR part 1324) adequately address requirements for these programs and that no additional clarification is needed in the final rule.

*Comment:* Some State agencies and AAAs expressed concern that the requirements in § 1321.9 regarding the promulgation of policies and procedures are too burdensome.

*Response:* The Act contains many programmatic and fiscal requirements of which State agencies should be aware, and section 305 of the Act requires State agencies to develop policies

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<sup>67</sup> 42 U.S.C. 3027(a)(4).

<sup>68</sup> 42 U.S.C. 3058 *et. seq.*

for “[...] all State activities related to the objectives of this Act[.]”<sup>69</sup> Substantially all requirements included in this section are set forth in the Act; accordingly, State agencies should be aware of them and already should have policies and procedures in place. For clarity and ease of reference, we combined the areas for which State agencies should have established policies and procedures in this provision to assist State agencies in understanding their obligations under, and ensuring their compliance with, the Act. ACL understands that some State agencies’ existing policies and procedures may not address all areas included in this section. To give State agencies ample time to establish or update their policies and procedures, ACL has deferred the compliance date of the rule to October 1, 2025.

*Comment:* One commenter recommends that the term “policies and procedures” be defined to also include State administrative rules or contractual obligations.

*Response:* ACL declines to define “policies and procedures” in order to provide flexibility to the State agencies and to allow them to take into account applicable State requirements and standard practices with respect to the development of policies and procedures, which can vary from one State to another.

*§ 1321.9(c)(1) Direct service provision.*

*Comment:* A commenter requested that the list in § 1321.9(c)(1) of topics related to direct services for State agencies be a suggested list, rather than a required list of topics to be covered.

*Response:* ACL declines to revise the regulatory language as requested. The topics covered are the minimum, essential areas for which State agencies should have policies and procedures to administer direct services as contemplated by the Act. State agencies may elect to adopt additional policies and procedures with respect to the provision of direct services under the Act.

*Comment:* With respect to § 1321.9(c)(1)(i), which requires State agencies to develop policies and procedures regarding requirements for client eligibility, periodic (at a minimum,

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<sup>69</sup> 42 U.S.C. 3025(a)(1)(C).

once each fiscal year) assessment, and person-centered planning, one commenter suggested that ACL require AAAs to consider the full array of available long-term service and support options, inclusive of community-based long-term services and supports, such as Programs of All-Inclusive Care for the Elderly (PACE programs).

*Response:* ACL appreciates the comment, but ACL declines to direct State agencies as to the specific requirements that State agencies must include in these policies and procedures. State agencies are in the best position to make such decisions based on conditions and need in their States, and ACL leaves these determinations to the State agencies.

*Comment:* Section 1321.9(c)(1), requires State agencies to have policies and procedures regarding the definition of those with greatest economic need and those with greatest social need within their States. One commenter recommended that ACL provide more detailed guidance on strategies for reaching populations with the “greatest economic need.” The commenter also recommended that ACL provide guidance regarding methods for measuring their success in reaching such populations and requested additional guidance regarding the definition of “greatest economic need” to prevent “unintended consequences” and to ensure that vulnerable older adults receive essential services. Commenters also recommended that we impose additional limitations on State agency determinations related to the definitions of greatest social need and greatest economic need, including recommendations of other populations to include and how such determinations should be made and disclosed.

*Response:* ACL retains the regulatory text in § 1321.9(c)(1) as proposed. ACL believes the definitions in § 1321.3 of greatest economic need and greatest social need, as well as the requirements in § 1321.27 regarding information required to be included in the State plan, adequately address these concerns.

Regarding the comments raised with respect to the definition of “greatest economic need,” the definition in the Act incorporates income and poverty status. The Act also permits State agencies to set policies, consistent with ACL’s regulations, that incorporate other



considerations into the definition of “greatest economic need,” and the discussion in § 1321.3 above includes additional guidance for State agencies regarding how to define “greatest economic need.”<sup>70</sup> Through its policies, the State agency may permit AAAs to further refine specific target populations of greatest economic need within their PSAs. A variety of local conditions and individual situations, other than income, could factor into an individual’s level of economic need. State agencies and AAAs are in the best position to understand the conditions and factors in their State and local areas that contribute to individuals falling within this category. Accordingly, this definition allows State agencies and AAAs to further refine target populations of greatest economic need. To maximize the flexibility afforded to State agencies in making these determinations, ACL declines to provide more specific direction in the final rule. Any additional guidance that may be appropriate will be offered by ACL via technical assistance.

*§ 1321.9(c)(2)(i) Intrastate funding formula (IFF).*

The Act sets forth requirements for distribution of Title III funds within the State in section 305(a)(2)(C)-(D).<sup>71</sup> The Act requires distribution to occur via an IFF (further defined in § 1321.49) or funds distribution plan (further defined in § 1321.51). The IFF is required for States with multiple PSAs, and a funds distribution plan is required for single PSA States. Through this provision, we also require that funds be promptly disbursed using the IFF or funds distribution plan and to allow fixed amount subawards up to the simplified acquisition threshold, as set forth in 45 CFR 75.353.

*Comment:* Some commenters requested definitions of the terms “promptly disbursed” “fixed amount subawards,” and “subaward” as used in this section. One commenter asked how State agencies will be monitored for compliance.

*Response:* The requirement that funds be promptly disbursed can be found in section

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<sup>70</sup> 42 U.S.C. 3026(a)(4)(A)(i)(I)(aa); 42. U.S.C. 3025(a)(1).

<sup>71</sup> 42 U.S.C. 3025(a)(2)(C)-(D).

311(d)(4) of the Act, and ACL declines to provide a definition for this term.<sup>72</sup> State agencies should define this term in their policies and procedures. Such definitions should include a reasonable time frame and should take into account State fiscal policy (which can vary from one State to another). For a definition of “subaward” see 2 CFR 200.1 and 45 CFR 75.2, and for an explanation of “fixed amount subaward” see 2 CFR 200.333 and 45 CFR 75.353. State agencies should have systems in place to monitor their compliance with the requirements of the Act, which ACL will regularly review as part of State plan review, in addition to ACL’s other fiscal and program monitoring activities.

In the course of reviewing § 1321.9(c)(2)(i) in response to comments received, ACL has determined that the language in this section should be clarified. Accordingly, ACL has revised the regulatory text of § 1321.9(c)(2)(i). In addition, ACL has moved the language regarding fixed amount subawards from this section to a new § 1321.9(c)(2)(xix) and has simplified the language used in this provision. For a definition of “simplified acquisition threshold” see 2 CFR 200.1 and 45 CFR 75.2. ACL will provide technical assistance, as needed, regarding § 1321.9(c)(2)(xix).

*Comment:* ACL received several other suggestions, recommendations, and implementation questions regarding the IFF.

*Response:* We intend to address any additional issues related to the IFF through technical assistance.

*§ 1321.9(c)(2)(ii) Non-Federal share (match).*

The provision contained in § 1321.47 (*Statewide non-Federal share requirements*) of the existing regulation is redesignated here as § 1321.9(c)(2)(ii) and revised. The Act includes requirements for non-Federal share (match) funds from State or local sources, as set forth in

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<sup>72</sup> 42 U.S.C. 3030a.

sections 301(d)(1),<sup>73</sup> 304(c),<sup>74</sup> 304(d)(1)(A),<sup>75</sup> 304(d)(1)(D),<sup>76</sup> 304(d)(2),<sup>77</sup> 309(b),<sup>78</sup> 316(b)(5),<sup>79</sup> and 373(h)(2).<sup>80</sup> We consolidate and streamline the requirements by listing the requirements and considerations that apply to such funds. We have received frequent technical assistance requests concerning the allowability of using funding for services that are means tested for match. We clarify that State or local public resources used to fund a program which uses a means test shall not be used to meet match requirements. We also clarify that a State agency or AAA may determine match in excess of required amounts, and we clarify match requirements that apply to service and administration costs for each type of grant award under Title III of the Act. We also provide prior written approval for unrecovered indirect costs to be used as match.

*Comment:* One commenter suggested that ACL encourage State agencies to allow the use of unrecovered facilities and administrative or indirect costs as match for administration.

*Response:* ACL appreciates this comment and notes that the rule authorizes unrecovered indirect costs to be used as match (see § 1321.9(c)(2)(ii)(J)(I)). ACL encourages State agencies to consider this approach, subject to State agency policies and procedures. ACL will provide technical assistance, as requested.

*Comment:* We received multiple comments supporting the use of means tested funds to count toward the required match. In addition, many commenters requested clarification on, or objected to, § 1321.9(c)(2)(ii)(C), which provides that “State or local public resources used to fund a program which uses a means test shall not be used to meet the match.”

*Response:* The prohibition against using State or local public resources which use a means test to count toward match is due to the prohibition against means testing in the OAA

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<sup>73</sup> 42 U.S.C. 3021(d)(1).

<sup>74</sup> 42 U.S.C. 3023(c).

<sup>75</sup> *Id.* section 3023(d)(1)(A).

<sup>76</sup> *Id.* section 3023(d)(1)(D).

<sup>77</sup> *Id.* section 3023(d)(2).

<sup>78</sup> 42 U.S.C. 3029(b).

<sup>79</sup> 42 U.S.C. 3030c-3(b)(5).

<sup>80</sup> 42 U.S.C. 3030s-1(h)(2).

under section 315(b)(3).<sup>81</sup> Match for the federal grant is the non-federal share of the total project costs that a grantee is required to contribute to achieve the purposes of the award and allowability of costs must conform to any limitations or exclusions set forth in the Federal award, 2 CFR 200.403(b) and 45 CFR 75.403(b). Therefore, match must meet the same requirements that apply to allowed costs under the Act, and the Act prohibits means testing. Accordingly, we maintain the regulatory language of § 1321.9(c)(2)(ii)(C) as proposed. ACL will further address this requirement through technical assistance, as needed.

*Comment:* A commenter asked for clarification regarding the difference between means testing and prioritizing services for individuals of “greatest economic need.”

*Response:* Means testing is a criterion used to determine an individual’s financial eligibility for a program. If an individual’s resources exceed the determined limit for a program, the individual is ineligible for a program – that individual cannot participate in the program even if the program has sufficient resources to be able to serve them. On the other hand, the use of “greatest economic need” is a way to prioritize services for those who are most in need of the service; it does not deem those of lesser economic need to be ineligible for the program.

*Comment:* Some commenters expressed concern that a State agency or AAA may determine a match in excess of amounts required under the Act.

*Response:* The Act does not prohibit a State agency or AAA from requiring a match in excess of amounts required under the Act, and ACL leaves these decisions to State agencies and AAAs to determine in accordance with State agency and AAA policies and procedures. ACL encourages State agencies to make requirements clear in terms and conditions of subaward agreements.

*Comment:* Some commenters requested that the match requirements be reduced.

*Response:* The match requirements are set by the Act, and ACL has no authority to reduce them.

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<sup>81</sup> 42 U.S.C. 3030c-2(b)(3).

*Comment:* Some commenters requested clarification regarding § 1321.9(c)(2)(ii)(I), which provides that other Federal funds may not be used as match for programs funded under Title III of the Act unless there is specific statutory authority.

*Response:* The Act does not provide statutory authority for other Federal programs to meet match requirements. ACL will provide additional guidance through technical assistance, as needed.

*§ 1321.9(c)(2)(iii) Transfers.*

The provision contained in § 1321.45 of the existing regulation (*Transfer between congregate and home-delivered nutrition service allotments*) is redesignated here as § 1321.9(c)(2)(iii) and revised. The Act allows for transfer of service allotments to provide some flexibility to meet State and local needs. ACL allocates Title III funding to State agencies by parts of the Act (for example, the supportive services allocation is designated as part B and the nutrition services allocation is designated as part C, and further by subpart (for example, part C-1 funding is for congregate meals and part C-2 funding is for home-delivered meals)). We list the requirements and considerations that apply if a State agency elects to make transfers between allotments, including the parts and subparts of Title III which are subject to transfer of allocations, the maximum percentage of an allocation which may be transferred between parts and subparts, and a confirmation that such limitations apply in aggregate to the State agency. For example, a State may find that older individuals have a need for transportation to congregate meal sites. A State agency is able to transfer, within allowed limits, allotments from the congregate meal nutrition grant award (part C-1) to the supportive services grant award (part B) to provide transportation to meet State and local service needs.

*Comment:* ACL received several comments on this section, which addresses transfers between Title III, parts C-1 and C-2 and between Title III, parts B and C. The comments on this section were mixed. Some expressed support for the provision, while other commenters expressed that the transfer limitations are unnecessarily burdensome, and that AAAs should be

able to make transfers as they see fit and without State agency approval.

*Response:* ACL does not have the authority to modify this requirement. Section 308(b) of the Act does not allow the State agency to delegate authority to make a transfer to a AAA or any other entity.<sup>82</sup> However, section 308 of the Act requires the State agency, in consultation with AAAs, to ensure that the process used by the State agency in transferring funds between Title III, parts C-1 and C-2 and between Title III, parts B and C is simplified and clarified to reduce administrative barriers. We have also clarified that for transfers between parts C-1 and C-2, State agencies must direct limited resources to the greatest nutrition service needs at the community level. We have added these requirements to § 1321.9(c)(2)(iii). Given the volume of comments on this issue, ACL will further address these requirements through technical assistance, as needed.

*§ 1321.9(c)(2)(iv) State, Territory, and area plan administration.*

Section 308 of the Act sets limits on the amount of Title III funds which may be used for State, Territory, and area plan administration.<sup>83</sup> In this provision, we specify the requirements and considerations that apply, including flexibilities that some State agencies of single planning and service States may exercise and how the State agency may calculate the maximum amounts available for AAAs to use. We receive regular requests for technical assistance about the use of funds for plan administration. This provision is intended to provide clarity to State agencies. For example, State agencies may either receive five percent of their funding allocation or \$750,000 (\$100,000 for certain Territories) of their total Title III allocation as set forth in the Act to complete the State plan administration activities required by the Act. Plan administration activities include planning, coordination, and oversight of direct services provided with the remainder of the Title III allocation. The State, Territory, and area plan administration allocation amounts may be taken from any same fiscal year Title III award allocation at any time during the

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<sup>82</sup> 42 U.S.C. 3028(b).

<sup>83</sup> *Id.* section 3028.

grant period and may be allocated to any part of the same fiscal year Title III grant allocation, with the statutory exception of allocation of area plan administration to part D (which provides funding for evidence-based disease prevention and health promotion programs). In States with multiple PSAs, we clarify section 304(d)(1)(A) of the Act and better streamline implementation of maximum allocation amounts.<sup>84</sup> We specify that the maximum amount the State agency may make available for area plan administration is ten percent of the total amount of funding allocated to AAAs. This funding may be made available to AAAs in accordance with the IFF for the purpose of area plan administration, which we further address in § 1321.57(b).

*Comment:* We received comment asking ACL to limit the amount of area plan administration funds that may be spent on the development of private pay or other contracts and commercial relationships.

*Response:* Funds for area plan administration are limited to ten percent of the total funding allocated to AAAs. AAAs must complete the area plan activities required under the Act and as set forth by State agency policies and procedures; development of private pay programs or other contracts and commercial relationships is allowable, but not required. Given the levels of funding for Title III programs under the Act and the responsibility for State agencies to set policies and procedures, ACL does not believe further limitation is needed.

*Comment:* One commenter expressed that too much OAA funding is allocable to State and area plan administration and requested that the administration of OAA programs be streamlined, while another expressed that amounts available for area plan administration should be increased, noting that area plan administration costs exceed the maximum that can be made available under the Act.

*Response:* The maximum amounts for State and area plan administration are specified in the Act, and ACL does not have the authority to modify such amounts. Accordingly, ACL maintains the regulatory language for this provision as proposed.

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<sup>84</sup> 42 U.S.C. 3024(d)(1)(A).

§ 1321.9(c)(2)(v) *Minimum adequate proportion.*

The Act sets forth requirements that the State plan must identify a minimum proportion of funds that will be spent on access services, in-home supportive services, and legal assistance. Our final rule requires the State agency to have policies and procedures to implement these requirements.

*Comment:* A commenter expressed concern about the impact of § 1321.9(c)(2)(v) in States that may lack continuity of leadership in their State agencies. The commenter also expressed concern that minimum expenditure requirements set by State agencies could impact the area agency and service provider network, given limited availability of OAA funds. Another commenter expressed concern that decisions on minimum adequate proportion amounts that will be expended on access services, in-home supportive services, and legal assistance will take away from current service levels in other areas without more funding being made available.

*Response:* ACL appreciates these concerns but declines to make any modifications to this section. Section 307(a)(2)(C) of the Act requires each State plan to specify a minimum proportion of Title III, part B funds that will be used by area agencies to provide access services, in-home supportive services, and legal assistance.<sup>85</sup> Accordingly, ACL does not have the authority to modify this requirement. Finally, the minimum expenditure requirements in this section are not new requirements; State and area agencies are already subject to these requirements.

*Comment:* A commenter suggested that ACL modify § 1321.9(c)(2)(v) to require each State plan to specify a minimum proportion of funds that will be used by area agencies to provide caregiver support services, in addition to access services, in-home supportive services, and legal assistance.

*Response:* ACL declines to make the requested change. The Act does not require that Title III, part B funds be used to provide caregiver support services, and ACL declines to impose

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<sup>85</sup> 42 U.S.C. 3027(a)(2)(C).



such a requirement on State agencies. Title III, part E funds are specified to provide family caregiver support services. ACL leaves the decision to the State agencies as to whether to use Title III, part B funds for caregiver services in accordance with the Act, in order to afford flexibility to the State agencies as to how to allocate Title III, part B funding.

*§ 1321.9(c)(2)(vi) Maintenance of effort.*

The provision contained in § 1321.49 (*State agency maintenance of effort*) of the existing regulation is redesignated here as § 1321.9(c)(2)(vi) and revised. The final rule requires State agencies to develop fiscal policies and procedures related to requirements under the Act, corresponding to sections 309(c)<sup>86</sup> and 374.<sup>87</sup> These requirements include expending specific minimum maintenance of effort amounts, which are calculated as required by the Act. In response to technical assistance requests, we also clarify that excess amounts reported in other reports, such as the Federal financial report (SF- 425), do not become part of the amounts used in calculating the minimum required maintenance of effort expenditures, unless the State agency specifically certifies the excess amounts for such purpose.

*Comment:* Two commenters recommended that § 1321.9(c)(2)(vi) be amended to allow for one-time appropriations of State funding to be excluded from the Act’s maintenance of effort requirement for Title III.

*Response:* ACL understands these concerns. ACL is unable to accommodate this suggestion, however, as this requirement is based on the language in section 309(c) of the Act, which provides that “[a] State’s allotment under section 304 [of the Act] for a fiscal year shall be reduced by the percentage (if any) by which its expenditures for such year from State sources under its State plan approved under section 307 [of the Act] are less than its average annual expenditures from such sources for the period of 3 fiscal years preceding such year.”<sup>88</sup>

*Comment:* A commenter recommended that § 1321.9(c)(2)(vi)(C) be removed. This

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<sup>86</sup> 42 U.S.C. 3029.

<sup>87</sup> 42 U.S.C. 3030s-2.

<sup>88</sup> 42 U.S.C. 3029.

paragraph provides that any amount of State resources included in the Title III maintenance of effort certification that exceeds the minimum amount required becomes part of the permanent maintenance of effort. The commenter expressed that this requirement may disincentivize States from providing more than the minimum amount of funds.

*Response:* ACL appreciates the comment but declines to remove this paragraph, in order to provide maximum flexibility to the State agencies. Contrary to the commenter's note, a State agency may have reason to employ this provision to increase the required maintenance of effort. In addition, as set forth in § 1321.9(c)(2)(vi)(D), excess State match reported on the Federal financial report does not become part of the maintenance of effort unless the State agency certifies the excess.

*§ 1321.9(c)(2)(vii) State Long-Term Care Ombudsman Program.*

This final rule requires State agencies to develop fiscal policies and procedures related to requirements under the Act, corresponding to section 307(a)(9).<sup>89</sup> These requirements include that the State agency will expend no less than the minimum amounts that are required to be expended by section 307(a)(9) of the Act. We also clarify that the State agency must provide the Ombudsman with information to complete Ombudsman program requirements and that the fiscal activities relating to the operation of the Office comply with the requirements set forth in § 1324.13(f).

*Comment:* Two commenters expressed support for this provision. Currently, the Act sets the required minimum expenditure amount at the amount expended by the State agency during fiscal year 2019 for the Ombudsman program under Titles III and VII of the Act,<sup>90</sup> and subsection (A) of § 1321.9(c)(2)(vii), which addresses the minimum expenditure amount, likewise refers specifically to fiscal year 2019. Several commenters recommended not including a specific fiscal year in § 1321.9(c)(2)(vii)(A), as such fiscal year may be modified as a result of

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<sup>89</sup> 42 U.S.C. 3027(a)(9).

<sup>90</sup> *Id.*

future reauthorizations of the Act and recommends instead using language in § 1321.9(c)(2)(vii)(A) that avoids mentioning a specific fiscal year.

*Response:* ACL appreciates the support expressed for § 1321.9(c)(2)(vii). We agree with the suggestion to remove the reference to fiscal year 2019 and have revised subsection (A) accordingly.

*Comment:* A commenter expressed concern that the language in § 1321.9(c)(2)(vii)(A), which sets forth the minimum amount State agencies must expend for the Ombudsman program, is unclear.

*Response:* ACL will address any questions regarding minimum expenditures for the Ombudsman program through technical assistance, as needed.

*§ 1321.9(c)(2)(viii) Rural minimum expenditures.*

The final rule requires State agencies to develop fiscal policies and procedures related to requirements under the Act, corresponding to section 307(a)(3)(B).<sup>91</sup> These requirements include that the State agency must: expend not less than the amount expended in accordance with the level set in the Act for services for older individuals residing in rural areas, project the cost of providing such services, and specify a plan for meeting the needs for such services. To implement these requirements, we set forth that the State agency establish a process and control for determining how rural areas within the State shall be defined.

*Comment:* A few commenters expressed support for § 1321.9(c)(2)(viii). Many commenters sought more clarity about the requirements in § 1321.9(c)(viii). One commenter shared the concern that State agencies will lack the necessary information to project the cost of providing services to rural areas.

*Response:* ACL appreciates the support of this provision. ACL appreciates these comments but declines to provide further direction in this final rule to State agencies as to how to

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<sup>91</sup> 42 U.S.C. 3027(a)(3)(B).

comply with these requirements (which can be found in section 307(a)(3)(B) of the Act).<sup>92</sup> State agencies are best positioned to make these determinations.

The term “rural” appears many times in the Act with respect to the delivery and prioritization of services. In addition, State agencies may use the IFF to direct Title III funding to rural areas. There is no one universally accepted or mandated definition of what constitutes a “rural area.” Over the years, State agencies have determined what areas in their States are rural, and the factors that State agencies have used to make this determination can vary. In recognition of this variation in how State agencies determine what areas in their State are rural, the Act does not mandate a definition of rural areas, and ACL declines to limit the flexibility afforded to the State agencies by the Act.

Likewise, State agencies are better positioned than ACL to project the cost of providing services and to develop a plan for meeting the needs for services in the rural areas of their respective States. We note that State agencies provide these projections in their current State plans on aging, as this is an existing requirement. For clarity, we have revised the final rule to specify that the minimum amount as set forth in the Act must be maintained. ACL will provide technical assistance with respect to this requirement, as needed.

*Comment:* Two commenters raised questions about the relationship between the requirement in § 1321.9(c)(2)(viii) that State agencies develop a process for determining how “rural areas” are defined and the Older Americans Act Performance System (OAAPS) definition of “rural” for reporting purposes. Another commenter raised a concern that this requirement conflicts with the OAAPS definition of “rural.”

*Response:* ACL appreciates these questions and concerns and acknowledges the potential for confusion due to the requirement of § 1321.9(c)(2)(viii) related to defining “rural areas” and the separate requirement to submit annual performance report data on “rural” program participants. OAAPS is the reporting tool that State agencies and, in some cases area agencies,

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<sup>92</sup> *Id.*

use to submit their annual performance report data on program participants, services, and expenditures related to the Act. OAAPS uses rural-urban commuting area (RUCA) codes defined at the ZIP code level to determine whether an individual program participant resides in a rural or non-rural area.<sup>93</sup> With respect to those clients for whom demographic data must be reported into OAAPS, all State agencies must use this definition and tool to report on “rural” program participants. State agencies are not required to use this definition of “rural” for any other purpose.

Section 1321.9(c)(2)(viii) of the final rule, by contrast, relates to the State agency’s projections, plans, and expenditures pertaining to its implementation and administration of programs and services under the Act. The definition of “rural areas” referred to in this section may be separate and distinct from the definition of “rural areas” that is required to be used for annual program reporting on individual program participants.

*Comment:* A commenter expressed concern that the language of § 1321.9(c)(2)(viii)(B), which requires State agencies to expend annually on services for older individuals residing in rural areas no less than the amount expended for such services as set forth in the Act, may cause State agencies to believe they are not allowed to spend on such services more than the required minimum expenditure.

*Response:* ACL appreciates this comment but disagrees with this interpretation of the section (the language of which is the same as that found in section 307(a)(3)(B) of the Act).<sup>94</sup> The language provides the minimum amount that State agencies must spend; it does not impose a maximum amount that State agencies may spend on services for older adults residing in rural areas.

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<sup>93</sup> Specifically, OAAPS uses Categorization C of the Rural-Urban Commuting Area (RUCA) codes to determine geographic distribution between rural and non-rural. *See* The Rural Health Research Ctr., <http://depts.washington.edu/uwruca/ruca-uses.php> (last visited Oct. 25, 2023). For additional information and background on the zip code-based RUCA, *see also* *Rural-Urban Commuting Area*, The U.S. Dep’t. of Agric., Econ. Research Serv., <https://www.ers.usda.gov/data-products/rural-urban-commuting-area-codes/documentation/> (last visited Oct. 25, 2023).

<sup>94</sup> 42 U.S.C. 3027(a)(3)(B).

*Comment:* With respect to the requirement in § 1321.9(c)(2)(viii)(B) that State agencies expend annually on services for older individuals residing in rural areas no less than the amount expended for such services as set forth in the Act, a commenter proposed that State agencies be required to demonstrate how their IFFs meet the needs of older adults with greatest social need and with greatest economic need, in lieu of a policy of requiring minimum expenditure levels for one category of older adults (i.e., older adults residing in rural areas).

*Response:* There is a requirement that State agencies expend annually on services for older individuals residing in rural areas no less than the amount as set forth in section 307(a)(3)(B) of the Act.<sup>95</sup> This provision is included to further implementation of this statutory requirement. ACL requires State agencies to include in the IFF a descriptive statement and application of the State agency's definitions of greatest economic need and greatest social need (see § 1321.49); we believe this requirement addresses the concern.

*Comment:* A few commenters expressed concern as to how State agencies will be able to comply with the rural minimum expenditure amount requirement set forth in § 1321.9(c)(2)(viii)(B) when the rule allows for various definitions among the State agencies. Another commenter recommends that ACL add clarifying language requiring State agencies to address their application of the rural minimum expenditure requirement, including how this requirement relates to each State agency's IFF.

*Response:* ACL appreciates the above comments related to rural minimum expenditure requirements set forth § 1321.9(c)(2)(viii)(B) but maintains the regulatory language as proposed. Regarding potential varying definitions of what constitutes rural areas, each State agency only compares what it will spend for each fiscal year against what was spent in that State as set forth in the Act. The definitions applied in other States will be irrelevant to this calculation. In addition, § 1321.9 (c)(2)(viii)(A) requires the State agency to establish a process and control for determining the definition of rural areas within their State in part so that the State agency will be

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<sup>95</sup> *Id.*

able to comply with the rural minimum expenditure requirement.

Regarding the recommendation that State agencies be required to address their application of the rural minimum expenditure requirement, section 307(a)(3) of the Act requires State agencies to provide assurances in their State plans with respect to their compliance with the rural minimum expenditure.<sup>96</sup> ACL declines to impose additional requirements.

*Comment:* Two commenters noted that without additional funding, the requirements of § 1321.9(c)(2)(viii) may result in decreased services to metropolitan areas with a higher proportion of older adults.

*Response:* The commenters' concerns relate to the distribution of Title III funds throughout the State, which is addressed elsewhere in the rule. Section 305(a)(2)(C) through (D) of the Act<sup>97</sup> requires distribution of Title III funds to occur via an IFF (further defined in § 1321.49) or funds distribution plan (further defined in § 1321.51). The IFF is required for States with multiple PSAs, and a funds distribution plan is required for single PSA States. Sections 1321.49 and 1321.51 require State agencies to develop the IFF or funds distribution plan, through a process that allows for input from area agencies, interested parties, and the public; the concerns raised by the commenters can be addressed during this public input process.

*Comment:* A commenter expressed concern that the OAAPS definition of rural is an inaccurate reflection of rural areas and could negatively impact area agencies. Another commenter expressed concerns as to U.S. Census data used in the OAAPS definition of rural.<sup>98</sup>

*Response:* States are not required to use the OAAPS definition of rural in their IFFs; accordingly, the commenter's concern that the OAAPS definition could negatively impact area agencies is misplaced. The comments regarding the inaccuracy of, and the data used in, the OAAPS definition of rural are outside of the scope of the rule, which does not address the OAAPS reporting system. ACL is available to provide technical assistance regarding defining

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<sup>96</sup> *Id.* section 3027(a)(3).

<sup>97</sup> 42 U.S.C. 3025(a)(2)(C–D).

<sup>98</sup> *Supra* note 93.

and serving rural areas.

*§ 1321.9(c)(2)(ix) Reallotment.*

Our final rule requires State agencies to develop fiscal policies and procedures related to a State agency's voluntary release of funds (reallotment), corresponding with sections 304(b)<sup>99</sup> and 703(b)<sup>100</sup> of the Act. These policies and procedures include that the State agency must communicate annually to ACL if the State agency has funding that will not be expended in the grant period to be voluntarily reallotted to the Assistant Secretary for Aging that will then be redistributed to other State agencies who identify as being able to utilize funds within the grant period. Additionally, the State agency should communicate annually to ACL whether they are able to receive and expend within the grant period any reallotted funds that may become available from the Assistant Secretary for Aging. We also clarify that the State agency must distribute any such reallotted funds it receives in accordance with the IFF or funds distribution plan, as set forth in § 1321.49 or § 1321.51.

*§ 1321.9(c)(2)(x) Voluntary contributions; § 1321.9(c)(2)(xi) Cost sharing.*

The provision contained in § 1321.67 of the existing regulation (*Service contributions*) is redesignated here as § 1321.9(c)(2)(x) (*Voluntary contributions*) and revised, and we add § 1321.9(c)(2)(xi) (*Cost sharing*) to delineate between the two types of consumer contributions. Section 315 of the Act allows for consumer contributions which may take the form of (1) an individual voluntarily contributing toward the cost of a service (a voluntary contribution)<sup>101</sup> and (2) the State agency establishing a cost sharing policy, creating a structured system for collecting sliding scale payments from some service participants for some services (cost sharing).<sup>102</sup> For many decades, State and area agencies and service providers have collected voluntary contributions from participants receiving services under the Act. Such voluntary contributions

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<sup>99</sup> 42 U.S.C. 3024(b).

<sup>100</sup> 42 U.S.C. 3058b(b).

<sup>101</sup> 42 U.S.C. 3030c-2(b).

<sup>102</sup> *Id.* section 3030c-2(a).



allow service participants to demonstrate their support of these services and for expansion of services to others in the community. For example, in FY 2021 State agencies reported nearly \$166 million in program income for Title III-funded services to ACL, a significant amount we estimate was in the form of voluntary contributions.

Cost sharing provisions were added in the 2000 amendments to the OAA (Pub. L. 106-501). Because the Act includes many restrictions regarding cost sharing, in practice ACL has seen cost sharing implemented for a few limited services such as transportation and respite. For example, a State agency may wish to pursue cost sharing under the Act as a way of more consistently soliciting contributions or for administrative simplicity to align with services provided under other funding sources that use a cost sharing model. Many State agencies choose not to pursue cost sharing as they find no benefit in comparison to the traditional model of collecting voluntary contributions.

We discuss these two provisions together because ACL has received many questions about how voluntary contributions and cost sharing compare. We discuss voluntary contributions first because, as explained above, State agencies have a long history of requesting voluntary contributions and are less likely to pursue cost sharing arrangements.

We specify in § 1321.9(c)(2)(x) that the Act states that voluntary contributions are allowed and may be solicited for all services, as long as the method of solicitation is non-coercive.<sup>103</sup> In contrast, we also list the services for which the Act prohibits cost sharing, which include information and assistance, outreach, benefits counseling, and case management services; long-term care ombudsman, elder abuse prevention, legal assistance, and other consumer protection services; congregate or home-delivered meals; and any services delivered through Tribal organizations.<sup>104</sup>

In § 1321.9(c)(2)(xi) we list applicable requirements to include how suggested

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<sup>103</sup> 42 U.S.C. 3030c-2.

<sup>104</sup> *Id.* section 3030c-2(a)(2).

contribution levels for cost sharing are established, which individuals are encouraged to contribute, the manner of solicitation of contributions, a prohibition on means testing, provisions that apply to all service recipients, a prohibition on denial of services, procedures that are to be established, that amounts collected are considered to be program income, and further provisions that apply to cost sharing. Both § 1321.9(c)(2)(x) and § 1321.9(c)(2)(xi) are intended to clarify that services may not be denied, even when a State agency has a cost sharing policy and or a voluntary contribution policy, if someone cannot or chooses not to contribute or to pay a suggested cost sharing amount. In other words, any State agency cost sharing and consumer contribution policies must not be required for OAA program participants, and State agencies must ensure that program participants are aware that they are not required to contribute, and services will not be impacted if they choose not to contribute. We also clarify that State agencies, AAAs, and service providers are prohibited from using means testing to determine eligibility for or to deny services to older people and family caregivers, as set forth in section 315(a)(5)(E)<sup>105</sup> and (b)(3),<sup>106</sup> and we confirm that both voluntary contribution and cost sharing solicitation amounts are to be based on the actual cost of services.

In specifying differences between voluntary contributions and cost sharing, voluntary contributions are encouraged for individuals whose self-declared income is at or above 185 percent of the FPL, while the Act further restricts the implementation of cost sharing and does not allow it to be imposed on service participants who are at or below the FPL or are otherwise low-income as specified by the State agency. Cost sharing is also prohibited for services delivered through Tribal organizations.

Additionally, if a State agency chooses to establish a cost sharing policy, it must be implemented statewide at all AAAs in the State, with limited exceptions, where a State agency approves a waiver request from a AAA where the AAA demonstrates that a significant

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<sup>105</sup> *Id.* section 3030c-2(a)(5)(E).

<sup>106</sup> *Id.* section 3030c-2(b)(3).

proportion of persons receiving services under the Act have incomes below a certain threshold or that applying the cost sharing policy would place an unreasonable burden upon the AAA, as set forth in section 315(a)(6).<sup>107</sup>

*§ 1321.9(c)(2)(x) Voluntary contributions.*

*Comment:* A few commenters expressed support for § 1321.9(c)(2)(x) and § 1321.9(c)(2)(xi), which detail requirements related to voluntary contributions and cost-sharing, respectively, and expressed appreciation for the distinctions made between the two concepts.

*Response:* ACL appreciates the support for these provisions.

*Comment:* A few commenters recommended removal of the requirement in § 1329.9(c)(2)(x)(B) that voluntary contributions be encouraged for individuals whose self-declared income is at or above 185 percent of the FPL. One commenter requested clarity as to whether this requirement applies to both registered and non-registered services, as defined in OAAPS.<sup>108</sup> The commenter also suggested that an exception be added to this provision for non-registered services under OAAPS where self-reported income is not collected as part of service delivery. Another commenter recommended that the voluntary donation policy be eliminated for Title III, part C meal programs and replaced with an income-based charge for meals.

*Response:* ACL appreciates these comments but does not have the authority to modify this requirement because it is mandated by section 315 of the Older Americans Act.<sup>109</sup> However, § 1329.9(c)(2)(x)(B) does not require an agency to obtain the income levels of all clients to determine whether the clients should be encouraged to voluntarily donate; rather, the provision merely requires that voluntary contributions be encouraged for individuals whose self-declared income is at or above 185 percent of the FPL.

*Comment:* ACL received a few comments objecting to allowing Ombudsman programs to

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<sup>107</sup> *Id.* section 3030c-2(a)(6).

<sup>108</sup> Registered services are certain services for which demographic and other information are collected from each client and reported into OAAPS (such as home-delivered meals), while non-registered services are those for which no client demographic information is required to be reported in OAAPS (such as public information sessions).

<sup>109</sup> 42 U.S.C. 3030c-2.

seek voluntary contributions, noting a concern that it could be a barrier to residents accessing ombudsman services.

*Response:* The language of the rule is permissive, and we defer to Ombudsman programs to make determinations about voluntary contributions. We decline to make further revisions to this provision.

*§ 1321.9(c)(2)(xi) Cost sharing.*

*Comment:* ACL received many comments regarding this section. There was disagreement among the commenters about this section. Some commenters expressed that the section helped to clarify the requirements of the Act. Most commenters, however, had issues with the concept of cost sharing as set forth in the provision (some felt the concept should be eliminated) or had issues with the process as set forth in the provision (many felt decisions as to cost sharing should be made at the area agency level).

*Response:* ACL appreciates these comments but declines to make the commenters' requested changes to this section. The requirements in § 1329.9(c)(2)(xi) is mandated by section 315 of the Act.<sup>110</sup>

*Comment:* Some commenters expressed confusion regarding the distinctions between voluntary contributions and cost sharing, and one commenter's understanding was that cost sharing is not voluntary.

*Response:* For many decades, State and area agencies and service providers have collected voluntary contributions from participants receiving services under the Act. Cost sharing provisions were added in the 2000 amendments to the Act (Pub. L. 106-501). Because the Act includes many restrictions and requirements regarding cost sharing, in practice ACL has only seen cost sharing implemented for a few limited services, such as transportation and respite. Many State agencies choose not to pursue cost sharing as they find limited or no benefit in comparison to the traditional model of collecting voluntary contributions. We clarify in §

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<sup>110</sup> *Id.* section 3030c-2.

1321.9(c)(2)(x) that voluntary contributions are allowed and may be solicited for all services, as long as the method of solicitation is noncoercive. In contrast, we also list the services for which the Act prohibits cost sharing.

In § 1321.9(c)(2)(xi) we list applicable requirements to include how suggested contribution levels for cost sharing are established, which individuals are encouraged to contribute, the manner of solicitation of contributions, a prohibition on means testing, provisions that apply to all service recipients, a prohibition on denial of services, procedures that are to be established, that amounts collected are considered to be program income, and further provisions that apply to cost sharing. Both § 1321.9(c)(2)(x) and (xi) are intended to clarify that services may not be denied, even when a State agency has a cost sharing policy and a voluntary contribution policy, if someone cannot or chooses not to contribute or to pay a suggested cost sharing amount. In other words, all State agency cost sharing and consumer contribution policies must be voluntary for OAA program participants, and State agencies must ensure that program participants are aware that they are not required to contribute.

ACL will offer technical assistance to any State agencies that request assistance in implementing voluntary contributions and cost sharing.

*Comment:* One commenter expressed concern regarding the applicability of cost sharing to Tribal organizations and requested that Tribal organizations be allowed to request a waiver from such requirements.

*Response:* ACL appreciates the comment but believes the commenter's concerns are adequately addressed in the rule. Section 315(a) of the Act<sup>111</sup> and § 1321.9(c)(2)(xi)(D)(3)(iv) expressly prohibit cost sharing for any services delivered through Tribal organizations.

*Comment:* One commenter requested that AAAs be allowed to implement cost sharing for Title III, part C nutrition programs (congregate and home-delivered meals). The commenter also expressed concern that some clients with the financial means to voluntarily contribute to the

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<sup>111</sup> *Id.* section 3030c-2(a).

cost of the meals do not do so, which can impact a AAA's ability to provide services to those at greatest social need and greatest economic need.

*Response:* Section 315(a) of the Act<sup>112</sup> expressly prohibits cost sharing for congregate and home-delivered meals. Even if cost sharing were permitted for these services, an area agency would not be permitted to deny the service to any client who is unwilling to contribute, as discussed above. Section 1321.9(c)(2)(x) requires that voluntary contributions be encouraged for clients whose self-reported income is at or above 185 percent of the FPL. In addition, serving clients with the “greatest social need” could include clients of considerable financial means.

*§ 1321.9(c)(2)(xii) Use of program income.*

The provision contained in § 1321.73 of the existing regulation (*Grant related income under Title III-C*) is redesignated here as § 1321.9(c)(2)(xii) and revised. We clarify the fiscal requirements that apply to program income, which include voluntary contributions and cost sharing payments. For example, we clarify that State agencies are required to report contributions as program income and set forth restrictions on the use of program income.

*Comment:* ACL received comments requesting clarification of the requirement in § 1321.9(c)(2)(xii)(B) that “[p]rogram income collected must be used to expand the service category by part of Title III of the Act, as defined in § 1321.71, for which the income was originally collected;” as well as requesting that § 1321.9(c)(2)(xii) be modified to permit area agencies the flexibility to allow program income to be used to expand any Title III service.

*Response:* Section 315 of the Act<sup>113</sup> does not authorize ACL to permit area agencies to use program income collected under one part of Title III to expand a service provided under another part of Title III.

In addition, in the course of reviewing these comments, ACL has determined that contributions must be used to expand a service funded under the Title III grant award pursuant to

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.* section 3030c-2.

which the income originally was collected, and that the language of this section was in need of revision. Accordingly, § 1321.9(c)(2)(xii)(B) has been revised to state that program income collected must be used to expand a service funded under the Title III grant award pursuant to which the income was originally collected.

Thus, a contribution for transportation (a supportive service under Title III, part B) can only be reported as income and used to expand Title III, part B supportive services such as transportation or multipurpose senior centers. Similarly, if someone pays a portion of the cost of a Title III, part B transportation service under a cost-sharing arrangement, that portion must be reported as income to the Title III, part B supportive services program. In addition, because Title III, part C-1 funding for congregate meals and Title III, part C-2 funding for home-delivered meals are issued under separate grant awards, contributions for services under these two awards cannot be commingled. A contribution for the nutrition service of home-delivered meals must be reported as income to the home-delivered nutrition program and used to expand home-delivered nutrition services, such as home-delivered meals, or nutrition education for home-delivered meals clients; it cannot be used to expand congregate meals services.

*§ 1321.9(c)(2)(xiii) Private pay programs.*

AAAs and service providers may, in addition to programs supported by funding received under the Act, offer separate private pay programs for which individual consumers agree to pay to receive services. These private pay programs may offer similar or the same services as those funded under Title III. We add paragraph (c)(2)(xiii) to this provision to provide guidance as to policies and procedures that should be in place to ensure that private pay programs offered by AAAs and service providers do not compromise core responsibilities under the Act. One such core responsibility, for example, is to ensure that individuals who receive information about private pay programs and who are eligible for services provided with Title III funds also are made aware of Title III-funded services and waitlist opportunities for those services.

*§ 1321.9(c)(2)(xiv) Contracts and commercial relationships.*

AAAs and service providers may receive and administer funding from multiple sources as they seek to provide comprehensive services to older adults. In doing so, they may enter into contracts and commercial relationships with various entities to accomplish the delivery of comprehensive services, as authorized in sections 212<sup>114</sup> and 306(a)(13) and (14) of the Act.<sup>115</sup>

The Act has always contemplated an aging network that plans, coordinates, and facilitates comprehensive and coordinated systems for supportive, nutrition, and other services, leveraging resources beyond what the OAA alone can support. The aging network has growing opportunities to braid different sources of government with private funding to serve older adults in need, which has been accomplished through contracts and commercial relationships with organizations such as Medicaid managed care plans and health systems, among others. Congress further strengthened this flexibility in the 2020 reauthorization of the OAA.<sup>116</sup>

In response to numerous questions about the appropriate roles, responsibilities, and oversight of such activities, feedback received in response to the RFI and the NPRM, and based on our observations of program activities, this final rule clarifies the policies and procedures that State agencies must establish related to all contracts and commercial relationships in subsection § 1321.9(c)(2)(xiv). We intend this rule to respond to numerous concerns from AAAs regarding inconsistent State agency approaches to contracts and commercial relationships, as well as concerns from State agencies about the level of risk and associated oversight required. We encourage a review and approval process that complies with the statutory requirements found in section 212<sup>117</sup> and throughout Title III but is not onerous, can be implemented easily, and does not cause undue delay. We anticipate providing technical assistance in this area to State agencies and AAAs.

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<sup>114</sup> 42 U.S.C. 3020c.

<sup>115</sup> 42 U.S.C. 3026(a)(13)-(14).

<sup>116</sup> 42 U.S.C. 3027(a)(26) (2018) as amended by Pub. L. 116-131 (2020).

<sup>117</sup> 42 U.S.C. 3020c.



As a component of these policies and procedures, and consistent with their authority under sections 305(a)(1)(C),<sup>118</sup> 306(a),<sup>119</sup> 306(b),<sup>120</sup> and 212(b)(1),<sup>121</sup> State agencies must establish processes for AAAs to receive prior approval for contracts and commercial relationships permitted under section 212 of the Act.<sup>122</sup> We expect such processes to be flexible and streamlined. This provision will help ensure that the activities of recipients and subrecipients of funding further the intended benefits of the Act and do not compromise core responsibilities or the statutory mission of State agencies, AAAs, and service providers. Through these requirements, we intend to promote and expand the ability of the aging network to engage in business activities.

*Comment:* Several commenters recommended that we define “commercial relationships.” Commenters also sought clarity as to whether this provision applies to contracts or commercial relationships to provide services to non-profit entities in addition to “profitmaking” entities (under section 212 of the Act).<sup>123</sup> We have received several questions through public comments and requests for technical assistance seeking to understand when a business arrangement is or is not a “commercial relationship.”

*Response:* Typically, an organization seeking clarity on this issue either wants to or is already engaged in a business arrangement and is trying to understand whether certain OAA requirements apply to that arrangement. Our intent is to broadly define “commercial relationships.” Whether they are contracts, “business arrangements,” “agreements,” “business transactions,” or any other term that an organization might use to describe the activity, it is broadly encompassed within the statutory term “contracts or commercial relationships.”

The Act only uses the phrase “commercial relationship” in tandem with “contracts” or

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<sup>118</sup> 42 U.S.C. 3025(a)(1)(C).

<sup>119</sup> 42 U.S.C. 3026(a).

<sup>120</sup> *Id.* section 3026(b).

<sup>121</sup> 42 U.S.C. 3020c(b)(1).

<sup>122</sup> *Id.* section 3020c.

<sup>123</sup> *Id.*

“contractual.”<sup>124</sup> We have sought to consistently adopt the phrase “contracts and commercial relationships” throughout the NPRM and in this final rule. When we are not referring to all “contracts and commercial relationships,” we explain which subset is relevant. For example, the phrase “contracts and commercial relationships that fall under section 212 of the Act” would refer to the agreements described in section 212 of the Act.<sup>125</sup> It is not relevant to distinguish between a “contract” and a “commercial relationship” under section 212; the same requirements apply, regardless of how an organization defines the agreement.

We appreciate comments seeking a clearer definition of “private pay” in the final rule. We have revised the definitions of “area plan administration,” “private pay programs” and “program development and coordination activities” to use “contracts and commercial relationships,” consistent with our use throughout the rest of the rule.

We also decline to provide a regulatory definition of “profitmaking” as used in section 212 of the Act, which lays out the circumstances under which a recipient may enter “[...] an agreement with a profitmaking organization for the recipient to provide services to individuals or entities not otherwise receiving services under this Act[.]”<sup>126</sup> We interpret “profitmaking” as referring to entities that are not non-profits. However, because section 212 establishes a framework for understanding how and when these arrangements are consistent with the intent of the Act, we think it is reasonable for a State agency to apply the same opportunities and obligations in the context of agreements with non-profit entities. In other words, if an agreement would be permitted under section 212 with a for-profit entity, a State agency could determine that a similar agreement with a non-profit entity is permissible so long as the other requirements of section 212 are met. We encourage State agencies to take this approach or otherwise explain why they decline to do so in their policies and procedures.

*Comment:* We received a significant number of comments related to contracts and

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<sup>124</sup> 42 U.S.C. 3026; 42 U.S.C. 3027; 42 U.S.C. 3012.

<sup>125</sup> 42 U.S.C. 3020c.

<sup>126</sup> 42 U.S.C. 3020c(a).

commercial relationships, generally focusing on approval requirements for agreements that fall under section 212 of the Act.<sup>127</sup> Many commenters raised concerns about the appropriate degree of State oversight and the role of the State agency. Commenters had concerns about how time-consuming State agency approval processes can be, both out of concern for the burden and potential cost to State agencies and because of the potential delay in executing contracts and commercial relationships and subsequent impact on potential partnerships. Several commenters were concerned that this provision could deter OAA grantees from innovating and forming relationships with health and social sector commercial entities.

All commenters that raised this issue agreed that oversight of contracts and commercial relationships should be streamlined and not overly burdensome. Several commenters described the proposed policies and procedures as an expansion of State agency control and were concerned that “excessive approval requirements” would usurp local decision-making. Other commenters suggested that ACL limit the State agency approval process to a generic review of AAA activity, and that State agencies should not be authorized to review and approve of specific contracts or contract details. Commenters recommended relying solely on assurances in AAA contracts that reflect adherence to all key principles within the OAA as a maximum degree of State oversight. One commenter suggested that State agency approval should be limited to approval of standard language for AAAs to incorporate into agreements with third-party entities, as appropriate.

Many comments related to the State approval process under section 212 of the Act,<sup>128</sup> including requests for more clarity about how comprehensive the process should be. One commenter recommended incorporating more specific information about the nature of State agency “approval” into the regulation and establishing a right of appeal if a State agency opts not to approve of a contract or commercial relationship. Several commenters noted that State

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<sup>127</sup> *Id.* section 3020c.

<sup>128</sup> 42 U.S.C. 3020c.

agencies are not a party to the contract they are responsible for approving, and thus should not have approval authority; other commenters asked whether the State agency became a party to the contract by virtue of its review and approval role.

Several comments included requests for information that we believe would be better incorporated into sub-regulatory guidance to assist in implementing this provision. For example, how should State agencies deal with contract amendments; can ACL provide examples of streamlined State agency review processes; what degree of oversight does a State agency have over a separate non-profit entity established by a AAA; what is the scope of State liability in the event of an issue that arises due to a contract or commercial relationship approved by the State agency; and what the remedy is if the State agency identifies an issue related to the proposed contract or commercial relationship.

*Response:* We appreciate these comments. We agree that State agency oversight policies and procedures should be streamlined, transparent, not overly burdensome to either the State or the subrecipients of Federal funds, and commensurate to the degree of risk associated with a specific contract or commercial relationship. Like most commenters who raised this issue, we do not believe it should usually be necessary for State agencies to review contract documents in order to approve the establishment of a contract or commercial relationship. As we stated in the proposed rule, we expect State agency approval processes to be flexible, reflecting the needs of the older individuals served and the abilities of AAAs and service providers to engage in contracts and commercial relationships.<sup>129</sup> We believe that requiring State agencies to establish clear policies and procedures for approval processes, developed in consultation with AAAs, will expedite the establishment of important partnerships.

States agencies could use a number of different approaches to streamline the approval processes. For example, a State agency could adopt standard assurances related to COI (and other concerns) to be adopted into all AAA agreements to provide services and decide not to

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<sup>129</sup> 88 FR 39578 (June 16, 2023).

review case-by-case information related to COI. A State agency could pre-approve a AAA to engage in a general category of contracts and commercial relationships with a certain type of organization, subject to certain conditions and a commitment to provide information about the agreement annually, as required under section 306(a).<sup>130</sup> The State agency could decide as a matter of policy that all contracts and commercial relationships to expand the reach of services will be approved unless certain concerning conditions exist (for example, if a AAA is under a corrective action plan). Under such a policy, AAAs would provide assurances that proposed agreements do not meet any exclusionary criteria. State agencies might decide that certain kinds of arrangements pose more risk than others. For example, contracts that involve a AAA on a corrective action plan or contracts that are disproportionately large compared to a AAA's overall budget may be considered to pose more risk. As we discussed in the proposed rule, State agencies could consider the potential risks of different kinds of contracts and commercial relationships as they develop and implement the most efficient and least burdensome approval processes possible.<sup>131</sup> State agencies have the discretion to decide whether it is appropriate to incorporate template language into agreements, standard assurances, or to use other methods of standardization.

We hope that having clear statewide policies and procedures will help to establish best practices nationwide. We strongly encourage State agencies to seek input on proposed approval processes from AAAs to help achieve a balanced and feasible approach that will achieve the goal of minimizing risks while enabling the expansion of services to reach older adults with unmet needs.

Commenters raised questions related to compliance and State agency liability for unsuccessful contracts or commercial relationships approved under State agency policy. We appreciate these concerns and reiterate here that the activities described in section 212 (both

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<sup>130</sup> 42 U.S.C. 3026(a)(13).

<sup>131</sup> 88 FR 39578 (June 16, 2023).

successful and unsuccessful) are allowable costs under the grant.<sup>132</sup> The State agency must establish and follow policies and procedures that are compliant with this final rule and comply with any other applicable requirements for recipients of Federal grants.

The structure of the Act is such that State agencies (as Federal grantees) are ultimately responsible for ensuring the appropriate use of funds, while AAA subrecipients are predominantly responsible for using those funds to develop the aging services network. This framework may lead State agencies to err on the side of caution (which is appropriate in overseeing the use of Federal funds) so as not to be held responsible for risky subrecipient activities. However, too much caution in this area may inhibit the provision of vital services and the sustainable growth of the network at a time when there is a growing population of older adults and greater demand for services. Section 212<sup>133</sup> and section 306(g)<sup>134</sup> highlight the importance of leveraging existing knowledge, expertise, and relationships to expand the reach of the aging services network.<sup>135</sup> All new business endeavors represent some degree of risk; we intend the policies and procedures under this provision to help mitigate, not eliminate, that risk. The intent of sections 212 and 306(g) can only be realized if the full weight of the potential failure of new contracts and commercial relationships does not fall on State agencies. We can alleviate that concern by clarifying that activities under section 212 are allowable costs so long as they comply with State agency policies and procedures.

We agree with commenters who noted that State agencies are not parties to these contracts and commercial relationships; however, that has no bearing on their authority to review and approve them. State agencies are responsible for reviewing and approving certain contracts and commercial relationships, consistent with sections 305(a)(1)(C),<sup>136</sup> 306(a),<sup>137</sup> 306(b),<sup>138</sup> and

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<sup>132</sup> 42 U.S.C. 3020c.

<sup>133</sup> *Id.* section 3020c.

<sup>134</sup> 42 U.S.C. 3026(g).

<sup>135</sup> 42 U.S.C. 3020c; 42 U.S.C. 3026(g).

<sup>136</sup> 42 U.S.C. 3025(a)(1)(C).

<sup>137</sup> 42 U.S.C. 3026(a).

<sup>138</sup> *Id.* section 3026(b).

212(b)(1) of the Act.<sup>139</sup> Engaging in these responsibilities does not make the State agency a party to the contract or commercial relationship under review.

Commenters encouraged ACL to develop regulatory text that sets an appropriate Federal regulatory floor for State agencies to meet but that remains flexible enough for State agencies with capacity or need to establish processes or standards that meet their State-specific priorities. We intend the regulatory text that we have set forward to be just that: a standard regulatory floor that defers to State agency discretion to develop policies and procedures to appropriately review contracts and commercial relationships that require State agency approval.

We prefer to leave State agencies the discretion to decide the details of their policies and procedures related to review and approval of contracts and commercial relationships (including pre-approval of agreements described in section 212 of the Act)<sup>140</sup> because circumstances vary across States and the State agency is ultimately responsible for ensuring the appropriate use of Federal funds granted to the State. However, in developing their policies and procedures, State agencies should consider the government interests in reviewing the potential contract or commercial relationship (including, among other concerns, any potential COI and whether appropriate firewalls exist to mitigate them; whether the AAA is meeting existing obligations under the Act; and potential risks to the AAA, the aging services network, or to the individuals served by the AAA associated with the proposed contract or commercial relationship). Section 306(a) of the Act sets forth many of these interests in the form of assurances that AAAs must offer for area plan approval.<sup>141</sup> State agencies have the discretion to request to review contract documents if they deem it necessary to determine whether the contract or commercial relationship may be approved, consistent with their policies and procedures. However, subrecipients should generally be able to provide sufficient information to address these concerns without having to share contract documents for review. This should include, at a minimum,

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<sup>139</sup> 42 U.S.C. 3020c(b)(1).

<sup>140</sup> 42 U.S.C. 3020c(b)(1).

<sup>141</sup> 42 U.S.C. 3026(a)(13).

information related to the proposed partnering entity,<sup>142</sup> the proposed services to be provided, and specific assurances related to other requirements under section 212(b).<sup>143</sup> We intend to provide tools and examples that State agencies may, at their discretion, adapt and use. We intend the delayed compliance date for this provision to provide adequate time for State agencies and subrecipients to adopt compliant policies and to engage in technical assistance as needed.

*Comment:* We received several comments recommending against incorporating any prior approval process for contracts and commercial relationships into the area plan approval process. Commenters also recommended that State agencies be required to provide timely approval.

*Response:* We agree that State agencies should establish a prior approval process that is distinct from the area plan approval process, as opportunities may arise outside of standard area plan timeframes and requests for prior approval may not need to meet the same expectations for public input, advisory council review, and other requirements. Subrecipients can only successfully establish contracts and commercial relationships that require prior approval if approval can be granted in a timely fashion. However, we encourage State agencies to use the area plan approval process as an additional opportunity to discuss any new business under development.

*Comment:* A number of commenters were particularly interested in minimizing the State's oversight role with respect to contracts and commercial relationships described in section 212 of the Act<sup>144</sup> that are executed by AAAs without expending OAA funding. Several commenters argued that the Act does not apply to such agreements, and thus oversight is not appropriate. Some commenters raised concerns that the State pre-approval required under section 212 of the Act conflicts with section 306(g) of the Act, which states that, "Nothing in this Act shall restrict an area agency on aging from providing services not provided or authorized by this

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<sup>142</sup> In deference to non-disclosure agreements, this may include the type of organization and not the identity of the specific entity. However, the State agency may require the AAA to attest that the proposed agreement is *not* with a specific entity.

<sup>143</sup> 42 U.S.C. 3020c(b).

<sup>144</sup> 42 U.S.C. 3020c.



Act[.]”<sup>145</sup> On the other hand, one AAA commenter strongly supported the approval role of the State agency and suggested that statewide standardization of the process to engage in contracts and commercial relationships under section 212 of the Act would help improve the AAA network’s ability to equitably engage in such business.

*Response:* We disagree with commenters who described State oversight in this area as an overreach. Our interpretation of the statute is that the Act applies to agreements “[...] to provide services to individuals or entities not otherwise receiving services under this Act [...]”<sup>146</sup> regardless of whether OAA funds are directly expended as part of the agreement. We seek to clarify here our interpretation of the statutory language and the Federal interests (as articulated in the Act) in responsible oversight of any contract or commercial relationship that falls within the category of “agreements” described in section 212.

Section 212(a) of the Act states that, subject to the conditions set forth in 212(b), “[...] this Act shall not be construed to prevent a recipient of a grant or a contract under this Act (other than title V) from entering into an agreement with a profitmaking organization for the recipient to provide services to individuals or entities not otherwise receiving services under this Act[.]”<sup>147</sup> We interpret this paragraph as defining “an agreement” for the purposes of section 212 as any arrangement with a profitmaking organization to provide services to individuals or entities not otherwise receiving services under this Act. Consistent with section 306(g),<sup>148</sup> such agreements must be permitted, provided they meet the conditions laid out in section 212, and that a subrecipient seeking pre-approval has followed the State agency policy and procedures established under this provision. A State agency should not arbitrarily deny approval of an agreement that satisfies the requirements of section 212 and of the State’s own policies and

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<sup>145</sup> 42 U.S.C. 3026(g).

<sup>146</sup> 42 U.S.C. 3020c(a).

<sup>147</sup> *Id.* section 3020c(a).

<sup>148</sup> 42 U.S.C. 3026(g) Nothing in this Act shall restrict an area agency on aging from providing services not provided or authorized by this Act, including through— (1) contracts with health care payers; (2) consumer private pay programs; or (3) other arrangements with entities or individuals that increase the availability of home- and community-based services and supports.

procedures.

Subsection (a) continues in paragraphs (a)(1) through (3) by providing three limiting conditions that are only relevant to certain agreements:

- Paragraph (a)(1) states that if funds provided under this Act to such recipient are initially used by the recipient to pay part or all of a cost incurred by the recipient in developing and carrying out such agreement, such agreement guarantees that the cost is reimbursed to the recipient.<sup>149</sup> We interpret this paragraph to mean that if agreements are developed and carried out using OAA funds, those funds must be reimbursed. Importantly, agreements may also be entered into *without* using OAA funds, in which case this condition does not apply, and reimbursement of OAA funds is not relevant.
- Paragraph (a)(2) states that if such agreement provides for the provision of one or more services, of the type provided under this Act by or on behalf of such recipient, to an individual or entity seeking to receive such services<sup>150</sup> certain additional conditions apply. Individuals and entities may only purchase services at a fair market rate; all costs incurred (and not otherwise reimbursed under (a)(1)) must be reimbursed; and recipients must report rates and rates must be consistent with the prevailing market rate in the relevant geographic area. We interpret this paragraph to mean that if the agreement is for the recipient to provide one or more OAA-authorized services to OAA service participants or clients, these additional conditions apply. As in (a)(1), we also interpret this paragraph to mean that an agreement might be entered into under section 212 that does *not* provide for the provision of one or more OAA services.

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<sup>149</sup> 42 U.S.C. 3020c(a)(1).

<sup>150</sup> *Id.* section 3020c(a)(2).

- Paragraph (a)(3) describes any amount of payment to the recipient under the agreement that exceeds reimbursement under this subsection of the recipient's costs is used to provide, or support the provision of, services under this Act.<sup>151</sup> We interpret this paragraph to mean that if an agreement is profitable beyond the required reimbursement of any OAA funds if used (under (a)(1)) and the reimbursement of any other costs incurred by the recipient (under (a)(2)(B)), any profits must be used to support the provision of OAA services to OAA clients.

Section 212(b) lists the limitations that apply to all agreements under section 212. An agreement described in paragraph (a) may not:

- be made without the prior approval of the State agency (or, in the case of a grantee under title VI, without the prior recommendation of the Director of the Office for American Indian, Alaska Native, and Native Hawaiian Aging and the prior approval of the Assistant Secretary), after timely submission of all relevant documents related to the agreement including information on all costs incurred.<sup>152</sup> We interpret this paragraph to require State agency pre-approval for all agreements under section 212. We have discussed at length the requirement in this final rule for State agencies to develop policies and procedures to implement this provision;
- have the effect of “[...] paying, reimbursing, subsidizing, or otherwise compensating an individual or entity in an amount that exceeds the fair market value of the services subject to such an agreement[.]”<sup>153</sup> This paragraph applies the limitation in section 212(a)(2)(A) to all agreements under section 212;

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<sup>151</sup> 42 U.S.C. 3020c(a)(3).

<sup>152</sup> *Id.* section 3020c(b)(1).

<sup>153</sup> *Id.* section 3020c(b)(2).

- result in the displacement of services otherwise available to an older individual with greatest social need, an older individual with greatest economic need, or an older individual who is at risk of institutional placement; or
  - in any other way compromise, undermine, or be inconsistent with the objective of serving the needs of older individuals, as determined by the Assistant Secretary.<sup>154</sup>
- Agreements under section 212 may not compromise OAA services to OAA program participants or clients and may not be inconsistent with the objective of serving older individuals. The Assistant Secretary for Aging has the discretion to determine whether an agreement violates this provision.

Section 212(c), (d), and (e) relate to monitoring and reporting requirements, timely reimbursement, and defining “cost” in this section, respectively.<sup>155</sup> We did not receive significant comments related to interpreting these provisions.

Section 212<sup>156</sup> cannot be read without the context provided by section 306(a),<sup>157</sup> which sets forth the requirements for the development of area plans, which lay out in detail the work that a AAA must do to fulfill their obligations under the Act, inclusive of compliance with section 212. Both sections 306(a) and 212 require subrecipients to provide information for State agency review and approval about the contracts and commercial relationships in which they are engaged, or in which they intend to engage. Section 306(a) incorporates the requirements of section 212 and enumerates the assurances the AAAs must offer as part of developing an area plan. Among other attestations, AAAs are required to provide assurances that they will:

- maintain the integrity and public purpose of services provided, and service providers, under this title in all contractual and commercial relationships;

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<sup>154</sup> *Id.* section 3020c(b)(3),(4).

<sup>155</sup> *Id.* section 3020c(c),(d),(e).

<sup>156</sup> 42 U.S.C. 3020c.

<sup>157</sup> 42. U.S.C. 3026(a).

- disclose the identity of each nongovernmental entity with which they have a contract or commercial relationship relating to providing any service to older individuals and the nature of such contract or such relationship;
- demonstrate that a loss or diminution in the quantity or quality of the services provided, or to be provided, under this title by such agency has not resulted and will not result from such contract or such relationship;
- demonstrate that the quantity or quality of the services to be provided under this title by such agency will be enhanced as a result of such contract or such relationship;
- if requested, disclose all sources and expenditures of funds such agency receives or expends to provide services to older individuals;
- avoid giving preference in receiving services under this title to particular older individuals as a result of a contract or commercial relationship that is not carried out to implement this title; and

use funds provided under this title to provide benefits and services to older individuals, giving priority to older individuals identified in section 306(a)(4)(A)(i),<sup>158</sup> and in compliance with these assurances and the limitations specified in section 212.159 [.]”

The OAA established the AAA designation, and AAAs have since grown into a nationally recognized network of entities working on behalf of older adults. The assurances laid out in section 306(a)<sup>160</sup> are a clear statement of the Federal interests in ensuring that the integrity of the network is not compromised by any contracts and commercial relationships in which recipients and subrecipients engage; and that services to OAA clients will be enhanced (and not diminished) as the result of such agreements.

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<sup>158</sup> 42 U.S.C. 3026(a)(4)(A)(i).

<sup>159</sup> 42 U.S.C. 3020c.

<sup>160</sup> 42 U.S.C. 3026(a).

Even commenters who felt that certain activities described in section 212 of the Act<sup>161</sup> were “not related to the OAA” shared comments that nevertheless indicated an understanding that these interests apply to those activities. For example, a commenter noted that AAAs should be able to demonstrate that the work aligns with their mission and should keep their State agency informed about their work, albeit without “seeking permission.” One commenter who wrote in favor of relying solely on assurances for pre-approval noted that AAAs could be required to attest that contracting work to provide services outside the OAA would not in any way harm the goals of the Act or compromise the agency’s responsibilities within the Act. Another comment noted further that any potential “profits” made from these kinds of contracts or commercial relationships are put back into services or the development of new programs for older adults, a reinvestment that is required under section 212—though the commenter claims that such agreements do not fall under the purview of section 212.

Both section 212<sup>162</sup> and section 306(a)<sup>163</sup> establish an important oversight role for State agencies. As we noted in the proposed rule, we intend this provision to help ensure that the activities in which recipients and subrecipients of funding under the Act engage further the intended benefits of the Act and do not compromise core responsibilities or the statutory mission of State agencies, AAAs, and service providers.

*Comment:* A few commenters raised concerns related to sharing proprietary information or violating non-disclosure agreements as part of the review process. One commenter specifically asked about the relationship between State public records laws and State agency oversight of contracts between AAAs and health care entities with non-disclosure agreements.

*Response:* Generally, the application of State public records laws is beyond the scope of our regulation. However, we are not aware of any State that does not include certain exceptions for trade secrets or other proprietary information. In addition, we encourage State agencies to

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<sup>161</sup> 42 U.S.C. 3020c.

<sup>162</sup> *Id.*

<sup>163</sup> 42 U.S.C. 3026(a)

request and review the minimum information appropriate to the circumstances in order to approve of a contract or commercial relationship.

*§ 1321.9(c)(2)(xv) Buildings, alterations or renovations, maintenance, and equipment.*

ACL has received technical assistance and clarification requests from State agencies and AAAs seeking to apply funding awarded under Title III to costs related to buildings and equipment (such as maintenance and repair). However, the Act provides limited standards regarding this use of funding. We add paragraph § 1321.9(c)(2)(xv) to provide clarification to ensure that funding will be used for costs that support allowable activities. In addition, section 312 of the Act provides that funds used for construction or acquisition of multipurpose senior centers are to be repaid to the Federal Government in certain circumstances.<sup>164</sup> To ensure that third parties will be on notice of this requirement, we include in this paragraph a requirement that a Notice of Federal Interest be filed at the time of acquisition of a property or prior to construction, as applicable.

*Comment:* One commenter requested definitions for: “alterations,” “renovations,” and “construction.” Two commenters suggested including “retrofitting” in the definition of “alterations” for clarity. Another commenter requested that ACL maximize flexibility for State agencies to make infrastructure investments.

*Response:* ACL appreciates these comments but declines to add the requested changes, as “altering or renovating” and “constructing” are defined in § 1321.3 of the rule. “Infrastructure” is a broad term, and ACL lacks authority under the Act to allow for such a broad use of OAA funds. Section 321 of the Act only allows construction activities for multipurpose senior centers.<sup>165</sup>

*Comment:* A commenter noted that the term “constructing,” as defined in the current regulation, specifically refers only to “multipurpose senior centers,” while the definition of the

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<sup>164</sup> 42 U.S.C. 3030b.

<sup>165</sup> 42 U.S.C. 3030d.

term “constructing” in § 1321.3 of the proposed rule makes no reference to senior centers. The commenter sought clarity as to whether constructing activities only are permitted for multipurpose senior centers.

*Response:* ACL appreciates this comment. Section 1321.9(c)(2)(xv)(C) of the rule expressly states that construction activities only are allowable for multipurpose senior centers.

*Comment:* One commenter expressed the concern that § 1321.9(c)(2)(xv) does not adequately address equipment.

*Response:* In response to this comment, we have revised the introductory statement of this section as follows: “Buildings and equipment, where costs incurred for [...] repair, and upkeep [...] to keep buildings and equipment in an efficient operating condition, including acquisition and replacement of equipment, may be an allowable use of funds and the following apply[.]” We also have made a technical correction to the cross-references in § 1321.9(c)(2)(xv)(D) to specify the applicability of this provision. Finally, we have added a provision at § 1321.9(c)(2)(xv)(F) to specify that prior approval by the Assistant Secretary for Aging does not apply.

*Comment:* In connection with the acquisition or construction of a multipurpose senior center, ACL received a comment requesting guidance and training related to the requirement to file a Notice of Federal Interest in the appropriate official records of the jurisdiction where the property is located.

*Response:* ACL will address this comment through technical assistance, as needed.

*§ 1321.9(c)(2)(xvi) Supplement, not supplant.*

The Act sets forth requirements in sections 306(a)(9)(B),<sup>166</sup> 315(b)(4)(E),<sup>167</sup> 321(d),<sup>168</sup> 374,<sup>169</sup> and 705(a)(4)<sup>170</sup> that OAA funds must supplement, and not supplant existing funds. We

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<sup>166</sup> 42 U.S.C. 3026(a)(9)(B).

<sup>167</sup> 42 U.S.C. 3030c-2(b)(4)(E).

<sup>168</sup> 42 U.S.C. 3030d(d).

<sup>169</sup> 42 U.S.C. 3030s-2.

<sup>170</sup> 42 U.S.C. 3058d(a)(4).



have received numerous questions about what these requirements mean and how State agencies can ensure that Federal funding is not used inappropriately to supplant other funds. For example, a State or local government might inappropriately decide to reduce State funding to support services for family caregivers due to an increase in Federal Title III, part E funding. In this example, the result would be that the increased Federal funds supplant, not supplement, the reduced State or local funding, with no increase in revenue available to the entity to provide additional services and in contradiction of section 374.<sup>171</sup> This provision requires a State agency policy and procedure on supplementing, not supplanting existing funds for the programs where specified in the Act.

*Comment:* ACL received a comment requesting guidance as to § 1321.9(c)(2)(xvi), which provides that funds awarded under certain sections of the Act must not supplant existing Federal, State, and local funds.

*Response:* ACL will address requests for guidance regarding this requirement through technical assistance, as needed.

*§ 1321.9(c)(2)(xvii) Monitoring of State plan assurances.*

The Act sets forth many assurances to which State agencies must attest as a part of their State plans and to which AAAs must attest as a part of their area plans. The final rule specifies that the State agency must have policies and procedures to monitor compliance with these assurances. We made a technical edit to remove “and area” from the proposed language in this provision, as monitoring of area plan assurances is addressed in § 1321.9(c)(4).

*§ 1321.9(c)(2)(xviii) Advance funding.*

In response to comments received at listening sessions and increased requests for technical assistance from State agencies, AAAs, and service providers, ACL specifies that State agencies may advance funding to meet immediate cash needs of AAAs and service providers, and if a State agency chooses to do so, the State agency must have policies and procedures that

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<sup>171</sup> 42 U.S.C. 3030s-2.

comply with all applicable Federal requirements.

*Comment:* One commenter expressed support for § 1321.9(c)(2)(xviii). Other commenters expressed concern that this section includes requirements that may be difficult to comply with, given the diverse needs of area agencies.

*Response:* ACL appreciates these comments, but we decline to revise this provision. We do not have the authority to modify or waive Federal requirements that apply to advance payments.

*§ 1321.9(c)(2)(xix) Fixed amount subawards.*

The rule allows fixed amount subawards up to the simplified acquisition threshold, as set forth in 2 CFR 200.333 and 45 CFR 75.353. The NPRM included this point in § 1321.9(c)(2)(i). In the course of reviewing § 1321.9(c)(2)(i) in response to comments received, ACL has determined that the language from that section regarding fixed amount subawards should be in a separate provision. Accordingly, ACL has added a new § 1321.9(c)(2)(xix) which states that fixed amount subawards up to the simplified acquisition threshold are allowed.

For a definition of “simplified acquisition threshold” see 2 CFR 200.1 and 45 CFR 75.2. ACL will provide technical assistance, as needed, regarding § 1321.9(c)(2)(xix).

*§ 1321.9(c)(3) State plan process; § 1321.9(c)(4) Area plan process.*

We add paragraphs § 1321.9(c)(3) and (4) to ensure the integrity and transparency of the State plan process and, in States with multiple PSAs, of the area plan process. The final rule requires the State agency to have policies and procedures that align with the requirements for State and area plans in §§ 1321.27, 1321.29, and 1321.65. In this final rule we have revised these requirements to clarify that State and area agencies must establish and comply with a reasonable minimum time period (at least 30 calendar days, unless a waiver has been granted) for public review of and comment on State and area plans.

*§ 1321.11 Advocacy responsibilities.*

Section 1321.13 of the existing regulation (*Advocacy responsibilities*) is redesignated

here as § 1321.11. Section 1321.11 sets forth the advocacy responsibilities of State agencies. As indicated, these include advocacy, technical assistance, and training activities. We make additional minor revisions to these provisions to include activities related to the National Family Caregiver Support Program. Section 305(a) of the Act provides that the State agency should serve as “an effective and visible advocate” for older individuals and family caregivers.<sup>172</sup> Accordingly, we revise § 1321.11(a)(3) to clarify that the State agency’s obligations to comment on applications to Federal and State agencies for assistance related to the provision of needed services for older adults and family caregivers are not limited to instances in which the State agency receives a request to do so.

*Comment:* We received comment supporting inclusion of advocacy responsibilities, such as including family caregivers, and offering suggestions for strengthening these expectations. One commenter requested we require State agencies to incorporate diversity, inclusion, and cultural competency training, while another commenter requested removing local plans from the items the State agency is expected to review, monitor, evaluate, and provide comment on.

*Response:* We appreciate these comments. We have revised § 1321.11(a)(1) from “[...] recommend any changes in these which the State agency considers to be appropriate” to “[...] recommend any changes in these which the State agency considers to be aligned with the interests identified in the Act[.]” At § 1321.61(b)(1), we also have revised the regulations to remove the phrase “where appropriate” and add “which the area agency considers to be aligned with the interests identified in the Act[.]”

We agree with the commenter that diversity, inclusion, and cultural competency are essential, and we encourage State agencies to incorporate these concepts throughout their trainings. However, we decline to expressly require such training. State agencies must provide training related to all of the topics listed in this regulation, including on how to provide services to those in the greatest economic and greatest social need. ACL encourages State agencies to

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<sup>172</sup> 42 U.S.C. 3025(a).

work with Tribes and Tribal organizations, organizations representing those identified as in the greatest economic need and greatest social need, and others with lived experience in providing such trainings.

Additionally, State agencies are encouraged to provide review and comment on local plans and activities as part of their statewide oversight responsibilities. The State agency may benefit from learning about local innovations and developments, and the local agency may benefit from feedback on and connections to State agency initiatives and activities.

*§ 1321.13 Designation of and designation changes to planning and service areas.*

Section 1321.29 of the existing regulation (*Designation of planning and service areas*) is redesignated here as § 1321.13 and is retitled to better reflect the content of the revised provision.

Section 305 of the Act requires the State agency to divide the State into distinct PSAs and subsequently designate a AAA to serve each PSA.<sup>173</sup> The Act allowed for exceptions for some State agencies to designate the entire State as a single PSA; however, this option only remains for States that did so on or before October 1, 1980. Single PSA States may be geographically small, such as Rhode Island, or may be sparsely populated relative to their geography, such as Alaska. Dividing States into distinct PSAs allows for a local approach to the planning, coordination, advocacy, and administration responsibilities as required under the Act. We revise this section to affirm the State agencies' obligations to have policies and procedures in place to ensure that the State agency process of designating and changing PSAs will be transparent, will hold the State agency accountable for its decisions, and will afford due process to affected parties. We also describe factors that a State agency should take into account when it considers changing a PSA designation, consistent with the aims of the Act. These factors include the geographical distribution of older individuals in the State, the incidence of the need for services under the Act, the distribution of older individuals with greatest economic need and greatest social need, the distribution of older individuals who are Native Americans, the distribution of

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<sup>173</sup> *Id.* section 3025.

resources under the Act, the boundaries of existing areas within the State, and the location of units of general purpose local government. Since all States now have designated PSAs, we provide greater detail on the requirements for changing PSAs, as specified in the Act, based on questions we have received and areas of confusion that have been expressed. For example, we anticipate that our requirement that State agencies must consider the listed factors will resolve confusion over how State agencies should make decisions about whether and how to change PSA designations.

*Comment:* One commenter pointed out a technical correction: the reference in § 1321.13(e) to § 1321.15(d) should instead reference § 1321.13(d).

*Response:* We are grateful to the commenter and have made this revision.

*Comment:* We received comments expressing support for the clarity of these provisions. One commenter also noted Tribes may request changes to better serve Native American elders.

*Response:* We appreciate these comments and encourage consideration of PSA changes that may better serve older adults and family caregivers, including Native American elders and family caregivers.

#### *§ 1321.15 Interstate planning and service area.*

Section 1321.43 of the existing regulation (*Interstate planning and service area*) is redesignated here as § 1321.15. Revisions are made to this provision to clarify the nature of an interstate PSA (per section 305(b) of the Act),<sup>174</sup> as well as the process for requesting the Assistant Secretary for Aging to designate an interstate PSA. Minor revisions have also been made to reflect statutory updates, including language reflecting the distribution of family caregiver support services funds under the Act, and updates to cross-references to other provisions within the regulation.

*Comment:* We received comment emphasizing the need for coordination especially when Tribal reservations cross State lines.

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<sup>174</sup> *Id.* section 3025(b).

*Response:* We appreciate this comment. ACL is available to provide technical assistance in coordinating among State agencies, AAAs, and Tribal aging programs regarding interstate PSAs.

*§ 1321.17 Appeal to the Departmental Appeals Board on planning and service area designation.*

Section 1321.31 (*Appeal to Commissioner*) is redesignated and modified here as § 1321.17 (*Appeal to the Departmental Appeals Board on planning and service area designation*). Section 305(a)(1)(E)<sup>175</sup> of the Act provides State agencies authority to divide the State into distinct PSAs to administer the Act's services and benefits. A local government, region, metropolitan area, or Indian reservation may appeal a State agency's denial of designation under the provisions of section 305(a)(1)(E)<sup>176</sup> to the Assistant Secretary for Aging who must then afford the entity an opportunity for a hearing pursuant to section 305(b)(4)<sup>177</sup> of the Act. There have historically been very few appeals under section 305(a)(1)(E).<sup>178</sup>

Through this provision, appeals of State agency decisions for designation of PSAs are delegated to the HHS Departmental Appeals Board (DAB) in accordance with the procedures set forth in 45 CFR part 16. The DAB may refer an appeal to its Alternative Dispute Resolution Division for mediation prior to issuing a decision. This change aligns with §§ 1321.23 and 1321.39. We believe it continues to fulfill the Act's mandate to provide an opportunity for a hearing while streamlining administrative functions and providing robust due process protections to appellants. The HHS DAB provides impartial, independent review of disputed decisions under more than 60 statutory provisions. We believe this change will provide clarity and consistency to State agencies and AAAs and is aligned with the intent of the Act.

*Comment:* We received comments supporting PSA designation appeals to the DAB. We also received comments requesting additional clarification.

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<sup>175</sup> *Id.* section 3025(a)(1)(E).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* section 3025(b)(4).

<sup>178</sup> *Id.* section 3025(a)(1)(E).

*Response:* ACL intends for appeals regarding any PSAs, including those in which an interstate Indian reservation is located, as set forth in § 1321.15 (*Interstate planning and service area*) to be considered by the DAB. We have revised § 1321.17 to clarify that PSA designation changes may be appealed.

As stated in § 1321.17(b), “Any applicant for designation as a planning and service area whose application is denied, and who has been provided a hearing and a written decision by the State agency, may appeal the denial to the Departmental Appeals Board (DAB)[.]” Any applicant includes Tribes who apply.

*§ 1321.19 Designation of and designation changes to area agencies.*

Section 1321.33 of the existing regulation (*Designation of area agencies*) is redesignated here as § 1321.19 and is retitled to better reflect the content of the revised provision. Section 305(b) of the Act requires State agencies not located in single PSA States to designate a AAA to serve each PSA.<sup>179</sup> We specify that only one AAA shall be designated to serve each PSA and that an organization may be designated as a AAA for more than one PSA. The Act intends that the AAA will proactively carry out, under the leadership and direction of the State agency, a wide range of functions designed to lead to the development or enhancement of comprehensive and coordinated community-based systems in, or serving, each community in the PSA. It is essential that each AAA has the capacity to carry out such responsibilities and that each AAA meets the Act’s qualification requirements. The existing regulation, however, contains only a few basic procedural requirements under the Act related to the designation of AAAs and provides no direction to State agencies with respect to this important function.

We revise this provision to clarify the State agencies’ obligations to have policies and procedures in place to ensure that the process of designating AAAs, as well as the voluntary or involuntary de-designation of a AAA (i.e., withdrawal of AAA designation), will be transparent, will hold the State agency accountable for its decisions, and will afford due process to affected

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<sup>179</sup> *Id.* section 3025(a).

parties. We provide greater clarity to assist State agencies in understanding the designation process pursuant to section 305 of the Act and the types of agencies permitted by the Act to serve as AAAs.<sup>180</sup> Consistent with the Act's requirements, we retain the existing restriction against a regional or local State office serving as a AAA, and the provision continues to reference the State agency's obligations under section 305 of the Act to provide a right of first refusal to a unit of general purpose local government for AAA designation and to give preference in such designation to an established office on aging if the unit of general purpose local government elects not to exercise its first refusal right.<sup>181</sup>

*Comment:* We received comments in support of these clarifying provisions. We received suggestions for additional language and a recommendation that further regulation and oversight be added when an area agency on aging serves more than one PSA.

*Response:* ACL appreciates these comments. We expect that State agencies will exercise appropriate oversight of each PSA. We have revised this provision to clarify that an area agency that serves more than one PSA must maintain separate funding, planning, and advocacy responsibilities for each PSA.

For consistency, we similarly revised § 1321.49 (*Intrastate funding formula*), § 1321.61 (*Advocacy responsibilities of the area agency*), § 1321.63 (*Area agency advisory council*), and § 1321.65 (*Submission of an area plan and plan amendments to the State agency for approval*). § 1321.21 *Withdrawal of area agency designation*.

Section 1321.35 of the existing regulation (*Withdrawal of area agency designation*) is redesignated here as § 1321.21. We include changes to paragraph (a) to clarify the circumstances under which a State agency may withdraw a AAA designation. These include failure to comply with all applicable Federal requirements or policies and procedures established and published by the State agency; a State agency decision to change one or more PSA designations; and a AAA

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<sup>180</sup> *Id.* section 3025.

<sup>181</sup> *Id.*



voluntary request for withdrawal of their designation. In paragraph (b) we include a clarification that changes to the designation of a AAA must be included in the State plan on aging or an amendment to the State plan, with appropriate cross-references. In paragraph (d) we detail that a State agency may request an extension of time to perform the responsibilities of a AAA after such designation has been withdrawn if the State agency has made reasonable but unsuccessful attempts to procure another entity to be designated as the AAA.

*Comment:* We received comments expressing appreciation for the clarifications made in this section. We also received a concern that an attempt to procure a new AAA no less than once per State plan on aging period was too long.

*Response:* We appreciate these comments. We have modified the final rule to remove the following sentence from § 1321.21(d)(3), “Reasonable attempts include conducting a procurement for an applicant to serve as an area agency no less than once per State plan on aging period.” The requirement for the Assistant Secretary for Aging to approve any extensions will allow for the Assistant Secretary for Aging to determine if an extension is appropriate. We decline to make any other changes to this provision and will provide technical assistance, as appropriate.

*§ 1321.25 Duration, format, and effective date of the State plan.*

Section 1321.15 of the existing regulation (*Duration, format, and effective date of the State plan*) is redesignated here as § 1321.25. Minor changes have been made to update cross-references to other provisions, to reflect updates to statutory language, and to clarify the authority of the Assistant Secretary for Aging to provide instructions to State agencies regarding the formulation, duration, and formatting of State plans.

*Comment:* ACL received comments in support of this provision, as well as recommendations regarding implementation of this provision. One commenter also recommended additional coordination opportunities relating to State plans on aging.

*Response:* ACL appreciates these comments. We intend to provide technical assistance regarding implementation of this provision and additional coordination opportunities that may be available as State agencies develop their State plans on aging.

*§ 1321.27 Content of State plan.*

Section 1321.17 of the existing regulation (*Content of the State plan*) is redesignated here as § 1321.27. As part of their responsibilities, State agencies must develop and administer a multi-year State plan on aging. The State plan delineates goals and objectives related to assisting older individuals and family caregivers and serves as a blueprint for achieving the goals and objectives during the plan period. Section 307 of the Act sets forth requirements that State plans must meet and content that must be included in the State plan and authorizes the Assistant Secretary for Aging to prescribe criteria for State plan development and content.<sup>182</sup>

We also include additional required core elements for the State plan, including that the State plan: must provide evidence that it is informed by, and based on, area plans in States with multiple PSAs; explain how individuals with greatest economic need and greatest social need are determined and served; include the State agency's IFF or funds distribution plan; demonstrate outreach to older Native Americans and coordination with Title VI programs under the Act; certify that program development and coordination activities will meet requirements; specify the minimum proportion of funds that will be expended on certain categories of services; provide information if the State agency allows for Title III, part C-1 funds to be used as set forth in § 1321.87(a)(1)(i); describe how the State agency will meet its responsibilities for the Legal Assistance Developer; explain how the State agency will use its elder abuse prevention funding awarded pursuant to Title VII of the Act; and describe how the State agency will conduct monitoring of the assurances to which they attest. The provision also clarifies the Assistant Secretary for Aging's authority to establish objectives for State plans, including objectives related to Title VII of the Act.

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<sup>182</sup> 42 U.S.C. 3027.

The State plan must define greatest economic need and greatest social need, including for the following populations: people with disabilities; people who experience language barriers; people who experience cultural, social, or geographical isolation, including due to racial or ethnic status, Native American identity, religious affiliation, sexual orientation, gender identity, or sex characteristics, HIV status, chronic conditions, housing instability, food insecurity, lack of access to reliable and clean water supply, lack of transportation, or utility assistance needs, interpersonal safety concerns, rural location; and people otherwise adversely affected by persistent poverty or inequality as the State agency defines it in the State plan. The Act directs State agencies and AAAs to focus attention, advocacy, and service provision toward those in greatest economic need and greatest social need. The listed populations include those identified in Executive Order 13985 *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*. The final rule establishes standard expectations for whom State agencies must include in their definitions of greatest economic need and greatest social need, while still allowing for State agencies to flexibly include other populations that are specific to their circumstances. For example, one State agency may also identify a population within their State that has specific dietary requirements that will be included in their definition of greatest social need. When determining the definition of greatest economic need, another State agency may also include persons experiencing housing instability. Another State agency may not specify any additional populations to be included in their definitions of greatest economic need and greatest social need at the State plan level but encourage such additions at the area plan level (for which we further discuss requirements in § 1321.65).

We also specify that upon identifying the populations of greatest economic need and greatest social need, the State plan must include how the State agency will target services to these populations, including how funds under the Act may be distributed in accordance with listed IFF or funds distribution plan requirements at § 1321.49 or § 1321.51, respectively. For example, a State agency may specify that it will use one factor based on the low-income and

rural population of individuals age 60 and older in its IFF to meet populations identified as in greatest economic need and greatest social need. Another State agency may use two separate factors, one for low-income individuals age 60 and older and another for rural individuals age 60 and older. These State agencies may use methods other than IFFs or funds distribution plans for targeting services to those with certain dietary requirements, experiencing housing instability, and as determined at the area plan level.

As a part of their responsibilities under the State plan, State agencies engage in program development and coordination activities to meet the needs of older adults. State agencies are also encouraged to translate activities, data, and outcomes into proven best practices, which can be used to leverage additional funding and to build capacity for long-term care systems and services in the State, beyond what the Act alone can support. State agencies also work in conjunction with and support of AAAs who lead such efforts, including integrating health and social services delivery systems. The final rule requires State agencies to certify as a part of their State plans that they will meet certain requirements, including what funding sources can be used for program development and coordination activities and what conditions apply to use of these funds. We specify that funds for program development and coordination activities may only be expended as a cost of State plan administration, area plan administration, or Title III, part B supportive services, under limited circumstances.

The final rule requires State agencies to specify the minimum proportion of funds that will be expended on certain categories of services as required by the Act in section 307(a)(2)(C), consistent with the legal assistance section at § 1321.93.<sup>183</sup>

The provision also includes a new requirement for State agencies to provide certain information regarding any permitted use of Title III, part C-1 funds (funds for meals served in a congregate setting) for shelf-stable, pick-up, carry-out, drive-through, or similar meals, as permitted by new § 1321.87(a)(1)(i). The congregate meal program is a core Title III program; in

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<sup>183</sup> *Id.* section 3027(a)(2)(C).

addition to a healthy meal, the program provides opportunities for social interaction and health promotion and wellness activities. In response to the COVID-19 Public Health Emergency (PHE), ACL provided guidance on innovative, permissible service delivery options that grantees could use to provide meals to older individuals and other eligible recipients of home-delivered meals with Title III, part C-2 funds.<sup>184</sup> In response to comments from grantees and interested parties on the RFI, we included a new provision at § 1321.87 to allow these meal delivery methods through the use of Title III, part C-1 congregate meal funds, subject to certain terms and conditions. As this represents an expansion of the permitted use of congregate meals funds, State agencies must provide information about this use of Title III, part C-1 funds in their State plans to ensure that the State agencies are aware of, and will comply with, the applicable terms and conditions so that ACL will be aware of the extent to which State agencies plan to implement this new allowable use of Title III, part C-1 funds.

We remove redundant provisions in § 1321.27 that are addressed in other more appropriate sections of the revised regulation (such as requirements related to State agency policies, voluntary contributions, and means testing, which are addressed in § 1321.9). We also make minor revisions to the provision to remove outdated references.

*Comment:* We received comments expressing support for this provision and for service to persons in greatest economic need and greatest social need. Commenters also shared concerns about how State agencies and AAAs can serve all the populations listed and how they will measure whether the targeted populations are being served, given lack of funding, incomplete data sources, and data privacy concerns.

*Response:* ACL appreciates these comments and concerns related to how to provide targeted services given limited funds and how to use data appropriately and sensitively. We

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<sup>184</sup> For example, *Reopening Considerations for Senior Nutrition Programs* (April 2021), available at [https://acl.gov/sites/default/files/programs/Senior\\_Nutrition/SNP\\_ReopeningConsiderations.Final.pdf](https://acl.gov/sites/default/files/programs/Senior_Nutrition/SNP_ReopeningConsiderations.Final.pdf); and, <https://acl.gov/sites/default/files/nutrition/Title%20III%20C1%20and%20C2%20Service%20Delivery%20Decision%20Tree%206.15.22%20508.pdf>.

expect State agencies to: (1) identify and consider populations in greatest economic need and greatest social need; (2) describe how they target the identified populations for service provision; (3) establish priorities to serve one or more of the identified target populations, given limited availability of funds and other resources; (4) establish methods for serving the prioritized populations; and (5) use data to evaluate whether and how the prioritized populations are being served.

For the first step, the State agency must assess and identify populations in greatest economic need and greatest social need within the State. For example, a State agency may review demographic and service data; engage in Tribal consultation; conduct needs assessments with older adults, family caregivers, and other community members; hold public hearings; and accept other feedback in determining how the State agency will define populations in greatest economic need and greatest social need. A State agency must establish a definition to include those populations identified pursuant to § 1321.27(d)(1) and also could include formerly incarcerated individuals as a population in greatest social need.

Next, the State agency must describe how it will target each of the populations included in the definitions of greatest social need and greatest economic need for service delivery. This description may be combined with the determination of priority populations outlined in the next paragraph. For example, the State agency might explain that it will market the availability of OAA services to statewide advocacy groups serving each of the populations identified pursuant to § 1321.27(d). The State agency could describe its plans to issue a monthly newsletter, highlighting a different targeted population each month.

For the third step, the State agency could determine that of the populations included in its definition, it will prioritize people living at or below 100 percent of the FPL; communities that experience isolation due to racial or ethnic status, Native American identity, sexual orientation, gender identity, or sex characteristics, and rural location; as well as formerly incarcerated individuals. The State agency might decide to prioritize these communities because of the State's

demographics, resources, and needs; information that should be collected consistent with the practices established through the State agency's policies and procedures (§ 1321.9(c)(3)); review of area plans (§ 1321.27(c)); and public participation process (§ 1321.29).

For the fourth step (establishing methods to serve the prioritized populations), we note that distributing funds under an IFF or funds distribution plan is an important strategy, but not a required or exclusive one. To clarify this, ACL has modified the provision at § 1321.27(d)(2) to state, “The methods the State agency will use to target services to the populations identified in § 1321.27(d)(1), including how funds under the Act may be distributed to serve prioritized populations in accordance with requirements as set forth in § 1321.49 or § 1321.51, as appropriate.”

For example, the State agency might use multiple methods to serve the priority populations in the example above. To serve minority individuals and people living at or below 100 percent of the FPL, the State agency might use an IFF factor based on Census data, along with a base amount of funding to ensure service to people living in rural areas. In addition, the State agency might target services to formerly incarcerated individuals by partnering with organizations providing re-entry services, developing referral protocols, and amending a statewide intake form to include optional disclosure of membership in this population. Finally, the State might focus services to LGBTQI+ older adults and family caregivers, by conducting trainings for service providers, offering outreach events in each PSA in the State, and updating their webpage, social media accounts, and other materials.

For the final step, the State agency would collect data to evaluate its success in its targeting and prioritization efforts. Data collection and analysis efforts may encompass a number of quantitative and qualitative methods to determine the success of efforts, such as counting leading indicators like the number of new partnerships implemented; analyzing output data, such as the number of activities taking place in certain settings and/or focused toward prioritized populations; reviewing demographic data of individual program participants collected (which

may or may not be reported in the State Program Report or other data collection that the State agency may require); conducting focus groups of service recipients and/or service providers; and completing outcome surveys with service recipients or community leaders. In any such data collection efforts, provisions of § 1321.75 (*Confidentiality and disclosure of information*) apply.

*Comment:* One commenter would like to see language added directing State agencies to include solo older adults as a target audience in their State plan, including how such individuals will be identified and served. Additionally, the commenter would like State agencies to identify amounts of funds to be directed toward meeting the needs of solo older adults.

*Response:* ACL appreciates this comment and recognizes that older adults living alone are a frequently prioritized population for provision of OAA services. In fact, a number of State agencies use the number of individuals within a PSA who are “Living Alone” as a single or combined factor in distributing funds under their IFF, consistent with § 1321.49. We recognize that persons living alone may be included in the target populations that State agencies or AAAs may define under § 1321.27(d)(1) and § 1321.65(b)(2)(i), respectively. Given that State agencies may consider and use various factors in distributing funds via an IFF or funds distribution plan (per § 1321.49 or § 1321.51(b)), and service providers may receive funds to serve various priority populations, we do not believe it would be feasible to identify specific amounts of funds to be directed toward meeting the needs of such individuals. However, we note that if “solo older adults,” individuals living alone, or some other priority population is defined by a State agency or a AAA, the State agency or a AAA should explain how such individuals will be served, which may include how funds are distributed.

*Comment:* In response to ACL's solicitation of input on ways ACL and State agencies can support improvements in I&A/R systems, one commenter highlighted the potential value of having one I&A/R database system for all AAAs and/or the entire aging network in a State, as well as potential added enhancements such as an internal referral system from one service area to another along with community resources. The commenter recommended one-time contract



investments to secure such a system. Another commenter noted that improvements in I&A/R systems are not limited to State agencies and recommended that the contributions of AAAs and others be recognized and encouraged.

*Response:* ACL appreciates this feedback and notes that such investments may be considered match, subject to § 1321.9(c)(2)(ii). Additionally, a State agency may establish policies and procedures requiring use of a standardized database system as set forth in § 1321.73. ACL enthusiastically recognizes and encourages the innovations of AAAs, service providers, and others in modernization and innovation efforts in provision of services under the Act.

*Comment:* We received a comment recommending that the State agency communicate with Tribes, Tribal organizations, and native communities regarding how greatest economic need and greatest social need are determined and addressed, including regarding the provision at § 1321.27(d).

*Response:* We appreciate this comment and have revised the provision at (g) to add that the determination of greatest economic need and greatest social need specific to Native American persons is identified pursuant to communication among the State agency and Tribes, Tribal organizations, and Native communities.

*Comment:* A commenter was concerned that § 1321.27 is overly prescriptive.

*Response:* As part of their responsibilities, State agencies must develop and administer a multi-year State plan on aging. The State plan delineates goals and objectives related to assisting older individuals, their families, and caregivers, and serves as a blueprint for achieving the goals and objectives during the plan period. Section 307 of the Act sets forth requirements that State plans must meet and content that must be included and authorizes the Assistant Secretary for Aging to establish criteria for State plan development and content.<sup>185</sup> State agencies have considerable discretion in developing goals, objectives, and strategies for the State plan, in establishing the IFF or resource allocation plan (as applicable), and in prioritizing and reaching

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<sup>185</sup> *Id.* section 3027.

targeted populations for service delivery.

*Comment:* A commenter recommended we require State agencies to demonstrate outreach to older Native Americans who do not live on Tribal lands in addition to coordination with Title VI programs.

*Response:* ACL appreciates this comment. We note that § 1321.27(d)(1) requires the inclusion of those who experience isolation due to their Native Americans identity in the State agency's definition of populations in the greatest economic need and greatest social need that must be addressed in the State plan. Native Americans, as defined in the rule, are not limited to Native Americans who live on Tribal lands. We have revised this provision to read, "[...] where there are older Native Americans in any planning and service area, including those living outside of reservations and other Tribal lands."

*Comment:* ACL received comments with recommendations of topics that should be required to be included in State plans, such as aligning State plans with master plans for aging, age-friendly initiatives, and No Wrong Door systems;<sup>186</sup> and encouraging intergenerational programming.

*Response:* As part of their responsibilities, State agencies must develop and administer a multi-year State plan on aging. The State plan delineates goals and objectives related to assisting older individuals, their families, and caregivers, and serves as a blueprint for achieving the goals and objectives during the plan period. Section 307 of the Act sets forth requirements that State plans must meet and content that must be included and authorizes the Assistant Secretary for Aging to establish criteria for State plan development and content.<sup>187</sup>

In response to the RFI and other requests for clarification, we establish additional

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<sup>186</sup> The No Wrong Door (NWD) System initiative is a collaborative effort of ACL, the Centers for Medicare & Medicaid Services (CMS), and the Veterans Health Administration (VHA). The NWD System initiative builds upon the Aging and Disability Resource Center (ADRC) program and CMS' Balancing Incentive Program No Wrong Door requirements that support state efforts to streamline access to long-term services and support (LTSS) options for older adults and individuals with disabilities. NWD Systems simplify access to LTSS, and are a key component of LTSS systems reform. For more information, see: <https://acl.gov/programs/connecting-people-services/aging-and-disability-resource-centers-programno-wrong-door>.

<sup>187</sup> 42 U.S.C. 3027.

required core elements for the State plan in § 1321.27, including that the State plan: must provide evidence that it is informed by, and based on, area plans in States with multiple PSAs; explain how individuals with greatest economic need and greatest social need are identified and served; include the State agency's IFF or funds distribution plan; demonstrate outreach to older Native Americans and coordination with Title VI programs under the Act; certify that program development and coordination activities will meet requirements; specify the minimum proportion of funds that will be expended on certain categories of services; provide information if the State agency allows for Title III, part C-1 funds to be used as described in § 1321.87(a)(1)(i); describe how the State agency will meet its responsibilities for the Legal Assistance Developer; explain how the State agency will use its elder abuse prevention funding awarded pursuant to Title VII of the Act; and describe how the State agency will conduct monitoring of the assurances to which they attest.

This provision also clarifies the Assistant Secretary for Aging's authority to establish objectives for State plans, including objectives related to Title VII of the Act. Significant issues that should be addressed through State plans will change over time, and conditions will vary from one State to another. For these reasons, we decline to establish additional specific content requirements for State plans through regulation.

*Comment:* Regarding § 1321.27(j), which addresses the permitted use, subject to certain terms and conditions, of Title III, part C-1 funds (funds for meals served in a congregate setting) for shelf-stable, pick-up, carry-out, drive-through, or similar meals, a commenter requested clarification as to how to project that the provision of such meals will enhance, rather than diminish the congregate meal program.

*Response:* ACL will address this comment through technical assistance, as needed.

*Comment:* A commenter noted that § 1321.27(c) requires that all State plans are to be informed by and based on area plans, while single PSA States have no area plans.

*Response:* We appreciate this comment and have revised the provision to clarify.

*Comment:* ACL received suggestions, recommendations, and implementation questions regarding § 1321.27(h), which addresses requirements related to program development and coordination activities. Some comments requested that use of funds in this manner not be subject to public review and comment requirements.

*Response:* This provision does not substantively change the requirements for use of Title III-B funds for program development and coordination activities in the existing regulation. Because this provision allows for use of funds that would otherwise be required to be used for direct services to older adults to be used for program development and coordination purposes, we believe it is appropriate to retain the public review and comment requirement. ACL will address other questions regarding this provision through technical assistance, as needed.

*§ 1321.29 Public participation.*

Section 1321.27 of the existing regulation (*Public participation*) is redesignated here as § 1321.29. The Act requires State agencies to periodically solicit the views of older individuals, family caregivers, service providers, and the public regarding the development and administration of the State plan and the implementation of programs and services under the Act.<sup>188</sup> Subsections 1321.29(a) and (b) set forth obligations for public input, including that opportunities for public participation should occur periodically (at a minimum, once each fiscal year) and should include the views of family caregivers and service providers, with particular attention to those of greatest economic need and greatest social need. In response to comments to the RFI and the NPRM, we have revised this provision to clarify that the public must be given a reasonable minimum period of time (at least 30 calendar days, unless a waiver has been granted by the Assistant Secretary for Aging) within which to review proposed State plans and that State plan documents be readily available to the public for review. Pursuant to Federal civil rights laws, the State plan document should be available in alternative formats and other languages if requested.

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<sup>188</sup> *Id.*

*Comment:* We received comments from individual older adults expressing they feel unheard and that there are not sufficient opportunities to provide input.

*Response:* We appreciate the feedback from individual older adults, especially those who wish to be engaged in planning efforts for services under the Act. Sections 1321.29 (*Public participation*) and 1321.65(b)(4) (*Submission of an area plan and plan amendments to the State agency for approval*) are intended to make clear the importance of soliciting and using feedback from individual older adults and family caregivers.

*Comment:* ACL received several comments requesting more specificity and direction regarding the requirement that State agencies obtain input on a periodic basis.

*Response:* Section 307(a)(4) of the Act requires that State agencies procure public input on a “periodic” basis.<sup>189</sup> The final rule defines “periodic” (at a minimum, once each fiscal year) and sets forth minimum requirements related to data collection and client assessments, as well as State and area plans and activities thereunder. The final rule otherwise affords State agencies flexibility in determining how to meet this requirement; ACL declines to impose additional conditions for State agencies to meet this requirement, as circumstances may vary from one State to another.

*Comment:* ACL received comments requesting additional direction to State agencies in § 1321.29 to ensure that individuals from underserved communities, as well as Tribal governments, have an opportunity to participate.

*Response:* ACL appreciates the comments and confirms § 1321.29 requires State agencies to focus on those in greatest economic need and in greatest social need in seeking public input, and the definition of greatest social need includes Native Americans.

*Comment:* One commenter requested that the public participation requirements of § 1321.29 also apply to area agencies. Another commenter recommended that ACL require each State agency to implement standard area plan needs assessment and data tools for use by all area

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<sup>189</sup> *Id.* section 3027(a)(4).

agencies in the State.

*Response:* Section 1321.65 requires State agencies to have in place requirements for public input with respect to area plans. ACL declines to impose additional requirements as to how State agencies must cause area agencies to seek public input, as conditions may vary from one State to another and from one region of a State to another. Accordingly, ACL maintains the regulatory text in § 1321.29.

*§ 1321.31 Amendments to the State plan.*

Section 1321.19 of the existing regulation (*Amendments to the State plan*) is redesignated here as § 1321.31. We make substantial revisions to this provision to clarify the circumstances under which amendments to the State plan are necessary. The revised provision also clarifies which amendments require prior approval by the Assistant Secretary for Aging and which only need to be submitted for purposes of notification. Amendments requiring prior approval are those necessary to reflect new or revised statutes or regulations as determined by the Assistant Secretary for Aging; an addition, deletion, or change to a State agency's goal, assurance, or information requirement statement; a change in the State agency's IFF or funds distribution plan for Title III funds; a request to waive State plan requirements; or other required changes. Amendments for purposes of notification only are those necessary to reflect a change in a State law, organization, policy, or State agency operation; a change in the name or organizational placement of the State agency; distribution of State plan administration funds for demonstration projects; a change in a PSA designation; a change in AAA designation; or exercising of major disaster declaration flexibilities, as set forth in § 1321.101. We also make minor revisions to reflect statutory updates.

*Comment:* Several commenters expressed concern regarding delayed response times due to State plan amendment requirements for funding set aside to address disasters. We also received comments requesting that we clarify the timeframes for State plan amendment submissions in § 1321.31(b).

*Response:* As set forth in this provision and in § 1321.101, the State plan amendment required when using funds set aside to address disasters does not require prior approval by the Assistant Secretary for Aging. ACL intends this requirement to facilitate transparency and communication in times of emergency and disaster and does not intend to delay response times. Through this requirement we intend to ensure that a State agency’s plan on aging accurately reflects current circumstances, facilitates communication, and promotes transparency. We have revised § 1321.31(b) to read “[...] whenever necessary and within 30 days of the action(s) listed in (1) through (6) of this paragraph[.]” For clarity, we have removed the redundant provision at § 1321.31(b)(6) and renumbered accordingly. We have also amended the other provisions of § 1321.31(b) for consistency.

*Comment:* ACL received a comment requesting guidance regarding the timing for State plan amendments that may be required as a result of the implementation of this final rule. One commenter requested clarification as to what would constitute “[a] significant change in a State law, organization, policy, or State agency operation” as set forth in § 1321.31(b)(1). ACL also received a comment inquiring as to the status of the guidelines prescribed by the Assistant Secretary for Aging, referred to in § 1321.31(c), regarding the submission of information required by § 1321.31.

*Response:* This final rule is effective 30 days after publication in the Federal Register. In consideration of comments related to the time required for implementation of the rule, we have decided to delay the compliance date of this rule until October 1, 2025. This will allow time for State agencies to incorporate the requirements of this final rule into State plan amendments, as needed, by October 1, 2025.

ACL will address these comments further through technical assistance, as needed.

*§ 1321.33 Submission of the State plan or plan amendment to the Assistant Secretary for Aging for approval.*

Section 1321.21 of the existing regulation (*Submission of the State plan or plan*

*amendment to the Commissioner for approval*) is redesignated here as § 1321.33 and has been retitled to reflect statutory updates. ACL's Regional Offices play a critical role in ACL's administration and oversight of State plans on aging. They provide technical assistance to State agencies regarding the preparation of State plans and amendments and are responsible for reviewing those that are submitted for compliance with the Act. Previously, the regulations required State agencies to submit a plan or amendment for approval, signed by the Governor or the Governor's designee, 45 calendar days prior to its proposed effective date. This 45-day period does not provide adequate time for proper Regional Office review and provision of appropriate technical assistance, for the State agency then to make any changes that are required, and for the State agency to re-submit the plan or amendment for further review and approval. The failure to have a State plan or amendment approved in a timely manner could result in significant ramifications to a State agency, such as a lapse in funding under the Act. In addition, if a State agency only submits a final, signed plan or amendment for review, and if changes are needed in order to bring the plan or amendment into compliance with the Act or the Assistant Secretary for Aging's guidance, the State agency could find itself in the difficult position of having to arrange for the Governor (or the Governor's designee) to re-execute the document. We aim to improve the State plan and amendment submission and review process by adding to this provision a requirement that the State agency submit a draft of the plan or amendment to its assigned ACL Regional Office at least 120 calendar days prior to the proposed effective date and a requirement that the State agency cooperate with the Regional Office in the review of the plan or amendment for compliance with applicable requirements.

*Comment:* ACL received several comments expressing concern that the requirement under § 1321.33(b) to submit a draft for review at least 120 calendar days prior to the proposed effective date is too burdensome.

*Response:* We appreciate these concerns but retain the requirement that drafts be submitted at least 120 calendar days prior to the proposed effective date of the plan or



amendment. We have added clarification that the plan be submitted at least 90 calendar days before the proposed effective date of the plan or plan amendment. Submission of a draft is necessary to provide sufficient time for review and revision before the 90-day deadline to submit the plan or plan amendment to the Assistant Secretary for Aging. We understand from comments that there may be exceptional circumstances that could prevent a State agency from being able to meet the 120- and 90-day time frames. In response to these concerns, § 1321.33(b) permits State agencies to request a waiver from the Assistant Secretary for Aging in the event of exceptional circumstances. We have added similar language to allow for a similar waiver with respect to the 90-day time frame.

*§ 1321.35 Notification of State plan or State plan amendment approval or disapproval for changes requiring Assistant Secretary for Aging approval.*

The provision contained in § 1321.23 of the existing regulation (*Notification of State plan or State plan amendment approval*) is retitled and redesignated here as § 1321.35. We also make changes to § 1321.35(b) for consistency with other related provisions that address appeals to the Assistant Secretary for Aging regarding disapproval of State plans or amendments.

*Comment:* Several commenters requested that ACL commit to either an estimated or a specific response time frame for State plan and State plan amendment submissions that require prior approval.

*Response:* ACL will use reasonable efforts to respond to State plan and State plan amendment submissions that require prior approval within 90 calendar days of receipt. This general timeframe may not be suitable in every case, as there may be conditions that warrant additional time for review. Examples of factors that may cause delays beyond these 90 days include incomplete or incorrect State plan or State plan amendment submissions and need for consultation or coordination with parties outside of ACL.

*§ 1321.39 Appeals to the Departmental Appeals Board regarding State plan on aging.*

Section 1321.77 of the existing regulation (*Scope*) is redesignated here at § 1321.39,

retitled, and modified. Sections 305<sup>190</sup> and 307<sup>191</sup> of the Act, respectively, require a State to designate a State agency to carry out Title III programs and develop a State plan on aging to be submitted to the Assistant Secretary for Aging for approval. Per section 307(c)(1)<sup>192</sup> the Assistant Secretary for Aging shall not make a final determination disapproving any State plan, or any modification thereof, or make a final determination that a State agency is ineligible under section 305,<sup>193</sup> without first affording the State agency reasonable notice and opportunity for a hearing.

In the past, the Assistant Secretary for Aging would have facilitated the appeals process. Consistent with § 1321.17 and new § 1321.23, appeals have been delegated to DAB in accordance with the procedures set forth in 45 CFR part 16. The Board will hear the appeal and may refer an appeal to the DAB's Alternative Dispute Resolution Division for mediation prior to issuing a decision.

Delegation of appeals to the DAB will continue to fulfill the statutory mandate to afford a State agency reasonable notice and opportunity for a hearing, while streamlining administrative functions and providing robust due process protections. The HHS DAB provides impartial, independent review of disputed decisions under more than 60 statutory provisions. We believe this change will provide clarity and consistency to State agencies and is aligned with the intent of the Act.

*§ 1321.41 When a disapproval decision is effective.*

In this section, redesignated from existing § 1321.79, retitled, and modified, we remove reference to the “Commissioner for Aging” and replace it with “the Departmental Appeals Board” to align with changes made to § 1321.39.

*§ 1321.43 How the State agency may appeal the Departmental Appeals Board's decision.*

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<sup>190</sup> 42 U.S.C. 3025.

<sup>191</sup> 42 U.S.C. 3027.

<sup>192</sup> *Id.* section 3027(c)(1).

<sup>193</sup> 42 U.S.C. 3025.

In this section, redesignated from § 1321.81 and retitled, we remove reference to the “Commissioner for Aging” and replace it with “the Departmental Appeals Board” to align with changes made to § 1321.39.

*§ 1321.45 How the Assistant Secretary for Aging may reallocate the State agency's withheld payments.*

The provision contained in § 1321.83 of the existing regulation (*How the Commissioner may reallocate the State's withheld payments*) is redesignated here as § 1321.45. The provision has been retitled, and minor, non-substantive changes have been made to the provision to reflect statutory updates.

*§ 1321.49 Intrastate funding formula.*

The provision contained in § 1321.37 of the existing regulation (*Intrastate funding formula*) is redesignated here as § 1321.49. In states with multiple PSAs, State agencies provide funding to AAAs through the IFF. Section 305 of the Act sets forth requirements for the IFF while, at the same time, affording State agencies some flexibilities in its development and implementation.<sup>194</sup> The changes to this provision are designed to assist State agencies in developing IFFs in compliance with the Act's requirements; to clarify the options available to State agencies; and to aid them in implementation of their IFFs. In paragraph (a), we specify that the State agency must include the IFF in the State plan, in accordance with guidelines issued by the Assistant Secretary for Aging and using the best available data; that the formula applies to supportive, nutrition, evidence-based disease prevention and health promotion, and family caregiver services provided under Title III of the Act; and that a separate formula for evidence-based disease prevention and health promotion may be used, as per section 362 of the Act.<sup>195</sup>

In paragraph (b) we clarify the elements of the IFF. The elements include a descriptive statement and application of the State agency's definitions of greatest economic need and

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<sup>194</sup> *Id.*

<sup>195</sup> 42 U.S.C. 3030n.

greatest social need; a statement that discloses any funds deducted for allowable purposes of State plan administration, the Ombudsman program, or disaster set aside funds, as set forth in § 1321.99; whether a separate formula for evidence-based disease prevention and health promotion is used; how the NSIP funds will be distributed; a numerical mathematical statement that describes each factor for determining how funds will be allotted and the weight used for each factor; a listing of the data to be used for each PSA in the State; a statement of the allocation of funds to each PSA in the State; and the source of the best available data used to allocate the funding.

In paragraph (c) we identify prohibitions related to the IFF. Prohibitions include that the State agency may not: withhold funds from distribution through the formula, except where expressly allowed for State plan administration, disaster set aside funds as set forth at § 1321.99, or the Ombudsman program; exceed State plan and area plan administration caps as detailed at § 1321.9(c)(2)(iv); use Title III, part D funds for area plan administration; distribute funds to any entity other than a designated AAA, except where expressly allowed for State plan administration funds, Title III, part B Ombudsman program funds, and disaster set-aside funds as set forth in § 1321.99; and use funds in a manner that is in conflict with the Act.

In paragraph (d) we specify other requirements that apply to distribution of NSIP funds, including that cash must be promptly and equitably disbursed to nutrition projects under the Act and provisions relating to election of agricultural commodities. In paragraph (e) we state that Title VII funds or Title III, part B Ombudsman program funds under the Act may be distributed outside the IFF. This subsection also allows the State agency to determine the amount of funding available for area plan administration before deducting funds for Title III, part B Ombudsman program and disaster set-aside funds. We include that a State agency may reallocate funding within the State when the AAA voluntarily or otherwise returns funds, subject to the State agency's policies and procedures. Revisions to paragraph (f) reflect statutory updates and cross-reference to other provisions within the regulation.

*Comment:* A commenter observed that § 1321.49(a) states, “The formula shall reflect the proportion among the planning and service areas of persons age 60 and over in greatest economic need or greatest social need[.]” The commenter noted that the phrase should read instead “greatest economic need and greatest social need.”

*Response:* ACL appreciates this comment and has made the revision.

*Comment:* Some commenters expressed that ACL should consider allowing other examples of “best available data” that capture experiences of LGBTQI+ populations.

*Response:* ACL appreciates the comment but does not believe any changes to the rule are necessary. Section 1321.49(b)(5) allows for “[o]ther high quality data available to the State agency” to be used in the IFF.

*Comment:* Some commenters expressed a need for a transparent process for the development of the IFF in a State, and more transparency in the content of the IFF. Other commenters requested clarification when a AAA serves more than one PSA.

*Response:* ACL appreciates these comments. The provision at § 1321.49 requires the IFF to be developed in consultation with the State’s area agencies, requires the proposed IFF to be published for public review and comment, and includes a list of specific information that must be included in an IFF. In response to comments, we have clarified that the public must be given a reasonable minimum period of time (at least 30 calendar days, unless a waiver has been granted by the Assistant Secretary for Aging) for review and comment. ACL declines to further dictate a specific process for the procurement of public input in a proposed IFF, as conditions may vary from one State to another. Instead, ACL leaves it to the discretion of each State agency to determine an appropriate public input process. ACL further believes the information required by § 1321.49 to be included in the IFF provides for adequate transparency. Aside from clarifying the minimum reasonable period of time for public comment, ACL maintains the regulatory language as proposed.

We expect that State agencies will exercise appropriate oversight of each PSA, and we

agree that additional clarification of expectations for area agencies on aging that serve more than one PSA could be helpful. Therefore, we have clarified that the requirements under § 1321.49 should be, “specific to each planning and service area.” For consistency, we have similarly revised § 1321.19 (*Designation of and designation changes to area agencies*), § 1321.61 (*Advocacy responsibilities of the area agency*), § 1321.63 (*Area agency advisory council*), and § 1321.65 (*Submission of an area plan and plan amendments to the State agency for approval*) regarding specificity to each PSA.

*Comment:* Some commenters expressed concerns as to particular populations that they felt should be considered in an IFF. One commenter suggested prohibiting State agencies from considering OAA Title VI awards in their States in considering how to allocate Title III funding via the IFF.

*Response:* ACL appreciates these comments but declines to revise § 1321.49, because it already contains a mechanism to address these concerns via the IFF development process and the requirement for public input. However, ACL confirms that Title III funds must supplement, not supplant, Title VI funds and that Title VI funds should not be considered to be “in place of” or a substitute for Title III funding to serve those prioritized as being in the greatest economic need and greatest social need.

*Comment:* ACL received comments and questions related to the process involved in revising an IFF, how often IFF demographic data should be updated, and the disbursement of NSIP funds.

*Response:* ACL will address these comments and questions through technical assistance, as needed.

#### *§ 1321.51 Single planning and service area States.*

The provision contained in § 1321.41 of the existing regulation (*Single state planning and service area*) is redesignated here as § 1321.51 and retitled. Most of the language of the existing provision relates to confirming the approval of an application of a State which, on or

before October 1, 1980, was a single PSA, to continue as a single PSA if the State agency met certain requirements. Only State agencies currently designated as a single PSA State may have such status; accordingly, we remove this language and clarify the specific requirements that apply to operating as a single PSA State. Single PSA States are addressed elsewhere in our final regulations, including definitions in § 1321.3 and regarding designation of and changes to PSAs in § 1321.13.

Based on questions we have received from such State agencies, we detail clarifications that single PSA State agencies must meet requirements for AAAs, unless otherwise specified. In paragraph (b), we clarify that single PSA State agencies, as part of their State plan, must include a funds distribution plan that mirrors many of the requirements of the IFF for States with multiple PSAs, minus distribution to AAAs. The State agency must also provide justification if it wishes to provide services directly and believes it meets applicable requirements to do so, as set forth in section 307(a)(8)(A).<sup>196</sup> In paragraph (c) we set forth that single PSA State agencies may revise their funds distribution plans, subject to their policies and procedures and prior approval of the Assistant Secretary for Aging. In response to comments, we have specified that the public be given a reasonable minimum period of time (at least 30 calendar days, unless a waiver has been granted by the Assistant Secretary for Aging) for review and comment of any proposed changes to the funds distribution plan. We include these changes to promote transparency and good stewardship of public funds. Revisions also are made to reflect statutory updates.

### *Subpart C – Area Agency Responsibilities*

#### *§ 1321.55 Mission of the area agency.*

The provision contained in § 1321.53 of the existing regulation (*Mission of the area agency*) is redesignated here as § 1321.55. This provision specifies the AAA's mission, role, and functions as the lead on aging issues in its PSA under the Act.

The social services systems in which AAAs and their community partners operate today

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<sup>196</sup> 42 U.S.C. 3027(a)(8)(A).

differs greatly from that which existed in 1988 when the existing regulation was promulgated. For example, in 1988 much of the work of AAAs involved the establishment and maintenance of focal points, which at that time were identified as “a facility established to encourage the maximum collocation and coordination of services for older individuals.” The existing language set forth in § 1321.53(c) regarding a AAA’s obligations with respect to focal points goes well beyond the requirements with respect to focal points that are set forth in section 306(a) of the Act.<sup>197</sup> Focal points in previous § 1321.53(c) focused on the need for brick-and-mortar facilities such as multipurpose senior centers. In light of the social service systems climate in which AAAs operate today, the existing language limiting these focal points to facilities could impede a AAA’s ability to develop and enhance comprehensive and coordinated community-based systems in, or serving, its PSA, as contemplated by the Act. Accordingly, we remove the language from this paragraph related to a AAA’s obligations with respect to focal points.

We also make minor revisions to this provision to align with updates to statutory terminology and requirements resulting from reauthorizations (e.g., adding family caregivers as a service population per the 2000 amendments) and to emphasize the Act’s aim that priority be given to serving older adults with greatest economic need and greatest social need.

*Comment:* ACL received several comments about the redesignation of § 1321.53 to § 1321.55 and the removal of focal points, which in prior regulations were identified as facilities “[...] established to encourage the maximum collocation and coordination of services for older individuals[.]” Many of these commenters voiced support for the removal of focal points to encourage maximum flexibility for area agencies to engage a broad range of community-based partners to provide OAA services. Additional commenters expressed concern about the removal of the language because of concerns about the impact on current brick-and-mortar multipurpose senior centers. One commenter specifically requested retaining “special consideration” of multipurpose senior centers and updating to provide flexibility to designate an entity rather than

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<sup>197</sup> 42 U.S.C. 3026(a).



a facility, which can include virtual focal points.

*Response:* As commenters noted, the removal of focal points recognizes the shifting social services environment and promotes flexibility surrounding the development of community-based systems that reflect the needs of a AAA's PSA. The rule removes an obligation for all AAAs to establish and maintain brick-and-mortar facilities, though it does not preclude any AAA from operating multipurpose senior centers based upon a determination of the needs of their individual PSAs. Thus, we maintain the regulatory language for § 1321.55 to provide AAAs the flexibility to develop and enhance a comprehensive and coordinated community-based system, which may include multipurpose senior centers, that meets the needs of their PSA.

*Comment:* Some commenters requested a definition of "community-based system" in § 1321.55(a). Other commenters recommended adding "implementation" to the mission of the area agency on aging and voiced concern that consumers will not be impacted unless implementation also occurs.

*Response:* We appreciate these comments, but retain the text as proposed. Section 1321.55(b) details general requirements for comprehensive and coordinated community-based systems and give an area agency the discretion to decide additional details of their comprehensive and coordinated community-based system as it pertains to the needs of their PSA.

*Comment:* Some commenters sought more clarity in § 1321.55(b)(3) and asked what it means to assure that the range of available public and private long-term care services and support options are readily accessible to all older persons and their family caregivers, no matter their income. Others shared concerns about assuring resources given that the accessibility of publicly funded services and programs is dependent upon available funding. One commenter specifically requested that ACL shift the language from "[a]ssure that these options are readily accessible [...]" to "prioritize making these options readily accessible."

*Response:* ACL appreciates comments regarding assurances that the range of available

public and private long-term care services and support options are readily accessible to all older persons and their family caregivers, no matter their income. We are maintaining the regulatory language and emphasize that the language applies to available public and private long-term care services and support options.

*Comment:* Some commenters asked ACL to clarify what it means to “offer special help or targeted resources” for the most vulnerable older persons, family caregivers, and those in danger of losing their independence under § 1321.55(b)(6).

*Response:* ACL appreciates these comments and reiterates that an area agency must prioritize services and supports for eligible populations with the greatest economic and greatest social need. ACL will provide technical assistance related to offering special help or targeted resources to people with the greatest economic and greatest social need, including those who are most vulnerable and in danger of losing their independence.

*Comment:* Many commenters shared concerns about § 1321.55(b)(10) related to an area agency board of directors. Several commenters recommended that ACL amend the provision to eliminate the phrase “board of directors” and to instead require area agencies to have an advisory council or to “engage with” leaders in the community, including leaders from groups identified as in the greatest economic need and greatest social need. Some commenters noted that many area agencies are part of local governments and may not have the authority to establish a board of directors. Other commenters recommended that ACL remove the requirement for a board of directors to include leaders from groups identified as in greatest economic and greatest social need.

*Response:* ACL appreciates the comments related to the regulatory text in § 1321.55(b)(10) and notes that both governmental and not-for-profit area agencies need an entity to be responsible for governance, including legal and fiduciary responsibilities. The OAA requires area agencies to establish advisory councils which have distinct responsibilities related to the responsibilities of an area agency that are separate and apart from the governance

responsibilities of a board of directors.<sup>198</sup> We note that this provision contains only minor changes from the existing rule which stated, “(10) Be directed by leaders in the community who have the respect, capacity and authority necessary to convene all interested persons, assess needs, design solutions, track overall success, stimulate change and plan community responses for the present and for the future.”

Thus, we decline to eliminate the regulatory text which states, “(10) Have a board of directors comprised of leaders in the community, including leaders from groups identified as in greatest economic need and greatest social need, who have the respect, capacity and authority necessary to convene all interested persons, assess needs, design solutions, track overall success, stimulate change, and plan community responses for the present and for the future.”

We acknowledge that governance responsibilities for government-based area agencies often reside with an elected Board of Commissioners or other elected officials. In this specific governance structure, an area agency may not have authority to establish a separate board of directors for the area agency or to broaden the composition of an elected board to include leaders from groups identified as in the greatest economic and greatest social need. For this reason, ACL will provide technical assistance regarding government-based area agencies who do not have the authority to establish a separate board of directors that includes leaders of groups identified as in greatest economic need and greatest social need to ensure the needs of these populations are reflected in the composition of the board of directors for the AAA.

*Comment:* Some commenters shared concerns related to the feasibility of monitoring an area agency under § 1321.55(d) to ensure that it is not engaging in activities that are inconsistent with the mission of the Act or State agency policies.

*Response:* ACL appreciates comments related to ensuring that area agencies activities are in alignment with the provisions detailed in §§ 1321.55 and 1321.9. We decline to amend the regulatory language because subpart C is specific to the responsibilities of an area agency. The

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<sup>198</sup> *Id.* section 3026(a)(6)(D).

State agency's responsibilities include monitoring the programs and activities initiated under part 1321, including AAA activities under this part.

*§ 1321.57 Organization and staffing of the area agency.*

The provision contained in § 1321.55 of the existing regulation (*Organization and staffing of the area agency*) is redesignated here as § 1321.57.

The existing language in paragraph (a)(2) of this provision prohibits a separate organizational unit within a multipurpose agency which functions as the AAA from having any purpose other than serving as a AAA. The Act promotes AAAs as innovative, collaborative organizations which adapt to ever-evolving social service, health, and economic climates. We eliminate this prohibition to provide more flexibility to AAAs to conduct their operations, subject to State agency policies and procedures. Adequate safeguards exist in the Act and in the regulation (such as requirements with respect to COI) to render this restriction unnecessary.

We also make a minor revision to paragraph (a)(1) to take into account the addition of family caregivers as a service population pursuant to the 2000 amendments to the Act (Pub. L. 106-501). We also include minor revisions to this provision to update cross-references to other sections of the regulation.

*Comment:* ACL received many comments about the proposed elimination of the requirement in the prior regulation (§ 1321.55(a)(2)), which prohibited a separate organizational unit within a multipurpose agency which functions as the AAA from having any purpose other than serving as an area agency. Most of these commenters expressed support for the proposed elimination of this requirement and observed that this change reflects the range of area agency governance structures and provides an area agency the flexibility to expand service offerings and funding sources. Other commenters shared concerns about the potential for the proposed language to restrict State agency approval authority and the importance of policies and procedures for area agencies within larger multipurpose agencies.

*Response:* As commenters noted, the elimination of the requirement referred to in the

paragraph above in the prior regulation at § 1321.55(a)(2) and re-numbered in this final rule as § 1321.57(a)(2) reflects the current range of area agency governance structures. It also promotes AAAs as innovative, collaborative organizations which adapt to ever-evolving social service, health, and economic climates. The elimination of this requirement provides more flexibility to AAAs to conduct their operations. ACL maintains that adequate safeguards exist in the Act and the regulations, such as requirements with respect to COI and adherence to State agency policies and procedures, to ensure that area agency activities align with the provisions detailed in § 1321.55.

*Comment:* Some commenters requested that § 1321.57(a)(1) be amended to provide flexibility to an area agency to provide programs to other populations, beyond older adults and family caregivers, including adults with disabilities.

*Response:* The Act provides area agencies with the statutory authority to serve adults aged 60 years and older, including those with disabilities, and their family caregivers. ACL made a minor revision to § 1321.57(a)(1) to account for the addition of family caregivers as a service population pursuant to the 2000 amendments to the Act (Pub. L. 106-501) and declines to add additional service populations because we do not have the statutory authority to do so.

*Comment:* One commenter recommended the elimination of § 1321.57(b) due to concerns regarding the costs associated with administrative functions for area agencies.

*Response:* ACL appreciates comments regarding the financial costs associated with administrative functions of area agencies. However, in light of the area agency responsibilities detailed throughout subpart C, area agencies need adequate and qualified staff to implement the provisions throughout this subpart. For this reason, we maintain this provision as proposed.

#### *§ 1321.61 Advocacy responsibilities of the area agency.*

We make minor revisions to this provision for clarity and to take into account the addition of family caregivers as a service population pursuant to the 2000 amendments to the Act (Pub. L. 106-501).

*Comment:* We received one comment asserting that the AAA's role is to investigate abuses in government and asking for AAAs to have the right to administrative hearings with ACL.

*Response:* ACL disagrees with the commenter that the advocacy role of AAAs is to investigate abuses in government. As stated in the Act, the role of the State agency is to, "serve as an effective and visible advocate for older individuals by reviewing and commenting upon all State plans, budgets, and policies which affect older individuals and providing technical assistance to any agency, organization, association, or individual representing the needs of older individuals[.]"<sup>199</sup> Subsequently, the Act states that the AAA will, "serve as the advocate and focal point for older individuals within the community by (in cooperation with agencies, organizations, and individuals participating in activities under the plan) monitoring, evaluating, and commenting upon all policies, programs, hearings, levies, and community actions which will affect older individuals[.]"<sup>200</sup>

Under Title III of the Act, the State agency is the grantee of ACL.<sup>201</sup> Title III of the Act provides for appeals by the grantee (the State agency), for which provisions are set forth at § 1321.39 and § 1321.43. Title III of the Act also provides for appeal by applicants seeking designation as a PSA, as set forth at § 1321.17, and if a State agency initiates an action or proceeding to withdraw designation of an area agency on aging, as set forth at § 1321.23.

Under § 1321.9, the State agency is responsible for developing, implementing, monitoring, and enforcing policies and procedures governing all aspects of part 1321 and part 1324. Such policies and procedures may include appeals processes at the State level. The intent of the Act is to foster a cooperative approach between State and community-based entities. When conflicts occur, we expect that application of State agency policies and procedures, in addition to technical assistance and robust discussion, will assist all parties in finding resolution that maximizes the intent of the Act.

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<sup>199</sup> 42 U.S.C. 3025(a)(1)(D).

<sup>200</sup> 42 U.S.C. 3026(a)(6)(B).

<sup>201</sup> 42 U.S.C. 3025.

*Comment:* Several commenters expressed support for the additional clarity surrounding the advocacy responsibilities of an area agency in § 1321.61, including the addition of family caregivers as a service population. One commenter asked for the definition of family caregiver to be expanded to include older relative caregivers. Several commenters noted barriers to successfully implementing the advocacy responsibilities of the area agency, including representing the interests of older persons and family caregivers to local level and executive branch officials, public and private agencies, or organizations, as required by the Act and this regulation. Other commenters requested clarification about the application of this provision when a AAA serves more than one PSA.

*Response:* ACL appreciates the comments related to the advocacy responsibilities of an area agency and notes that the definition of family caregiver in § 1321.3 includes older relative caregivers to ensure the consideration of older relative caregivers as advisory council members. ACL will also continue to provide technical assistance surrounding best practices related to serving as a public advocate for the development or enhancement of comprehensive and coordinated community-based systems of services, including consistently conducting outreach to the public related to the needs of older persons and family caregivers in PSAs.

We expect that State agencies will exercise appropriate oversight of each PSA, and we agree that additional clarification of expectations for area agencies on aging that serve more than one PSA could be helpful. Therefore, we have added clarification at § 1321.61 (*Advocacy responsibilities of the area agency*) to state, “and specific to each” in reference to the PSA. For consistency, we have similarly revised § 1321.19 (*Designation of and designation changes to area agencies*), § 1321.49 (*Intrastate funding formula*), § 1321.63 (*Area agency advisory council*), and § 1321.65 (*Submission of an area plan and plan amendments to the State agency for approval*) regarding specificity to each PSA.

*§ 1321.63 Area agency advisory council.*

The provision contained in § 1321.57 of the existing regulation (*Area agency advisory*

*council*) is redesignated here as § 1321.63. Section 306 of the Act<sup>202</sup> requires AAAs to seek public input with respect to the area plan; accordingly, we include new language in this section clarifying the AAA's advisory council duties with regard to soliciting and incorporating public input. Minor changes are made to the language describing the required composition of the advisory council, in order to clarify (1) that council members should include individuals and representatives of community organizations from or serving the AAA's PSA, including individuals identified as in greatest economic need and individuals identified as in greatest social need; (2) that a main focus of the council should be to assist the AAA in targeting individuals of greatest social need and greatest economic need; and (3) that providers of the services provided pursuant to Title III of the Act, as well as representatives from Indian Tribes and older relative caregivers, should be represented in the council.

We also make minor revisions to this provision to take into account the addition of family caregivers as a service population pursuant to the 2000 amendments to the Act (Pub. L. 106-501).

*Comment:* Commenters shared concerns that service providers on a council may inappropriately influence decisions related to awarding OAA funds, even if they abstain from voting on funding decisions. ACL received many comments on § 1321.63(b), § 1321.63(b)(4), and § 1321.63(b)(5) regarding the inclusion of Title III service delivery representatives and representatives of health care provider organizations as members of an area agency advisory council. Most commenters expressed concern about the participation of service providers or representatives of health care provider organizations on an area agency advisory council due to the potential for COI and the perception that participation may benefit one service provider over a different potential service provider. Some commenters expressed support for the inclusion of Title III service delivery representatives, including volunteer service delivery providers, on an area agency advisory council.

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<sup>202</sup> 42 U.S.C. 3026.



*Response:* ACL appreciates the comments regarding the inclusion of Title III service delivery representatives and health care representatives as members of an area agency advisory council. We decline to revise the regulatory text at § 1321.63(b) introductory text and (b)(4) and (5) because the primary focus of the council should be to assist the area agency in developing and coordinating community-based systems of services, including targeting individuals of the greatest economic and greatest social need. Service providers and health care provider representatives are fundamental to developing community-based systems of services that reach these populations. To clarify, the advisory council is required to function as a separate body from the AAA's governing body. The governing body is responsible for making funding decisions and other matters related AAA leadership. In contrast, the advisory council is responsible for providing local feedback from the community to assist the governing body's leadership in developing, administering, and operating the area plan on aging. The OAA requires that service providers be among the members of the AAA's advisory council.<sup>203</sup> ACL recognizes the concerns regarding COI and has established COI requirements at § 1321.47 (*Conflicts of interest policies and procedures for State agencies*) and § 1321.67 (*Conflicts of interest policies and procedures for area agencies on aging*). These provisions specifically list advisory council members among the individuals to whom these provisions apply.

Further, § 1321.67 of this rule requires area agencies to develop and maintain COI policies, including related to governing boards and advisory councils, to avoid actual, perceived, or potential COI. We believe the COI policy requirement serves as an adequate guardrail against the concern raised by commenters related to service providers and health care provider organizations serving on area agency advisory councils.

*Comment:* Several commenters requested revisions to clarify the role of an area agency advisory council and the distinction between an advisory council and a board of directors. Specifically, commenters recommended adding language restricting an advisory council from

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<sup>203</sup> *Id.* section 3026.

also operating as a board of directors and prohibiting members from serving on both the area agency advisory council and the board of directors. Some commenters requested guidance on the decision-making authority of advisory councils, especially regarding the development and submission of the area plan. Other commenters questioned whether a AAA that is designated to serve multiple PSAs as allowed by § 1321.19(a) is required to have an advisory council for each PSA or may have an advisory council subcommittee for each PSA.

*Response:* ACL appreciates the requests for clarity related to the role of an area agency advisory council. The primary focus of the area agency advisory council should be to assist the area agency in developing community-based systems of services targeting individuals with the greatest social need and greatest economic need. Section 1321.63(a)(1) through (5) details how the advisory council can assist an area agency in ensuring that individuals with the greatest social need and greatest economic need are prioritized in an advisory capacity. Except for the change noted below, we are maintaining the language as is in § 1321.63(a)(1) through (5) because it details the primary functions of an advisory council as advisors to an area agency.

Regarding AAAs which serve multiple PSAs, we have revised § 1321.63(a) to specify, “The council shall carry out advisory functions which further the area agency’s mission of developing and coordinating community-based systems of services for all older persons and family and older relative caregivers specific to each planning and service area.” We decline to provide further detail in the rule regarding how each PSA will be addressed and leave this to State and area agency policies and procedures to accomplish.

In light of the comments received regarding both the role of an advisory council and the role of a board of directors, ACL will provide technical assistance regarding the functions of an advisory council, the functions of a board of directors or governing body, corresponding best practices regarding AAAs serving multiple PSAs, and COI policies and procedures for advisory and governing bodies. In response to comments, we have added new § 1321.63(d), clarifying that an advisory council may not operate as a board of directors, and prohibiting members from

servicing on both the advisory council and the board of directors.

*Comment:* A couple of commenters requested revisions to clarify the requirements for public hearings related to the area plan and the role of the advisory council. Other commenters requested expansion of the language in § 1321.63(a)(3) to include “or otherwise ensuring community engagement and obtaining community input.” Some noted support for the additional clarity surrounding the advisory council’s role in soliciting and incorporating public input into the area plan.

*Response:* ACL appreciates comments related to public hearings related to the area plan, and the role of the advisory council in soliciting and incorporating public input into the area plan. Section 306 of the Act requires area agencies to seek public input with respect to the area plan.<sup>204</sup> The rule at § 1321.63 clarifies that the council must advise the area agency in conducting public hearings, among other activities. For example, the advisory council may advise the area agency on how to ensure that individuals of the greatest social and greatest economic need are included in the hearings. We maintain the language in § 1321.63(a)(3) and reference in § 1321.63(c) which clarifies that the advisory council shall review and provide comments related to the area plan to the area agency prior to the area agency’s submission of the plan to the State agency for approval. In light of the comments received, ACL will provide technical assistance related to the parameters for public hearings, the role of the advisory council in soliciting and incorporating public input, and best practices soliciting and incorporating public input, especially from individuals with the greatest social and greatest economic need, into the area plan.

*Comment:* A couple of commenters asked us to clarify the meaning of “[r]epresentatives from Indian Tribes, Pueblos, or Tribal aging programs” as proposed in § 1321.63(b)(9)(i) and one specifically recommended that the proposed provision be revised to include both unofficial and official representatives.

*Response:* In § 1321.63(b) ACL lists the individuals and representatives of community

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<sup>204</sup> *Id.*

organizations who shall comprise the AAA's advisory council. These may include both official and unofficial representatives. For example, a AAA serving a large metropolitan area may serve Native Americans from multiple Indian Tribes, including those a far distance from the AAA's service area. The provision at § 1321.63(b)(9)(i) encourages individuals who represent Indian Tribes, Pueblos, or Tribal aging programs, whether formally or informally, to be considered as members of the AAA's advisory council. We encourage official representation by Indian Tribes, Pueblos, or Tribal aging programs to be provided in AAA advisory council composition.

*Comment:* ACL received many comments regarding proposed § 1321.63(b)(1) which requires that the majority, or more than 50 percent, of area agency advisory council members be older persons, including minority individuals who are participants or who are eligible to participate in the programs. Most of these commenters expressed support for this requirement and noted the importance of ensuring that the service populations' perspectives are included in area agency plans and policies. Some commenters specifically supported the inclusion of older adults with the greatest economic or greatest social need, including LGBTQI+ older adults and people with HIV. Other commenters requested flexibility surrounding advisory council composition because of concerns related to recruiting volunteer advisory council members, including those in rural communities, and with the greatest economic or greatest social need. One commenter specifically requested that we define the term "efforts" in relation to including those identified as in the greatest economic need and greatest social need.

*Response:* ACL appreciates comments regarding the proposed requirements that the majority of advisory council members be older persons who are eligible to participate in area agency programming and that area agencies must intentionally seek to include those in the greatest economic and greatest social need. The primary focus of the advisory council is to assist the area agency in coordinating community-based systems of services for all older persons and family and older relative caregivers in the PSA. The inclusion of older adult members who have the greatest economic or greatest social need will help to ensure that the perspectives of these

communities are represented in the area plan. For this reason, we are maintaining § 1321.63(b)(1) as proposed and emphasize that the language encourages but does not require area agencies to appoint advisory council members representing those identified as in the greatest economic or greatest social need. This provides area agencies the flexibility sought by several commenters regarding council composition due to concerns about volunteer recruitment. ACL will continue to provide technical assistance regarding recruiting older adult advisory council member volunteers in diverse geographical settings, including those identified as in the greatest economic or greatest social need, including how an area agency can demonstrate “effort” to recruit older adult advisory council members with the greatest economic or greatest social need.

*Comment:* Several commenters voiced support for the inclusion of family caregivers in area agency advisory council membership, as proposed in § 1321.63(b)(3) and § 1321.63(b)(9)(ii). Some commenters specifically requested that ACL add “kinship caregivers” to § 1321.63(b)(3) to ensure that older relative caregivers raising grandchildren are included in an area agency’s advisory council.

*Response:* ACL appreciates comments related to the inclusion of family caregivers and older relative caregivers as members of area agency advisory councils. The 2000 amendments to the Act (Pub. L. 106-501) added family caregivers as a service population and the revision at § 1321.63(b)(3) reflects this addition. As commenters noted, many older adults are kin or grandparent caregivers, and § 1321.3 includes older relative caregivers in the definition of family caregiver. We further specify “Older relative caregivers, including kin and grandparent caregivers of children or adults age 18 to 59 with a disability” in § 1321.63(b)(9)(ii). Therefore, we are maintaining the language for § 1321.63(b)(3).

*§ 1321.65 Submission of an area plan and plan amendments to the State agency for approval.*

The provision contained in § 1321.52 (*Evaluation of unmet need*) and § 1321.59 (*Submission of an area plan and plan amendments to the State for approval*) of the existing regulation are combined and redesignated here as § 1321.65. The State agency is responsible for

ensuring that area plans comply with the requirements of section 306 of the Act.<sup>205</sup> The final rule includes revisions to this provision to clarify for State agencies the area plan requirements that should be addressed by State agency policies and procedures. These include identification of populations in the PSA of greatest economic need and greatest social need; evaluation of unmet needs; public participation in the area plan development process; plans for which services will be provided, how services will be provided, and how funding will be distributed; a process for determining if a AAA meets requirements to provide certain direct services pursuant to section 307(a)(8)<sup>206</sup> of the Act; minimum adequate proportion requirements per section 306(a)(2)<sup>207</sup> of the Act; and requirements for program development and coordination activities as set forth in § 1321.27(h). State agencies may include other requirements that meet State-specific needs.

We make an addition to area plan requirements to reflect changes in the nutrition program, as discussed above. Consistent with § 1321.87, if State agency policies and procedures allow for the service option to provide shelf-stable, pick-up, carry-out, drive-through, or similar meals under Title III, part C-1, AAAs will be required to provide this information in their area plans to ensure AAAs are aware of, and in compliance with, the applicable terms and conditions for use of such funds. It will also provide State agencies and ACL necessary information to determine the extent to which AAAs plan to implement this allowable use of Title III, part C-1 funds for new service delivery methods.

In paragraphs (c) and (d) we include additions to reflect statutory updates with respect to inclusion of hunger, food insecurity, malnutrition, social isolation, and physical and mental health conditions and furnishing of services consistent with self-directed care in area plans. In response to questions received, we clarify in paragraph (e) that area plans must be coordinated with and reflect State plan goals. This provision parallels § 1321.27(c), which requires the State plan to provide evidence the plan is informed by and based on area plans. State plans and area

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<sup>205</sup> *Id.*

<sup>206</sup> 42 U.S.C. 3027(a)(8).

<sup>207</sup> 42 U.S.C. 3026(a)(2).

plans may have cycles that align or vary, based on multiple considerations. With this provision, we clarify that State plans and area plans processes should be iterative, where each informs the other.

*Comment:* One commenter expressed support for the clarified requirements for area plans and associated activities. Other commenters requested that we clarify application of this provision to AAAs that serve more than one PSA.

*Response:* We appreciate these comments. We expect that State agencies will exercise appropriate oversight of each PSA, and we agree that additional clarification of expectations for area agencies that serve more than one PSA would be helpful. Therefore, we have revised § 1321.65 (*Submission of an area plan and plan amendments to the State agency for approval*) to state, “specific to each planning and service area.” For consistency, we have made similar revisions to § 1321.19 (*Designation of and designation changes to area agencies*), § 1321.49 (*Intrastate funding formula*), § 1321.61 (*Advocacy responsibilities of the area agency*), and § 1321.63 (*Area agency advisory council*) regarding specificity to each PSA.

*Comment:* ACL received many comments about the proposed regulatory language for § 1321.65(b)(2) which requires an area agency to identify populations at the greatest economic need and greatest social need within the PSA. Most of the commenters expressed support for area agencies identifying populations at the greatest economic need and greatest social need in their PSAs as part of the area plan process. Some commenters observed that it may be difficult for area agencies to identify and collect data related to populations at the greatest economic need and greatest social need. Other commenters argued for broader language to encourage local flexibility in determining those with the greatest economic and greatest social need.

A few commenters recommended that ACL require area agencies to work in partnership with organizations that serve populations with the greatest economic need and greatest social need to determine prioritization of programs and services for these populations. Specifically, a couple of commenters recommended that ACL require State agencies to grant area agencies and

Centers for Independent Living (CILs) equal responsibility for determining and prioritizing populations with the greatest economic need and greatest social need for an area plan.

*Response:* ACL appreciates the comments regarding identifying older adults with the greatest economic need and greatest social need as part of the area plan. As commenters noted, the rule at § 1321.65(b) provides area agencies with the flexibility to identify populations within their individual PSAs and ensures that area plans prioritize serving older individuals with the greatest economic need and greatest social need. We require the area agency to identify select populations and encourage area agencies to select additional populations as needed based upon the unique characteristics of their PSAs for the area plan. We have revised the regulatory text at § 1321.65(b)(2)(i) to clarify our expectations for area plans. In accordance with policies and procedures established by the State agency, we expect AAAs to: (1) identify and consider populations in greatest economic need and greatest social need; (2) describe how they target the identified populations for service provision; (3) establish priorities to serve one or more of the identified target populations, given limited availability of funds and other resources; (4) establish methods for serving the prioritized populations; and (5) use data to evaluate whether and how the prioritized populations are being served.

ACL also appreciates comments related to ensuring that representatives from groups with the greatest economic need and greatest social need are involved in the identification of these groups and in the related prioritization of programs and services. The Act requires area agencies to form advisory councils and § 1321.63 clarifies the role of the council, including in assisting area agencies in targeting individuals of greatest economic need and greatest social need, and requires the majority of members be older adults, including older adults with disabilities. The advisory council should seek to ensure that the area plan accurately identifies communities of greatest economic need and greatest social need and that public input from these individuals be incorporated into the area plan.

As the responsibility for the area plan is statutorily required to be with the State agency



and the area agency, we cannot assign such responsibilities to other entities. However, we encourage area agencies to work collaboratively with other entities in the community in development and administration of the area plan on aging.

*Comment:* ACL received many comments related to proposed § 1321.65(b)(3) which requires area plans to provide an assessment and evaluation of unmet need for supportive services, nutrition services, evidence-based disease prevention and health promotion, family caregiver support, and multipurpose senior centers. Most commenters specifically expressed appreciation for the inclusion of an assessment and evaluation of unmet needs in area plans and noted that the requirement may enable area agencies to address local need more intentionally. Some commenters recommended that area agencies support culturally responsive outreach and data collection programming to ensure that the needs of populations with the greatest economic need and greatest social need, including LGBTQI+ persons and people with HIV, be included in the assessment and evaluation. Other commenters recommended that ACL expand the proposed assessment and evaluation to include other programs and service areas that impact older adults, including supportive services that disseminate information and provide access to assistive technology devices through a State assistive technology entity.

A variety of commenters shared concerns about the capacity and training needed to develop specific data collection strategies to implement proposed § 1321.65(b)(3). These commenters generally recommended that ACL provide area agencies flexibility surrounding strategies for conducting assessment and evaluation.

*Response:* ACL appreciates the comments related to assessment and evaluation of unmet need. As commenters noted, § 1321.65(b)(3) equips area agencies with the data needed to prioritize resources and to address need more intentionally within the PSA. In recognition of the challenges of collecting statistically valid data, we modify the language to read, “[...] objectively collected, and where possible, statistically valid, data with evaluative conclusions[.]” The language also broadly includes “supportive services” which provides area agencies the flexibility

to conduct assessments and evaluation of unmet need based upon considerations within the PSA. Additionally, § 1321.65(c) requires area plans to incorporate services which address the incidence of hunger, food insecurity and malnutrition, social isolation, and physical and mental health conditions. Further, the language does not limit the evaluation to programs exclusively funded by the Act. Therefore, we are making no further changes to § 1321.65(b)(3). However, in light of the comments received regarding the training and capacity needed to develop specific data collection strategies and to implement this section, ACL will provide technical assistance regarding best practices and tools for assessing and evaluating unmet need within a PSA.

*Comment:* Several commenters voiced support for proposed regulatory language at § 1321.65(b)(4) which requires public participation, specifically from older adults with the greatest economic need and the greatest social need, in area plan development. Comments generally supported public participation in area plan development though also expressed concern about the proposed “minimum time period” and effective date of the new area plan requirements. Some comments noted concern about the proposed requirements’ impact on administrative capacity.

*Response:* ACL appreciates comments related to public participation in area plan development and has revised the regulatory language at § 1321.65(b)(4) to specify that the public must be given a reasonable minimum period of time (at least 30 calendar days, unless a waiver has been granted by the State agency). Area agency advisory councils should provide area agencies with additional capacity to support the solicitation of public participation in area plan development through public hearings and related opportunities for feedback, especially for older adults with the greatest economic need and greatest social need. In light of the feedback received, we will offer technical assistance regarding best practices for timely solicitation and reporting related to public participation for area agencies and their advisory councils.

#### *Subpart D – Service Requirements*

##### *§ 1321.71 Purpose of services allotments under Title III.*

The provision contained in § 1321.63 of the existing regulation (*Purpose of services*

*allotments under Title III*) is redesignated here as § 1321.71. We make minor revisions to this provision to reflect statutory updates with respect to services provided under Title III, as well as to provide consistency with other updates to the regulation. For example, we make minor revisions to this provision to take into account the addition of the National Family Caregiver Support Program and family caregivers as a service population pursuant to the 2000 amendments to the Act (Pub. L. 106-501). Additional minor revisions are included for clarity, such as distinctions in the manner in which Title III funds are awarded between single PSA States and States with AAAs, with cross-references to language on IFFs, funds distribution plans, and provision of direct services by State agencies and AAAs.

*Comment:* We received comments of support for including family caregivers as a service population.

*Response:* We appreciate these comments.

*Comment:* We received comment asking us to clarify whether information technology systems that support direct service provision may be funded with direct services funding under Title III of the Act.

*Response:* ACL appreciates this concern and confirms that Title III direct services funds may be used for reasonable, allowable, and allocable expenses necessary for the provision of direct services, subject to appropriate procurement and other policies and procedures. This may include information technology systems; devices, such as laptop or tablet computers and smartphones; and training of staff and volunteers.

*Comment:* We received comment expressing concern that the Ombudsman program was not listed as an allowable supportive service.

*Response:* As proposed, § 1321.85(a) references the twenty-six items listed at section 321 of the Act, of which ombudsman services are included.<sup>208</sup> ACL confirms that ombudsman services are an acceptable use of funds appropriated under Title III, part B.

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<sup>208</sup> 42 U.S.C. 3030d.

*Comment:* We received a suggestion to clarify that the IFF referenced in § 1321.71(c) is the one set forth at § 1321.49.

*Response:* We are grateful to commenters for noting this and correct the provision to read “[...] as set forth in § 1321.49.”

*§ 1321.73 Policies and procedures.*

The provisions contained in § 1321.65 of the existing regulation (*Responsibilities of service providers under area plans*) are redesignated and revised in part here as § 1321.73 and § 1321.79. Revised § 1321.73 sets forth requirements to ensure AAAs and local service providers develop and implement policies and procedures to meet requirements set by State agency policies and procedures, in accordance with § 1321.9. Accordingly, we move the requirements previously set forth in (b)-(g) to other sections. We also specify that the State agency and AAAs must develop monitoring processes, the results of which are strongly encouraged to be made available to the public. Doing so may be one way to ensure accountability and stewardship of public funds, as required by the Act.

*Comment:* We received comments supporting this provision, as well as requesting clarity on the expectations for an “independent qualitative and quantitative monitoring process.” We received other comments requesting clarification on whether assessments and assessment policies must be made available to the public. Other comments requested development of a core set of services to be provided by all AAAs with standardized quality measures.

*Response:* ACL expects that the State agency and AAAs will conduct qualitative and quantitative monitoring of the programs and services funded under the Act. Use of funds provided for State and area plan administration for such monitoring is appropriate. ACL acknowledges the wide range of circumstances and resources for conducting monitoring and determining independence of those conducting monitoring. We believe this provision strikes the appropriate balance between providing sufficient guidance to State agencies and AAAs for implementation while maintaining flexibility to respond to local needs and circumstances. This

includes determinations regarding whether to make quality monitoring and measurement results available to the public. ACL is available to provide technical assistance on these topics.

Title III of the Act contains certain core required services and standards (such as the provision of meals that meet mandated dietary guidelines in accordance with requirements of Title III-C of the Act and the provision of evidence-based health promotion programs with Title III-D funds; reporting standards and requirements; establishment by the State agency of a minimum proportion of funds that will be spent on access services, in-home supportive services, and legal assistance; prohibition against means testing; and voluntary contribution requirements, etc.). At the same time, the Act provides latitude to State agencies to determine how best to implement the Act in order to respond to local needs and circumstances. The State agency may also, in turn, offer such flexibility to AAAs. Conditions can vary from one State to another and from one region of a State to another, and State agencies also are required, and are in the best position, to monitor the quality and effectiveness of services provided under the Act. ACL believes that the Act and this final rule strike an appropriate balance between required services and standards and flexibilities offered to State agencies in implementation of the Act. ACL declines to impose requirements beyond what is contemplated by the Act regarding required services and standards.

*Comment:* We received various comments requesting improvements in services, such as meal presentation.

*Response:* ACL recognizes the importance of meals and other services provided under the Act being appealing to participants. Services must be person-centered, as set forth in § 1321.77. Additionally, we expect that feedback from service participants will be solicited and used to the greatest extent possible in the ongoing provision of services as set forth in § 1321.73(c). To further clarify the importance of the participant experience, we have added “[...] and preferences,” to this provision under the expectations for monitoring participant needs.

*§ 1321.75 Confidentiality and disclosure of information.*

Section 1321.75 reorganizes and redesignates existing § 1321.51. The revised section sets forth updated requirements for State agencies' and AAAs' confidentiality procedures. State agencies and AAAs collect sensitive, legally protected information from older adults and family caregivers during their work. Our revisions will enhance the protections afforded to OAA participants. Revised § 1321.75 also adds “family caregivers” as a service population under the Act to reflect the 2000 amendments to the Act (Pub. L. 106-501).

We clarify the obligation of State agencies, AAAs, or other contracting, granting, or auditing agencies to protect confidentiality. For example, the provision prohibits providers of ombudsman services to reveal any information protected under the provisions in 45 CFR part 1324, subpart A. Similarly, State agencies, AAAs, and others subject to this provision shall not require a provider of legal assistance under the Act to reveal any information that is protected by attorney client privilege, including information related to the representation of the client.<sup>209</sup>

The policies and procedures required under this section must ensure that service providers promote the rights of each older individual who receives services, including the right to confidentiality of their records. We require that the policies and procedures comply with all applicable Federal requirements. The State agency may also require the application of other laws and guidance for the collection, use, and exchange of both Personal Identifiable Information (PII) and personal health information.

Section 1321.75 includes exceptions to the requirement for confidentiality of information. PII may be disclosed with the informed consent of the person or of their legal representative, or as required by court order. The final rule also allows disclosure for program monitoring and evaluation by authorized Federal, State, or local monitoring agencies. State and area agencies that are covered entities under the Health Insurance Portability and Accountability Act of 1996 (HIPAA)<sup>210</sup> are also required to disclose records to the Secretary for the purpose of assessing

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<sup>209</sup>*Model Rules of Professional Conduct: Rule 1.6 Confidentiality of Information*, The Am. Bar Assn. (1983), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct)

<sup>210</sup> Pub. L. 104-191; 110 Stat. 1936.

compliance with the HIPAA Rules.<sup>211</sup> Under the revised provision, State agencies' policies and procedures may explain that individual information and records may be shared with other State and local agencies, community-based organizations, and health care providers and payers to provide services, and we encourage agencies to develop memoranda of understanding regarding access to records for such purposes.

*Comment:* We received a comment encouraging organizations to abide by Tribal data sovereignty policies.

*Response:* ACL appreciates this comment and encourages organizations to coordinate and to abide by Tribal data sovereignty policies where appropriate. In response to this comment, we have added a statement at § 1321.75(f) that State agencies are encouraged to consult with Tribes regarding any Tribal data sovereignty expectations that may apply.

*Comment:* We received comments expressing support for inclusion-focused language and highlighting the importance of protecting PII and personal health information. Another commenter requested more guidance regarding criteria for the definitions, including reporting requirements. Other commenters responded to ACL's request for comment on whether ACL sufficiently set forth exceptions to OAA confidentiality requirements, offering strong support of the new language in (b), including that the language helps clarify the Ombudsman's obligation to protect program records and not disclose them to any State agency, area agency, or auditing agency.

*Response:* ACL is committed to the protection of confidential information collected in the provision of services under the Act and believes this provision will reduce confusion, including regarding the Ombudsman program. In recognition of these comments, ACL notes that § 1321.9(b) states that, "[P]olicies and procedures are aligned with periodic data collection and reporting requirements, including ensuring service and unit definitions are consistent with definitions set forth in these regulations, policy guidance, and other information developed by

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<sup>211</sup> 45 CFR 160.310.

the Assistant Secretary for Aging.” ACL anticipates providing training and technical assistance upon promulgation of the final rule to support effective implementation of these provisions. We believe that State agencies should be allowed to place restrictions on information sharing when necessary and appropriate, and this final rule provides that discretion.

*Comment:* One commenter noted that expressly including HIPAA in this provision may cause confusion and might imply that all OAA-funded activities are implicated under that law.

*Response:* ACL appreciates this comment. To avoid confusion, we have removed the reference to HIPAA and have clarified that State agencies’ policies and procedures must comply with all applicable Federal requirements. However, we note that it is increasingly common for OAA recipients to be engaged in activities that make them HIPAA-covered entities and we encourage grantees and subrecipients to be aware of any associated legal obligations.

*§ 1321.79 Responsibilities of service providers under State and area plans.*

The provision contained in § 1321.65 of the existing regulation (*Responsibilities of service providers under area plans*) is redesignated in part here as § 1321.79 and at § 1321.73 and is retitled for clarity. Minor revisions are made to this provision to reflect statutory updates with respect to family caregiver services provided under Title III, as well as to emphasize that providers should seek to meet the needs of individuals in greatest economic need and greatest social need. We encourage providers to offer self-directed services to the extent feasible and acknowledge service provider responsibility to comply with local adult protective services (APS) requirements, as appropriate. The final rule sets forth that this provision applies to both State plans, as well as to area plans, as there are circumstances in which a service provider may provide services under a State plan (such as in a single PSA State). The language in paragraph (a) of the existing provision (reporting requirements) has been moved to § 1321.73, which addresses accountability requirements applicable to service providers.



*Comment:* We received comment questioning the provisions at § 1321.79(d) allowing for sharing of information with local APS without the consent of the older person or their legal representative, especially for legal assistance and ombudsman services.

*Response:* We appreciate this comment and have clarified § 1321.79(d) to state, “[...] in accordance with local adult protective services requirements, except as set forth at § 1321.93, part 1324, subpart A, and where appropriate, bring to the attention of[.]”

*Comment:* We received other comments discussing importance of sharing information for purposes of program analysis, research, and other worthwhile endeavors. Other commenters provided program management and implementation recommendations regarding this provision.

*Response:* We appreciate these comments and decline to make further changes to this provision. We intend to address other suggestions and requests for clarification through technical assistance.

#### *§ 1321.83 Client and service priority.*

The provision contained in § 1321.69 of the existing regulation (*Service priority for frail, homebound or isolated elderly*) is redesignated here as § 1321.83 and is retitled for clarity. We received numerous inquiries about how State agencies and AAAs should prioritize providing services to various groups. Questions included whether there was an obligation to serve everyone who sought services and whether services were to be provided on a first-come, first-served basis. Questions about prioritization were particularly prevalent in response to demand for services created by the COVID-19 PHE. Entities sought clarification on whether they are permitted to set priorities, who is permitted to set priorities, and the degree to which entities have discretion to set their own priority parameters.

Section 1321.83 clarifies that entities may prioritize services and that they have flexibility to set their own policies in this regard. It also clarifies that State agencies are responsible for setting services priorities, but may establish policies and procedures to grant AAAs and/or service providers the discretion to set service priorities at the local level. We also include

revisions to this provision to account for the addition of the National Family Caregiver Support Program, family caregivers as a service population, and priorities for serving family caregivers pursuant to the 2000 amendments to the Act (Pub. L. 106-501).

*Comment:* Some commenters expressed support of this provision. Others stated confusion regarding the priorities proposed in (c) of this provision.

*Response:* We appreciate these comments. To reflect that service to older relative caregivers is at the option of the State agency and/or a AAA, we have replaced the word “When” in § 1321.83(c)(3) with “If” for clarity. Given limited availability of resources, service to older relative caregivers is not required by the Act. However, in this provision we clarify that if older relative caregivers are to be served, older relative caregivers of those with severe disabilities are to be given priority.

*Comment:* Some commenters questioned whether funds for the Ombudsman program provided under Title III, part B are subject to the requirements at § 1321.83(b).

*Response:* We appreciate this comment and have revised § 1321.83(b) to read, “[...] services under Title III, parts B (except for Ombudsman program services which are subject to provisions at part 1324), C, and D[.]”

*Comment:* We received other suggestions, program management recommendations, and implementation questions regarding this provision.

*Response:* We decline to make further changes to this provision and intend to address other suggestions and requests for clarification through sub-regulatory guidance and technical assistance.

#### *§ 1321.93 Legal assistance.*

The provision contained in § 1321.71 of the existing regulation (*Legal assistance*) is redesignated here as § 1321.93. We are modifying § 1321.93 to better reflect the purpose of the

Act, including the application of section 101<sup>212</sup> to elder rights and legal assistance, and to clarify and simplify implementation of the statutory requirements of State agencies, AAAs, and the legal assistance providers with which the AAAs or State agencies, where appropriate, must contract to procure legal assistance for qualifying older adults. Section 101(10), in particular, finds that older people are entitled to “Freedom, independence, and the free exercise of individual initiative in planning and managing their own lives, full participation in the planning and operation of community-based services and programs provided for their benefit, and protection against abuse, neglect, and exploitation.”<sup>213</sup> Legal assistance programs funded under Title III, part B of the Act play a pivotal role in ensuring that this objective is met. Additionally, legal assistance programs further the mission of the Act as set forth in section 102(23) and (24) by serving the needs of those with greatest economic need or greatest social need, including, historically underrepresented, and underserved populations, such as minority older individuals, LGBTQI+ older adults, those who have LEP, and those who are isolated by virtue of where they live, such as rural elders, those who are homebound and those residing in congregate residential settings.<sup>214</sup>

ACL intends to offer technical assistance, pursuant to section 202(a)(6) of the Act,<sup>215</sup> to State agencies, AAAs, and legal assistance service providers, to enable all parties to understand and most effectively coordinate with each other to carry out the provisions of this section.

The final rule combines all regulatory provisions relevant to legal assistance into one section. The purpose of this revision is to mitigate historic and existing confusion and misconceptions about legal assistance, achieve clarity and consistency, and create greater understanding about legal assistance and elder rights. We further include a technical correction to change the reference to statutory language in section (a) of the prior regulation from section

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<sup>212</sup> 42 U.S.C. 3001.

<sup>213</sup> *Id.* section 3001(10).

<sup>214</sup> 42 U.S.C. 3002(23) and (24).

<sup>215</sup> 42 U.S.C. 3012(a)(6).

307(a)(15)<sup>216</sup> to 307(a)(11),<sup>217</sup> which sets forth State plan requirements for legal assistance.

Section 307(a)(15) sets forth requirements for serving older people with LEP.<sup>218</sup>

Section 1321.93(a) provides a general definition of legal assistance based on the definition in section 102(33) of the Act.<sup>219</sup> Section 1321.93(b) sets forth the requirements for the State agency to add clarity about its responsibilities. The State agency is required to address legal assistance in the State plan and to allocate a minimum percentage of funding for legal assistance. The State plan must assure that the State agency will make reasonable efforts to maintain funding for legal assistance. Funding for legal assistance must supplement and not supplant funding for legal assistance from other sources, such as the grants from the Legal Services Corporation (LSC). The State agency is also obligated to provide advice, training, and technical assistance support for the provision of legal assistance as provided in revised § 1321.93 and section 420(a)(1) of the Act.<sup>220</sup> As part of its oversight role, the State agency must ensure that the statutorily required contractual awards by AAAs to legal assistance providers meet the requirements of § 1321.93(c).

Section 1321.93(c) sets forth the requirements for the AAA regarding legal assistance. Similar to the State agency requirement to designate a minimum percentage of Title III, part B funds to be directed toward legal assistance, the AAAs must take that minimum percentage from the State agency and expend at least that sum, if not more, in an adequate proportion of funding on legal assistance and enter into a contract to procure legal assistance. The final rule reflects the statute and existing regulation in stating requirements for the AAAs to follow when selecting the best qualified provider for legal assistance, including that the selected provider demonstrate expertise in specific areas of law that are given priority in the Act, which are income, health care, long-term care, nutrition, housing, utilities, protective services, abuse, neglect, age

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<sup>216</sup> 42 U.S.C. 3027(a)(15).

<sup>217</sup> *Id.* section 3027(a)(11).

<sup>218</sup> *Id.* section 3027(a)(15).

<sup>219</sup> 42 U.S.C. 3002(33).

<sup>220</sup> 42 U.S.C. 3032i(a)(1).

discrimination, and defense against guardianship. Section 1321.93(e) also sets forth standards for contracting between AAAs and legal assistance providers, including requiring the selected provider to assist individuals with LEP, including in oral and written communication. The selected provider must also ensure effective communication for individuals with disabilities, including by providing appropriate auxiliary aids and services where necessary. We also clarify that the AAA is precluded from requiring a pre-screening of older individuals seeking legal assistance or from acting as the sole and exclusive referral pathway to legal assistance.

We call particular attention to two areas of law given priority in section 307(a)(11)(E) of the Act.<sup>221</sup> The first is long-term care, which we interpret to include rights of individuals residing in congregate residential settings and rights to alternatives to institutionalization. Legal assistance staff with the required expertise in alternatives to institutionalization would be knowledgeable about Medicaid programs such as the Money Follows the Person demonstration, which helps individuals transition from an institutional setting to a community setting, as well as Medicaid HCBS authorities and implementing regulations, including HCBS settings requirements, that allow individuals to receive Medicaid-funded services in their homes and community. To demonstrate this expertise, staff would exhibit the ability to represent individuals applying for such programs; to appeal denials or reductions in the amount, duration, and scope of such services; and to assist individuals who want to transition to the community. Regarding expertise around alternatives to institutionalization, ACL expects legal assistance staff to work very closely with the Ombudsman program to protect resident rights, including the right to seek alternatives to institutionalization and the right to remain in their chosen home in a facility by manifesting the knowledge and skills to represent residents and mount an effective defense to involuntary discharge or evictions.

The other area of focus is guardianship and alternatives to guardianship. Section 307(a)(11)(E) of the Act also states: “[...] area agencies on aging will give priority to legal

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<sup>221</sup> 42 U.S.C. 3027(a)(11)(E).

assistance related to [...] defense of guardianship[.]”<sup>222</sup> We interpret this provision to include advice to and representation of older individuals at risk of guardianship to oppose appointment of a guardian and representation to seek revocation of or limitations on a guardianship. It also includes assistance that diverts individuals from guardianship to less restrictive, more person-directed forms of decision support such as health care and financial powers of attorney, advance directives and supported decision-making, whichever tools the client prefers, whenever possible.

Despite the clear prioritization of legal assistance to defend against imposition of guardianship of an older person, the Act in section 321(a)(6)(B)(ii) also states Title III, part B legal services may be used for legal representation “in guardianship proceedings of older individuals who seek to become guardians, if other adequate representation is unavailable in the proceedings[.]”<sup>223</sup> The language in section 321(a)(6)(B)(ii)<sup>224</sup> and the language in section 307(a)(11)(E)<sup>225</sup> have been interpreted by some AAAs and some contracted legal providers as meaning funding under the Act can be used to petition for guardianship of an older adult, rather than defending older adults against guardianship.

Specifically, our goal is to clarify the role of legal assistance providers to promote self-determination and person-directedness and support older individuals to make their own decisions in the event of future diminished decisional capacity. Additionally, public guardianship programs in some States, and private practitioners in all States, are generally more available and willing to represent petitioners to establish guardianship over another adult than they are to represent older adults over whom guardianship is sought. The primary role of legal assistance providers is to represent older adults who are or may be subjected to guardianship to advance their values and wishes in decision-making. Legal assistance resources are scarce and accordingly should be preserved to represent older adults’ basic rights to make their own decisions. ACL believes that

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<sup>222</sup> *Id.*

<sup>223</sup> 42 U.S.C. 3030d(a)(6)(B)(ii).

<sup>224</sup> *Id.*

<sup>225</sup> 42 U.S.C. 3027(a)(11)(E).

legal assistance should not be used to represent a petitioner for guardianship of an older person except in the rarest of circumstances.

The final rule includes the statutory exception in the regulations, and it will apply in the very limited situation of (1) someone who is eligible for Older Americans Act services, (2) who seeks to become a guardian of another individual when no other alternatives to guardianship are appropriate, and (3) where no other adequate representation is available. The legal assistance provider undertaking such representation would have to establish that the petitioner is over 60, and that no alternatives to guardianship, as discussed above, are available. The provider would also have to establish that no other adequate representation is available through public guardianship programs that many States have established, through bar associations and other pro bono services, or through hospitals, nursing homes, APS, or other entities and practitioners that represent petitioners for guardianship. A legal assistance program that would bring guardianship proceedings as part of its normal course of business, that represents a relative of an older person as petitioner at the request of a hospital or nursing facility to seek the appointment of a guardian to make health care decisions, or that undertakes representation at the behest of APS would not satisfy our interpretation of the limited applicability of the exception. These parties have access to counsel for representation in petitioning for guardianship.

Section 1321.93(d) sets forth the requirements for selecting legal assistance providers. Providers must provide legal assistance to meet complex and evolving legal needs that may arise involving a range of private, public, and governmental entities, programs, and activities that may impact an older adult's independence, choice, or financial security, and the standards AAAs must use to select the legal assistance provider or providers with which to contract. The provider selected as the "best qualified" by a AAA must have demonstrated capacity to represent older individuals in both administrative and judicial proceedings. Representation is broader than providing advice and consultation or drafting simple documents; it encompasses the entire range of legal assistance, including administrative and judicial representation, including in appellate

forums.

Legal assistance providers must maintain the expertise required to capably handle matters related to all the priority case type areas under the Act, including income, health care, long-term care, nutrition, housing, utilities, protective services, abuse, neglect, age discrimination and defense against guardianship. Under our final rule, a legal assistance provider that focuses only on one area, especially an area not specified by the Act as a priority case type, such as drafting testamentary wills, and that does not provide a broader range of services designated by the Act as priorities or represent individuals in administrative and judicial proceedings, would not meet the requirements of this section and the Act. A AAA that contracted with such a provider would also not meet their obligations under revised § 1321.93(c) and under the Act.

We describe that, as required by the Act and existing regulation, legal assistance providers must maintain the capacity to collaborate and support the Ombudsman program in their service area. Legal assistance providers must cooperate with the Ombudsman in entering into the Memorandum of Understanding proffered by the Ombudsman as required pursuant to section 712(h)(8) of the Act.<sup>226</sup> Legal assistance programs are required to collaborate with other programs that address and protect elder rights. We encourage coordination and collaboration with APS programs, State Health Insurance Assistance Programs, Protection and Advocacy systems, AAAs and ADRC options counselors and I&A/R specialists, nutrition programs, and similar partners where such coordination and collaboration promote the rights of older adults with the greatest economic need or greatest social need. Similarly, existing statutory and regulatory provisions urge legal assistance providers that are not housed within LSC grantee entities to coordinate their services with existing LSC projects. Such coordination will help ensure that services under the Act are provided to older adults with the greatest economic need or greatest social need and are targeted to the specific legal problems such older adults encounter. We will provide technical assistance on all these required practices.

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<sup>226</sup> 42 U.S.C. 3058g(h)(8).



As indicated in § 1321.9(c)(2)(xi), cost sharing for legal assistance services is prohibited. This means that a client may not be asked or required to provide a fee to the provider, as is sometimes the practice with some Bar Association referral services. Likewise, the Act prohibits requesting contributions from legal assistance clients before or during representation. Only after the conclusion of representation may a request for a contribution be made. If a client chooses to voluntarily contribute, the proceeds must be applied to expanding the service category.

The final rule precludes a legal assistance program from asking an individual about their personal or family financial information as a condition of establishing eligibility to receive legal assistance. Such information may be sought when it is relevant to the legal service being provided. Requesting financial information would be appropriate, for example, when an older person is seeking assistance with an appeal of denial of benefits, such as Medicaid and Supplemental Nutrition Assistance Program (SNAP), that have financial eligibility requirements.

The final rule requires legal assistance provider attorney staff and non-attorney personnel under the supervision of legal assistance attorneys to adhere to the applicable Rules of Professional Conduct for attorneys. Such non-attorney staff may include law students, paralegals, nurses, social workers, case managers, and peer counselors. Even if such non-attorney staff have their own rules of professional conduct, they must still adhere to the applicable Rules of Professional Conduct in their work in a legal assistance program office because their services are under the supervision of attorney staff. Non-disclosure of confidential client information is a critical component of adhering to Rules of Professional Conduct for both attorney and non-attorney staff, even if, for example, the non-lawyer staff may otherwise be subject to mandatory reporting of suspected elder maltreatment.

The final rule maintains the prohibition against a legal assistance provider representing an older person in a fee-generating case and includes the limited exceptions to that prohibition. The final rule also addresses prohibited activities by legal assistance providers, including prohibiting the use of Older American Act funds for political contributions, activities, and lobbying. The

prohibition against lobbying using Title III funds clarifies that lobbying does not include contacting a government agency for information relevant to understanding policies or rules, informing a client about proposed laws or rules relevant to the client's case, engaging with the AAA, or testifying before an agency or legislative body at the request of the agency or legislative body.

*Comment:* Proposed § 1321.93(a) provides the general definition for the provision of legal assistance under the Act. We received several comments asking us to amend proposed § 1321.93(a)(2), where we define legal assistance as “[...] legal advice and/or representation provided by an attorney[.]”<sup>227</sup> The commenters pointed out that non-lawyers, including paralegals and law students, may engage in legal advice and/or even legal representation in certain circumstances, and that State law may permit such representation.

*Response:* ACL appreciates these comments and notes that § 1321.93(a)(2) currently states that “[l]egal assistance may include, to the extent feasible, counseling, or other appropriate assistance by a paralegal or law student under the direct supervision of an attorney, and counseling or representation by a non-lawyer as permitted by law.” Additionally, we acknowledge such representation in § 1321.93(b)(1)(vi), (e)(2)(v) where we require non-lawyer personnel under the supervision of attorneys to adhere to the same Rules of Professional Conduct as an attorney. We understand the important role that paralegals and law students and other non-legal professionals play in providing legal representation to older people. Our goal is to assure high quality legal representation by requiring such professionals to be supervised by attorneys and to be bound by the same rules of conduct, as provided in the Older Americans Act. One commenter requested that we provide more detail about the Rules of Professional Conduct established by State judicial systems and bar associations. We decline to do so as this is beyond the scope of these regulations.

AAA information and referral services, State Health Insurance Assistance Programs,

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<sup>227</sup> 88 FR 39628 (June 16, 2023).

ADRCs, Long-Term Care Ombudsman Programs, and Centers for Independent Living (CIL) may work with legal assistance programs to provide information, education, and referral services. One commenter suggested that where a particular service of a legal nature might be able to be facilitated through a non-legal provider, a AAA should be allowed to do so, provided its actions are documented, accountable, and demonstrate that the AAA has made the best effort to provide the most comprehensive legal services. We believe our regulations encourage collaboration, especially in areas of education, cross-training of professionals and referrals to appropriate services and allowing older individuals to decide where and how to receive the services they want or need. AAAs may want to consider maintaining documentation of such collaboration as a best practice. However, as we note below, the Act requires that every AAA make an assessment that the selected legal assistance program is the entity best able to provide legal assistance services. Many legal interventions related to the OAA-designated priority case types require the full representational services of attorneys and non-lawyers under the supervision of attorneys to appropriately redress the legal problems experienced by older adults, and may not be provided by community partners, in accordance with applicable Rules of Professional Conduct. An example is representation opposing guardianship in judicial proceedings of an older adult who has been proposed for guardianship.

*Comment:* Another commenter raised concerns about the ability to continue to use pro bono attorneys.

*Response:* Section 307(a)(11) of the Act specifically requires contracts for legal assistance services to encourage coordination with the private bar for pro bono or reduced fee services for older Americans.<sup>228</sup> Section 1321.93(e)(2)(iv) requires, as a standard for contracting, that the selected legal assistance provider undertake reasonable efforts to engage the private bar to furnish services on a pro bono or reduced fee basis. While pro bono attorneys are an important resource to increase the amount of representation for OAA clients, we remind State agencies and

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<sup>228</sup> 42 U.S.C. 3027(a)(11).

AAAs that section 307(a)(2)(C) of the Act also requires State agencies to designate a minimum proportion of Title III, part B funds for direct legal services.<sup>229</sup> See also § 1321.93(b)(2), (c)(1) of these regulations. AAAs that receive these allotments must dedicate this amount, the “adequate proportion” per section 306(a)(2)(C) of the Act, to contracting for the provision of legal assistance.<sup>230</sup> A AAA that relies only on pro bono attorneys to provide legal assistance would not meet the requirement to fund legal assistance programs. Additionally, § 1321.93(d)(1), standards for legal assistance provider selection, requires the providers to exhibit the capacity to retain staff with requisite expertise. A program that utilizes only pro bono attorneys does not meet this requirement.

*Comment:* As stated above, proposed § 1321.93(b)(2) and (c)(1) require AAAs or State agencies in a State with a single planning area to establish and spend a minimum proportion of Title III, part B funds for legal assistance. We received comments concerning the variation in the amount of funding set aside by each State agency, making it difficult for legal assistance providers to represent those with the greatest economic and greatest social needs across the range of priority areas set forth in the OAA and in the regulations. Several commenters discussed the need for adequate funding, not minimum funding. Commenters suggested that the regulations provide clear guidance on how States should establish an adequate minimum proportion of funding for legal assistance to ensure a reasonable number of full-time attorneys are supported across the State.

*Response:* In this final rule, we require adequate minimum funding to maintain a robust legal assistance program as required by the OAA. We decline to provide detailed processes for State agencies in this regulation, given the variations and size of the older population in each State, and because we do not provide similar requirements in the rule for the proportion of funding to go to other services. However, we will provide technical assistance to State agencies

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<sup>229</sup> *Id.* section 3027(a)(2)(C).

<sup>230</sup> *Id.* section 3026(a)(2)(C).

on how to achieve the goal of adequate minimum funding for legal assistance. We also received comments about the lack of sufficient funding for legal assistance programs. We thank the commenters for these observations; however, such comments are beyond the scope of this regulation.

*Comment:* Commenters supported the requirements for formalized agreements for coordination and collaboration among other aging providers, citing work with long-term care ombudsmen, APS programs, Senior Health Insurance Programs (SHIPs), law enforcement, States Attorneys, CILs, and others. They particularly agreed with § 1321.93(b)(1), which lays out requirements for legal services. One commenter, however, asked that we require OAA funds to be used as a last resort to provide services to older people so that OAA funds could not be used if the provider had LSC funding available.

*Response:* We decline to make the change. Section 307(a)(11)(D) of the OAA provides that “to the extent practicable” OAA-supported legal assistance will be provided “in addition to any legal assistance for older individuals being furnished with funds from sources other than this Act[.]”<sup>231</sup> This provision recognizes the flexibilities needed to assure adequate and high-quality legal assistance is available to all older Americans with economic or social need. It does not set up a standard of OAA legal assistance as “a last resort.” Moreover, the same provision of the Act goes on to require, “that reasonable efforts will be made to maintain existing levels of legal assistance for older individuals;” which is consistent with many comments we received. Finally, LSC funding has more restrictive eligibility criteria, and different priorities along with additional restrictions. We agree, instead, with a legal services provider who described the importance of OAA Title III, part B funding for legal aid and noted how such funding enabled them to double the number of older clients served. The commenter appreciated deference to the legal assistance program in how to use funds for each case and in coordination with other funding. We thank commenters for these comments.

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<sup>231</sup> *Id.* section 3027(a)(11)(D).

*Comment:* ACL sets forth in § 1321.93(d) that the selected legal assistance provider must retain staff with expertise in specific areas of law affecting older persons with economic or social need, including public benefits, resident rights, and alternatives to institutionalization. ACL also requires the providers to demonstrate expertise in specific areas of law given priority in the OAA, including income and public entitlement benefits, health care, long-term care, nutrition, housing, utilities, protective services, abuse, neglect, age discrimination, and defense of guardianship.

Many commenters agreed with the list of statutorily mandated substantive areas in which legal assistance providers should be knowledgeable. One commenter suggested we amend § 1321.93(d)(1) to include all the legal priority areas in section 307(a)(11)(E) of the Act, rather than the three priority areas listed.<sup>232</sup> Other commenters raised questions about the list of statutorily mandated substantive areas. These commenters suggest that AAAs should consider the greatest needs of those in their community, or that it may be hard to find attorneys with requisite knowledge in rural areas. One commenter asked that we add consumer law as a priority to the specific areas of law, consistent with the goal of helping older adults who desire to age in their own home. Another commenter suggested we add pensions as a priority area. Other commenters raised concerns that, by further defining defense of guardianship in § 1321.93(d)(2)(i), ACL intended that priority be given to those cases over other priority areas.

*Response:* We appreciate the comment regarding § 1321.93(d)(1) and have amended the subsection as requested.

The list of substantive focus areas in § 1391.93(d)(2) sets forth the priority legal areas in section 307(a)(11)(E) of the OAA; the proposed rule did not expand upon these areas as one commenter stated.<sup>233</sup> However, within each community the AAA-contracted legal assistance provider may determine, in communication with the State agency, AAA, and others within their

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<sup>232</sup> *Id.* section 3027(a)(11)(E).

<sup>233</sup> *Id.*

community, how to focus on implementing the required case priorities to meet the needs of older individuals with economic or social need within their community. Moreover, the balancing of priorities could change over time as circumstances evolve. For example, a legal assistance provider in a community where many older people are losing their Medicaid because of the Medicaid renewal process may focus on Medicaid fair hearings. In another community where many older people are sued for medical debt, the provider may decide to prioritize representation in those cases. Still another community may focus on a growing trend of evictions and homelessness among older adults, representing individuals facing eviction and fighting homelessness, while another community could be on an Indian reservation in a very isolated area with legal issues related to other federal laws. Our objective is that, as the Act requires, the legal assistance providers contracted by AAAs have expertise in specified areas of importance to older people with greatest economic or greatest social need who receive services under the OAA. Most private practitioners of law for example, generally do not have such expertise. We note, also, that ACL provides technical assistance to legal assistance programs, as well as to AAAs and ADRCs, the Ombudsman program, general legal services programs, and disability programs, on legal problems included in the priority areas, including assistance in representation of individuals in administrative and court hearings. The technical assistance can provide support to help ensure high quality representation in the areas of focus under the OAA. Finally, particularly in rural areas, for services that cannot be provided by non-legal providers, the AAA may be able to facilitate delivery of the required legal assistance through arrangements with legal assistance programs in other parts of the State, using available technological solutions to fulfill the requirements of the Act. Technical assistance has been and will continue to be available from ACL to assist legal assistance providers, AAAs, and collaborating partners in rural areas. Legal assistance programs are encouraged to develop and strategically disseminate self-help materials, in areas where appropriate, developed by knowledgeable and respected expert consumer-facing organizations. Additionally, as noted in several comments and discussed above, State law may

permit a nonlawyer to engage in counseling or representation in certain circumstances.

In response to these comments, we have modified § 1321.93(d)(2) as follows. We have added “consumer law” to the list of legal areas in which legal assistance providers demonstrate expertise. Consumer law issues can fall within the statutory case priority categories related to income, housing, health care, long-term care, and abuse, for example. We have not added “pensions,” as requested by a commenter, since pensions are income, which is already included. We note that ACL funds pension counseling services in accordance with section 215 of the Act.<sup>234</sup> We have also corrected the numbering of provisions of § 1321.93(d)(3) though (5). We have also revised § 1321.93(e)(2)(i), which requires the selected legal assistance provider to maintain expertise in the specific areas described in § 1321.93(d)(2). We have also clarified, as noted above, that legal assistance providers may prioritize their work from among the focus areas identified in the regulations based on the needs of the community they serve.

*Comment:* In § 1321.93(d)(2)(i) we define what is meant by the term “defense of guardianship.” Several commenters were confused by the term “defense of guardianship,” and interpreted it as being inconsistent with the intent of the proposed rule to promote self-determination and alternatives to guardianship. One commenter suggested changing the language to defense against guardianship, while another suggested using the funding to promote guardianship prevention measures. Another commenter suggested we clarify that the term guardianship includes conservatorship and other similar fiduciary proceedings analogous to guardianship. Several commenters suggested we update the terms “proposed protected persons” and “protected persons” to “older individual at risk of guardianship” and “older individual subject to guardianship” as more in keeping with the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA).<sup>235</sup>

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<sup>234</sup> 42 U.S.C. 3020e-1.

<sup>235</sup> Nat'l. Conference of Comm'rs. on Unif. State Laws, Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (2017), <https://www.uniformlaws.org/committees/community-home?CommunityKey=2eba8654-8871-4905-ad38-aabbd573911c>.



*Response:* We reiterate that we use “defense of guardianship” in these regulations because it is the language used in section 307(a)(11)(E) of the OAA.<sup>236</sup> We also agree that, unlike the other priority areas of law set forth in § 1321.93(d)(2), the term is very confusing. That is why while we will keep the term to retain consistency with the Act, we have chosen to include a separate subsection, § 1321.93(d)(2)(i), to define defense of guardianship. Our definition includes what commenters described as guardianship prevention, including execution of advance directives and supportive decision arrangements as chosen by older individuals. We agree with the commenter that the term guardianship includes conservatorship and other similar fiduciary proceedings analogous to guardianship. We have also revised § 1321.93(d)(2)(i) and replace “proposed protected persons” and “protected persons” with “older individuals at risk of guardianship” and “older individuals subject to guardianship.” We have made a technical correction at § 1321.93(e)(2)(i) to correct the cross-reference from “paragraph (c)(1)(ii)(B)(1)(ii)” to “paragraph (d)(1), (2).”

*Comment:* Several commenters asked us to go beyond the proposed definition of defense of guardianship. For example, they asked that we require someone’s beliefs about guardianship be memorialized in their person-centered plan. Other commenters asked that we require the person subject to guardianship be involved to the maximum extent possible. Others asked that we require all people subject to guardianship proceedings be represented by an attorney.

*Response:* ACL is very supportive of person-centered planning. In § 1321.77(b), we give older adults and family caregivers an opportunity to develop a person-centered plan that discusses the services they may receive under the Act, where appropriate. Service providers who assist in developing these plans may want to include the view of older adults and family caregivers on guardianship and whether they have alternatives in place. Person-centered plans as developed in the context of receipt of certain Medicaid benefits are outside the scope of this regulation, as it does not address Medicaid requirements. The request to involve the person

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<sup>236</sup> 42 U.S.C. 3027(a)(11)(E).

subject to guardianship to the maximum extent possible is consistent with the existing obligations of attorneys under Rules of Professional Conduct in representing someone who is the subject of a guardianship proceeding or who seeks to modify or revoke a guardianship. State law, not Federal law, governs how the individual under guardianship will be involved in working with the guardian, and accordingly this request is beyond the scope of these regulations. We note that attorneys representing persons under guardianship retain all the requisite duties of loyalty to the client imposed by the ethical obligations of the Rules of Professional Conduct of their State. Similarly, State law, not Federal law, governs whether the person subject to a guardianship petition is entitled to have an attorney appointed to represent them.

*Comment:* Another commenter requested that we modify § 1321.93(d)(2)(i) to require that limitation of guardianship be sought both when a guardianship is initially established and in subsequent petitions to modify the guardianship. The same commenter recommended amending § 1321.93(d)(2)(ii)(A), (B) to reference promoting limited guardianship.

*Response:* We appreciate the comments and have revised these provisions. While attorneys representing persons proposed for and subject to guardianship are generally expected to seek diversion from and alternatives to guardianship, we recognize and agree that limitations on guardianship may be appropriate in certain cases.

*Comment:* We received many comments from organizations that represent older people or people with disabilities on guardianship itself in response to our discussion about the meaning of the term “defense of guardianship” in the proposed rule. All commenters agreed that guardianship should be avoided. Some commenters discussed alternatives to guardianship, including those referenced in the proposed regulations, as discussed above. Others suggested complimentary approaches, such as increased education about advance planning and expressing each person’s preferences. Many discussed the role that aging and disability organizations play in representing and protecting the interests of older people.

Regarding our request for comments on the role of legal assistance and AAAs in defense

of guardianship, one commenter agreed that public guardianship is a last resort and that it is critical to have firewalls between AAA functions and guardianship functions to avoid COIs or the appearance of COIs. The commenter objected, however, to precluding AAAs from serving as guardians, particularly for older adults with significant barriers to functioning and without other supports.

*Response:* We appreciate the concerns raised by the commenter. Our regulatory approach is to promote alternatives to guardianship and to support limitations on the imposition of guardianship. Our COI provisions are designed to prevent conflicts that could arise if a AAA receives outside funding to serve as a guardian, while at the same time contracting with legal assistance entities that represent people to oppose, divert from, or find alternatives to guardianship or who want to revoke an existing guardianship. Similar conflicts may arise if a Title III, part B legal assistance program is housed in a program funded by the LSC, and the LSC program brings a petition for guardianship while the OAA-funded component is asked to represent the individual over whom the guardianship is sought. Rules of Professional Conduct would apply to that conflict, as would standard legal services processes for checking conflicts among clients.

*Comment:* Several commenters provided examples of when OAA-funded legal services programs might appropriately petition for guardianship. Examples include petitioning for guardianship over a minor grandchild or other relative; or where appealing a Social Security termination or reduction may require a decision-maker, yet there is no authorized representative on file and the older individual lacks decisional capability to consent to the representation; or similarly where there is a need to assert rights by appealing Medicaid denials where appeal may only be brought by a power of attorney or guardian and there is no agent under a power of attorney; preventing eviction or foreclosure; or taking action against someone engaged in adult maltreatment. According to the commenters, all the examples resulted in an older person continuing to serve as primary care giver for a minor; or as a caregiver of another older

individual endeavoring to retain public benefits; to live in the individual's preferred residence; and/or to remain in the community. One commenter pointed out that, although pro bono attorneys may be willing to file for guardianship, they may feel uncomfortable or un knowledgeable about bringing a Medicaid or Social Security appeal and may not be equipped to explain to the court why the temporary guardianship is needed to appeal the public benefit denial. Other commenters said that they petition for guardianship because there are no attorneys available to bring the petition in the rural area they serve. Several CILs asked that CILs be added to the list of entities available to bring guardianship petitions.

*Response:* We thank the commenters for their responses. We emphasize the imperative of identifying the least restrictive means of pursuing rights such as those described above. OAA-funded legal assistance providers should consistently strive to avoid guardianship as a remedy in these circumstances, unless they can document that no other option is available. Additionally, however, we believe that the CILs who asked to identify CILs as entities available to bring guardianship petitions misunderstood the context of the discussion and therefore, we decline to make the change. Petitioning for guardianship is inconsistent with the mission of CILs to promote autonomy and self-direction. We intend to offer technical assistance to provide additional clarification based on the comment responses.

*Comment:* Section 1321.93(d)(2)(ii)(A) contains an exception to defense of guardianship in limited circumstances involving guardianship proceedings of older individuals who seek to become guardians when no other alternatives to guardianship are appropriate, and only if other adequate representation is unavailable in the proceeding. The exception is stated in section 321(a)(6)(B)(ii) of the Act.<sup>237</sup> In addition to the comments discussed above that provide examples of when legal assistance providers use this exception, we received comments asking us to strengthen the language to ensure the exception is used only in limited circumstances. Several commenters said the language could be strengthened by requiring providers to document the

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<sup>237</sup> 42 U.S.C. 3030d(a)(6)(B)(ii).

efforts they made to explore less restrictive alternatives, why none of those options were appropriate or available, and how the provider determined that no other adequate representation was available.

*Response:* Many State statutes require this kind of documentation from all parties to guardianship proceedings;<sup>238</sup> we accept the comments and have modified the language accordingly. Commenters also suggested making the exception to defense of guardianship a separate section to clarify what we mean by defense of guardianship. We accept these comments as well. Accordingly, we have modified § 1321.93(d)(2)(ii)(A) to create a new § 1321.93(d)(2)(ii)(C) that sets forth the limited circumstances in which a legal assistance program may bring a guardianship petition on behalf of an older individual, i.e., only if other adequate representation is unavailable; and the provider documents the circumstances as described above.

*Comment:* Section 1321.93(e) establishes standards for contracting between AAAs and legal assistance providers. We received comments from legal assistance providers that support the provision. They strongly supported § 1321.93(e)(3)(i), clarifying that area agencies are precluded from requiring a pre-screening to receive legal services or from being the sole and exclusive referral pathway for older adults to access legal assistance, to avoid creating unnecessary barriers to such assistance. They found the provision consistent with the Rules of Professional Conduct, as well as a means to avoid potential COI with the area agency. Commenters also cited the requirement in § 1321.93(e)(1)(v) referencing adherence to the Rules of Professional Conduct as helpful, particularly when AAAs with which they contract want them to provide confidential information about their clients without authorization from the client in contravention of the Rules of Professional Conduct.

Regarding OAA-funded legal assistance programs that are located within a LSC grantee entity, commenters were particularly appreciative of § 1321.93(e)(3)(v)(c). That section enables

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<sup>238</sup> See e.g. Tex. Estate Code Ann. § 1101.001; Ariz. Rev. Stat. Ann. section 14-5303; Wash. Rev. Code Ann. section 11.130.265.

the Assistant Secretary for Aging to exempt additional restrictions on activities and client representation that would otherwise be prohibited for legal assistance providers housed within a LSC grantee entity. This provision implements section 307(a)(11)(A) of the Act.<sup>239</sup> The commenters noted that such restrictions can prevent legal assistance providers from advocating for individuals in the greatest social and economic need and require assistance in the very areas that the OAA identified as priorities.

*Response:* We thank commenters for their comments.

*Comment:* Section 1321.93(f) sets out legal assistance provider requirements. These requirements include taking reasonable steps to ensure meaningful access to legal assistance by older individuals with LEP and other communication needs, including providing access to interpretation, translation, and auxiliary aids and services. Several commenters raised concerns that people who are deaf and rely on American Sign Language (ASL) or who rely on Communication Real Time Access (CART), as well as people with visual impairments and other sensory disabilities, have had difficulties accessing legal assistance.

*Response:* We appreciate the concerns raised by these commenters and reiterate that the regulations require the legal assistance provider to provide the necessary accommodations. We agree with commenters that interpretation and translation services must be provided through qualified individuals. The use of qualified individuals is particularly critical, given the technical nature of discussions about legal rights. The use of untrained laypersons for interpretation and translation could lead to dangerous or detrimental outcomes, and conflicts with civil rights obligations.

*Comment:* Section 1321.93(f) also prohibits the use of funds for lobbying. Subsection 1321.93(f)(4)(ii)(A)(5) clarifies that the section is not intended to prohibit legal assistance providers from testifying before a government agency, legislative body, or committee at the request of the government agency, legislative body, or committee. One commenter asked that we

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<sup>239</sup> 42 U.S.C. 3027(a)(11)(A).

remove the requirement that the legal assistance provider may testify when requested to do so by the entity before which they propose to testify. The commenter pointed out that the legal assistance provider may have important information to share and a technical understanding of older adults' experience with the issue but may not be able to obtain a timely request from the government agency, legislative body, or committee.

*Response:* We decline to make the edit, as the language is consistent with other requirements for recipients of Federal funding.

## **B. New Provisions Added to Clarify Responsibilities and Requirements Under Grants to State and Community Programs on Aging**

We include the following new provisions to provide direction in response to inquiries and feedback received from grantees and other interested parties and changes in the provision of services, and to clarify requirements under the Act.

### **Subpart B – State Agency Responsibilities**

#### **§ 1321.23 Appeal to the Departmental Appeals Board on area agency on aging withdrawal of designation.**

Section 305(a)(2)(A) of the Act empowers State agencies to designate eligible entities as AAAs.<sup>240</sup> Section 305(b)(5)(C)(i) of the Act affords a AAA the right to appeal a State agency's decision to revoke its designation including up to the Assistant Secretary for Aging.<sup>241</sup> Per section 305(b)(5)(C)(iv) the Assistant Secretary for Aging may affirm or set aside the State agency's decision.<sup>242</sup> Historically, appeals of AAA designation to the Assistant Secretary for Aging have been extremely rare.

Under new § 1321.23, the HHS Departmental Appeals Board (DAB) will preside over appeals under the OAA. The DAB may refer an appeal to its Alternative Dispute Resolution Division for mediation prior to issuing a decision. We believe this will streamline administrative

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<sup>240</sup> 42 U.S.C. 3025(a)(2)(A).

<sup>241</sup> *Id.* section 3025(b)(5)(C)(i).

<sup>242</sup> *Id.* section 3025(b)(5)(C)(iv).

functions and provide robust due process protections to AAAs. This aligns with §§ 1321.17 and 1321.39. The HHS DAB provides impartial, independent review of disputed decisions under more than 60 statutory provisions. We believe this regulation will provide clarity and consistency to State agencies and AAAs.

**§ 1321.37 Notification of State plan amendment receipt for changes not requiring Assistant Secretary for Aging approval.**

Sections 1321.19 and 1321.23 of the existing regulation, redesignated as §§ 1321.31 and 1321.35, address submission of amendments to the State plan and notification of State plan or amendment approval; however, they lack a process for notification of receipt of State plan amendments that are required to be submitted, but not approved by the Assistant Secretary for Aging. We include this new section to provide for notification of receipt of State plan amendments that do not require Assistant Secretary for Aging approval.

**§ 1321.47 Conflicts of interest policies and procedures for State agencies.**

Section 307(a)(7)(B) of the Act directs State agencies to include assurances against COI in their State plans.<sup>243</sup> As explained earlier, § 1321.3 defines two broad categories of conflict: one or more conflicts between the private interests and the official responsibilities of a person in a position of trust; and/or one or more conflicts between competing duties of an individual, or between the competing duties, services, or programs of an organization, and/or portion of an organization. State agencies may wish to identify other COI based on State law or other requirements.

Section 1321.47 requires State agencies to have policies and procedures that establish mechanisms to avoid both actual and perceived COI and to identify, remove, and remedy any existing COI at organizational and individual levels. They include providing a mechanism for informing relevant parties of COI responsibilities and identifying and addressing conflicts when they arise. Procedures to mitigate COI could include establishing firewalls between or among

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<sup>243</sup> 42 U.S.C. 3027(a)(7)(B).



individuals, programs, or organizations involved in the conflict, removing an individual or organization from a position, or termination of a contract. Whether the potential COI is actual or perceived, it is essential that the State agency pursue solutions that preserve the integrity of the mission of the Act.

*Comment:* Many commenters supported proposed § 1321.47 and appreciated the clarification related to COI for OAA grantees and subrecipients. Several commenters provided suggestions to strengthen the rule. One commenter suggested requiring provisions related to COI in State plans on aging. Another commenter suggested establishing an appeals process for entities should a State agency identify a COI. A commenter suggested requiring training for individuals, including leadership, on COI. One commenter recommended a two-year timeframe for review and implementation of the rule's COI provisions.

*Response:* We appreciate these suggestions for strengthening the rule. Section 307(a)(7)(B) of the Act requires assurances related to COI in State plans, including that no officer, employee, or other representative of the State or area agency is subject to a COI prohibited under this Act.<sup>244</sup> We decline to require additional COI provisions in State plans in this regulation because such provisions, if determined appropriate by the State agency, are best determined at the State level. State agencies may include such provisions in their State plans if they believe it will assist in implementation and enforcement of the rule's COI requirements. We likewise decline to require the establishment of an appeals process. Such a process, if determined appropriate by the State agency, is best developed at the State level. We agree training for staff on COI is necessary and appropriately incorporated in the training required by § 1321.5(a). We intend to provide State agencies with technical assistance on this final rule's COI provisions. We believe the timeframe specified for implementation of the rule is sufficient for State agencies to come into compliance.

*Comment:* A few commenters pointed out the potential for COI when a State agency or a

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<sup>244</sup> *Id.* section 3027(a)(7)(B).

AAA is lobbied by private interest or establishes contracts and commercial relationships with private entities.

*Response:* We agree that COI may arise in the context of contracts and commercial relationships with private entities. As detailed in the discussion of § 1321.9(c)(2), a State agency should consider the potential for a heightened risk of COI when developing policies and procedures for approving such agreements.<sup>245</sup> ACL will continue to provide sub-regulatory guidance and technical assistance related to COI in contracts and commercial relationships for grantees and subrecipients.

*Comment:* A few commenters sought to clarify that it may not be a COI for a State agency to operate both OAA programs and APS or a public guardianship program, for example. A commenter noted that such arrangements strengthen the ability of an agency to improve the lives of older adults and influence policy. Comments reiterated that this situation is not uncommon and requested clarity as to whether specific scenarios represent COI that cannot be mitigated. We received several comments that described how the commenters mitigated the potential COI with guardianship programs. For example, they only served as guardian of last resort; promoted the use of alternatives to guardianship; provided for defense of guardianship through another funding source; and generally adhered to the ethical standards for guardians developed by the National Guardianship Association.

*Response:* Whether a COI exists due to co-location of APS and guardianship programs, and whether it can be mitigated, is fact-dependent. This provision does not suggest that certain programs may not be located in State agencies. Rather, State agencies should carefully evaluate the potential for COI to arise when programs are co-located and should create and maintain robust policies, firewalls, monitoring, and remediation as necessary. To address concerns, however, we have amended §1321.47 to require the State agency to document COI mitigation strategies, as necessary and appropriate, when a State agency or Title III program operates an

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<sup>245</sup> 88 FR 39572 (June 16, 2023).

APS or guardianship program.

*Comment:* A few commenters requested eliminated or revising § 1321.47(a)(3), which requires “robust monitoring and oversight.” Commenters asserted that such monitoring would be too costly and burdensome to implement. Another commenter suggested that State plans on aging include provisions for the State agency to perform continual monitoring for COI.

*Response:* We appreciate the comments. Given the importance of this provision to ensuring access to vital services, we decline to make changes.

*Comment:* One commenter suggests that ACL add definitions for “financial interest” and “agent of the State” or give State agencies the discretion to adopt a State law or common definition. The commenter also asks whether “agent of the State” includes a AAA, employees of a AAA, and AAA providers.

*Response:* As with all terms not defined in the Act or in this final rule, State agencies may use reasonable definitions for “financial interest” or “agent of the State” or any other term the State agency chooses to define (or chooses not to define) including State law or common definitions.

### **§ 1321.53 State agency Title III and Title VI coordination responsibilities.**

New § 1321.53 sets forth expectations for coordinating activities and delivery of services under Title III and Title VI, as articulated in sections 306(a)(11)(B),<sup>246</sup> 307(a)(21)(A),<sup>247</sup> 614(a)(11),<sup>248</sup> and 624(a)(3)<sup>249</sup> of the Act. We received inquiries and feedback from grantees and other interested parties asking for clarification on their obligation to coordinate activities under Title III and Title VI. Questions included whether coordination is required or discretionary, what coordination activities entities must undertake, and which entities are responsible for coordination. We clarify that coordination is required under the Act and that all entities are

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<sup>246</sup> 42 U.S.C. 3026(a)(11)(B).

<sup>247</sup> 42 U.S.C. 3027(a)(21)(A).

<sup>248</sup> 42 U.S.C. 3057e(a)(11).

<sup>249</sup> 42 U.S.C. 3057j(a)(3).

responsible for coordination, including State agencies, AAAs, service providers, and Title VI grantees, and that State agencies must have specific policies and procedures to guide coordination efforts within the State.

*Comment:* Commenters overwhelmingly expressed support for coordination between Title III and Title VI programs. Comments expressed concern regarding the lack of coordination with Title VI grantees by State agencies, low amounts of funding provided under Title III to Tribes, and lack of technical assistance on how Tribes can apply for available Title III funds. One commenter recommended that any entities involved in provision of services under Title III of the Act develop their procedures for outreach and coordination with the relevant Title VI program director. Another commenter expressed they thought the proposed language regarding coordination was too permissive. We received a comment recommending specifying that services should be delivered in a culturally appropriate and trauma-informed manner. Some commenters also requested technical assistance for State agencies on their roles and responsibilities. We also received other suggestions, program management recommendations, and implementation questions regarding this provision, including regarding examples and best practices for coordination.

*Response:* To make clear the responsibilities of State agencies under the Act, explicit expectations for coordination between Title III and Title VI programs are specified in this rule. The provision at § 1321.53 is complementary with the provisions for AAAs and service providers under Title III of the Act as set forth at § 1321.69 (*Area agency on aging Title III and Title VI coordination responsibilities*) and § 1321.95 (*Service provider Title III and Title VI coordination responsibilities*), as well as for Title VI grantees under the Act as set forth at § 1322.31 (*Title VI and Title III coordination*). This rule makes clear that all entities are responsible for coordination, including State agencies, AAAs, service providers, and Title VI grantees. Based on the comments received, we revised each provision to use consistent language, where appropriate. We explain the changes made in the following paragraphs.

We have reordered the opening paragraph in § 1321.53 as § 1321.53(a) and have reordered the subsequent paragraphs accordingly. ACL also recognizes the variability of local circumstances, resources, and needs. We appreciate the comment recommending that Title III entities work with the relevant Title VI program directors in developing their policies and procedures regarding coordination. We have further revised the language at reorganized § 1321.53(a) to read, “For States where there are Title VI programs, the State agency’s policies and procedures, developed in coordination with the relevant Title VI program director(s) as set forth in § 1322.13(a), must explain how the State’s aging network, including area agencies and service providers, will coordinate with Title VI programs to ensure compliance with sections 306(a)(11)(B) (42 U.S.C. 3026(a)(11)(B)) and 307(a)(21)(A) (42 U.S.C. 3027(a)(21)(A)) of the Act. State agencies may meet these requirements through a Tribal consultation policy that includes Title VI programs.”

We have created a reordered paragraph § 1321.53(b) and have revised this provision to clarify the topics that the policies and procedures set forth in paragraph (a) “[...] must at a minimum address[.]” As such, we have clarified that coordination is required. We further enumerate how outreach and referrals will be provided to Tribal elders and family caregivers regarding services for which they may be eligible under Title III and/or VII; remove duplicate language which was incorporated into revised paragraph (a); revise “such as” to “to include” in reference to meetings, email distribution lists, and public hearings and add “Title III and other funding opportunities, technical assistance on how to apply for Title III and other funding opportunities,” to the list of communication opportunities; clarify collaboration on and sharing of program information and changes; add “How services will be provided in a culturally appropriate and trauma-informed manner;” and add “Opportunities to serve on advisory councils, workgroups, and boards, including area agency advisory councils, as set forth in § 1321.63.”

Regarding provision of Title III funding to Tribes, the amount of available Title III funding is limited to what is appropriated for such purposes. State agencies are required to

distribute such funding to AAAs via an IFF in States with multiple PSAs, as required by the Act and as set forth at § 1321.49. In some States, Tribes have been designated as AAAs and receive Title III funds. Single PSA State agencies are required to distribute funds in accordance with a funds distribution plan as set forth at § 1321.51(b), and Title VI programs may receive funds under a contract or grant with a State agency in such States. State agencies and AAAs are required to establish and follow procurement policies in awarding Title III funds under the Act, which may allow for awarding of funds to Title VI grantees, Tribes, and other Tribal organizations. ACL encourages Tribes and Tribal organizations to apply to provide Title III-funded services. However, the statute does not allow for a requirement that Title III funds be provided to Title VI grantees outside of the procurement policies in place for awarding of Title III funds under the Act.

There are multiple successful examples of such coordination that ACL is committed to sharing and expanding. As such expectations were not explicitly stated in the prior regulation, we believe that the promulgation of these regulations will provide a significant opportunity to further coordination between Title III and Title VI programs, including improving ACL's monitoring of programs for compliance. ACL anticipates providing technical assistance on this provision and other provisions related to coordination among Title VI and Title III programs upon promulgation of the final rule.

#### *Subpart C – Area Agency Responsibilities*

##### *§ 1321.59 Area agency policies and procedures.*

Section 306 of the Act sets forth the responsibilities of AAAs regarding programs operated under the Act.<sup>250</sup> Section 306, in conjunction with other language throughout the Title III of the Act, establishes the AAA's role with relation to the State agency and service providers.<sup>251</sup> However, we have received inquiries and feedback from AAAs and others that

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<sup>250</sup> 42 U.S.C. 3026.

<sup>251</sup> *Id.*

indicates a lack of clarity as to, for example, the scope of State agency versus AAA responsibility.

New § 1321.59 states that AAAs shall develop policies and procedures governing all aspects of programs operated under the Act, in compliance with State agency policies and procedures. It also clarifies that the scope of AAA responsibility includes consulting with other appropriate parties regarding policy and procedure development, monitoring, and enforcing their own policies and procedures. We also incorporate the provision previously set forth at § 1321.25 (*Restriction of delegation of authority to other agencies*) within this new provision.

*Comment:* ACL received many comments regarding the roles of both area agencies and State agencies in developing policies and procedures for the area agency. Most of these comments expressed support for the proposed provision as detailed in § 1321.59(a) and the reinforcement of an area agency's responsibility for developing their own policies and procedures, in compliance with the State agency's rules. A variety of commenters recommended that State agencies and program participants explicitly be consulted with surrounding the development of area agency policies and procedures.

*Response:* ACL appreciates comments regarding the development of area agency policies and procedures. As commenters noted, area agencies have the authority and responsibility to develop their own policies and procedures. These policies and procedures must be developed in compliance with all State agency policies and procedures, including those detailed in § 1321.9, and be in alignment with the Act and all applicable Federal requirements, and, where appropriate, in consultation with other parties in the PSAs. ACL maintains that the rule provides area agencies the flexibility to develop policies and procedures that align with the needs of their individual PSAs. Area agencies have full authority to consult with State agencies in the development of policies and procedures, as appropriate. Further, the Act requires area agencies to establish advisory councils who help with developing and administering the area plan; § 1321.63 requires the councils to be representative of program participants or those that are

eligible to participate and to solicit and incorporate public input into the area plan, which will help ensure that the perspectives of older adults are incorporated into area agency policies and procedures.

*Comment:* Some commenters requested that ACL revise § 1321.59(b) to require area agencies to make quality monitoring and measurement results publicly available and specifically requested that they be available to the public in “plain language format designed to support and provide information and choice.”

*Response:* ACL appreciates comments related to the transparency of quality monitoring and measurement results and the importance of sharing information with the public in a manner that is easily accessible and understood. We maintain that § 1321.59(b) encourages both transparency and accessibility surrounding quality monitoring and measurement results and decline to revise the provision. ACL will continue to provide technical assistance to encourage area agencies to ensure that quality monitoring and measurement results are available to the public and provide technical assistance surrounding best practices for communicating in plain language.

*Comment:* One commenter voiced concern that § 1321.59(d), which clarifies that area agencies may not delegate the authority to award or administer funds to another agency, could be understood to prohibit provider subgrants which would disrupt program and service delivery. The commenter provided a specific example in which an area agency may contract with a county-based service provider which then in-turn provides subawards for home-delivered meals.

*Response:* ACL appreciates the request for clarity surrounding § 1321.59(d). This section requires the area agency to be responsible for approving and administering funding for all subawards; area agencies may not delegate the authority to award or administer funds to another agency. In the example provided, the area agency would need to approve all subawards by the service provider and would be responsible for administering all funding under the subawards. ACL will provide technical assistance regarding this requirement, as needed.



*Comment:* One commenter proposed setting requirements for eligibility beyond age and need, assessment, planning, and detailing the limitation of the frequency or type of services provided. The commenter also stated that if there is a limit of service and hours, there would need to be a staffing procedure to allow for the circumstances when additional hours are necessary.

*Response:* Given the wide variation in resources, needs, and available services, ACL believes that this regulation sufficiently requires establishment of policies and procedures at the AAA level, in accordance with State agency policies and procedures. State agencies and AAAs may establish additional policies and procedures, as long as they are in accordance with the Act and all applicable Federal requirements.

*§ 1321.67 Conflicts of interest policies and procedures for area agencies on aging.*

As previously discussed, § 1321.3 defines COI, and § 1321.47 explains the responsibilities of State agencies to avoid and mitigate COI. Similarly, § 1321.67 explains the responsibilities of AAAs to meet the requirements of section 307(a)(7)(B) of the Act.<sup>252</sup> AAAs must have policies and procedures to identify both organizational and individual COI. The policies must establish the actions and procedures the AAA will require employees, contractors, grantees, volunteers, and others in a position of trust or authority to take to remedy or remove such conflicts. AAAs have expanded their business activities over the last decade, necessitating additional guidance on preventing and mitigating COI so they may engage in the new activities and carry out the objectives of the Act.

*Comment:* Several commenters requested more information and assistance in identifying and addressing COI, including examples, training, tools, and best practices. Commenters noted that there is currently no process in place for Title III providers or AAA administrators to comply with the proposed rule to “ensure that no individual or immediate family of and individual involved in Title III program has a conflict of interest” and noted that the additional screening

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<sup>252</sup> 42 U.S.C. 3027(a)(7)(B).

could be burdensome for programs. One commenter emphasized the need for flexibility as State agencies and AAAs address and mitigate COI.

*Response:* We intend to provide technical assistance to AAAs and State agencies on COI requirements. We welcome ongoing feedback as we develop these materials. In policies involving COI, and throughout this rule, we recognize the need to balance flexibility and ease of administration for grantees and subrecipients while adhering to the requirements of the Act.

*Comment:* We received numerous comments on COI related to guardianship programs administered by AAAs. Several commenters wrote in support of allowing AAAs to serve as public guardians. Some noted that such programs are a last resort. A commenter offered that allowing a AAA to serve as a guardian was preferable to relying on a for-profit entity, where the presence of a profit motive heightens the risk of abuse. One commenter wrote that guardianship programs hosted by AAAs were particularly important in rural communities, where other options may not be readily available.

Many commenters stressed the necessity of appropriate safeguards and firewalls for guardianship programs co-located in or administered by AAAs. Some commenters provided examples of successful guardianship programs administered by AAAs. Commenters stressed that such programs can be ethically and efficiently administered alongside other Title III programs with appropriate measures to protect from COI and further detailed the process by which their State agency or a AAA establishes firewalls to protect against conflicts. As discussed in response to comments to § 1321.47, commenters described mitigation strategies such as serving as guardian of last resort; promoting the use of alternatives to guardianship; and providing for defense of guardianship through another funding source.

A number of other commenters, however, held that it is in the public interest to prohibit AAAs from being appointed as guardians and that an inherent and irremediable COI exists for a AAA hosting a guardianship program. One commenter offered an example wherein individuals remained in a nursing home when they should have received care in the community due to a COI

in a AAA guardianship program.

*Response:* We appreciate commenters who responded to our request for input regarding AAAs conducting guardianship programs or being appointed the guardian for an older person.

We recognize the potential for COI and are sensitive to the gravity of such situations and concerns of commenters who believe such conflicts are irredeemable. However, we decline to completely prohibit AAAs from hosting guardianship programs or serving as guardians to older adults. As noted by some commenters, oftentimes these programs and appointments exist because no other alternative is available. Furthermore, some State statutes appoint the AAA or State agency to serve as guardian in cases where no other entity is available or appropriate.

We agree that policies and procedures including firewalls and other safeguards are necessary to protect against COI for AAAs that serve as guardians. Therefore, we have amended both § 1321.47 and § 1321.67 to require documentation of COI mitigation strategies, as necessary and appropriate, when a State agency, AAA, or Title III program operates an Adult Protective Services or guardianship program. We will continue to provide technical assistance to State agencies and AAAs.

*Comment:* A commenter expressed support for APS and Ombudsman programs co-located within AAAs provided there are appropriate safeguards and firewalls in place. Another commenter sought to clarify whether an organizational COI necessarily exists when a AAA provides both OAA and non-OAA services. The commenter noted deeming such a situation a COI may create an administrative burden and increase programmatic costs.

*Response:* Many APS and Ombudsman programs are located in AAAs. We agree such placement is advantageous in many situations; however, appropriate COI policies and procedures are necessary. As stated in response to the previous comment, we have amended §§ 1321.47 and 1321.67 to require documentation of mitigation strategies when a State agency or AAA also houses the APS program.

We also wish to clarify that a AAA providing both OAA and non-OAA services is not a

per se COI. We recognize this is an extremely common occurrence and encourage AAAs to develop dynamic and diverse service delivery systems. The COI standards for AAAs in this final rule apply across organizations, providers, and service relationships. Furthermore, some non-OAA programs offered by a AAA may be governed by their own COI rules, for example the State Health Insurance Assistance Program or Medicaid managed care plans. Ombudsman program COI requirements are governed by this rule at § 1324.21.

*Comment:* A few commenters noted that in small communities, particularly rural and frontier areas, many AAAs with limited providers may be serving family members. Agency staff may be related to staff of organizations that receive Title III funding. A commenter noted that nearly everyone wears multiple hats and has relationships within the organization and community.

*Response:* We understand that in smaller communities the possibility for individual and organizational COI may be more likely to arise simply by nature of communities' size and structure. Whether and how actual or potential COI may be remedied through appropriate policies and procedures is fact-dependent. Factors to consider include whether the individual in question is a decision maker, whether firewalls or other safeguards can be erected between organizations and individuals, and what monitoring protocols are in place for a potentially conflicted situation. Similarly, if a conflict arises, a AAA may ask whether it can be remediated and what the likely impact will be on the quality of services and the credibility of the AAA, its employees, and agents.

*§ 1321.69 Area agency on aging Title III and Title VI coordination responsibilities.*

Consistent with new § 1321.53 (*State agency Title III and Title VI coordination responsibilities*), new § 1321.69 sets forth expectations for coordinating activities and delivery of services under Title III and Title VI, as articulated in sections 306(a)(11)(B),<sup>253</sup>

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<sup>253</sup> 42 U.S.C. 3026(a)(11)(B).

307(a)(21)(A),<sup>254</sup> 614(a)(11),<sup>255</sup> and 624(a)(3)<sup>256</sup> of the Act. We clarify that coordination is required under the Act and that all entities are responsible for coordination, including State agencies, AAAs, service providers, and Title VI grantees. The section complements the language at § 1321.53 for State agencies, and includes specific considerations for AAAs, such as opportunities for representatives of Title VI grantees to serve on AAA advisory councils, workgroups, and boards and opportunities to receive notice of Title III and other funding opportunities.

*Comment:* Commenters overwhelmingly expressed support for coordination between Title III and Title VI programs. Comments expressed concern regarding the lack of coordination with Title VI grantees, low amounts of funding provided under Title III to Tribes, and lack of technical assistance on how to apply for available Title III funds. One commenter recommended that any entities involved in provision of services under Title III of the Act develop their procedures for outreach and coordination with the relevant Title VI program director. Another commenter expressed they thought the proposed language regarding coordination was too permissive. We received a comment recommending specifying that services should be delivered in a culturally appropriate and trauma-informed manner. Some commenters also requested technical assistance on roles and responsibilities. We also received other suggestions, program management recommendations, and implementation questions regarding this provision, including regarding examples and best practices for coordination.

*Response:* To make clear the responsibilities of area agencies under the Act, explicit expectations for coordination between Title III and Title VI programs are included as new provisions in this rule. The provision at § 1321.69 is complementary with the provisions for State agencies and service providers under Title III of the Act as set forth at § 1321.53 (*State agency Title III and Title VI coordination responsibilities*) and § 1321.95 (*Service provider Title III and*

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<sup>254</sup> 42 U.S.C. 3027(a)(21)(A).

<sup>255</sup> 42 U.S.C. 3057e(a)(11).

<sup>256</sup> 42 U.S.C. 3057j(a)(3).

*Title VI coordination responsibilities*), as well as for Title VI grantees under the Act as set forth at § 1322.31 (*Title VI and Title III coordination*). This rule makes clear that all entities are responsible for coordination, including AAAs, State agencies, service providers, and Title VI grantees. Based on the comments received, we have revised each provision to use consistent language, where appropriate. We explain the changes we have made in the following paragraphs.

We have reordered the opening paragraph in § 1321.69 as § 1321.69(a) and have reordered the subsequent paragraphs accordingly. ACL also recognizes the variability of local circumstances, resources, and needs. We appreciate the comment recommending that Title III entities work with the relevant Title VI program directors in developing their policies and procedures regarding coordination. We have revised the language at § 1321.69(a) to read, “For planning and service areas where there are Title VI programs, the area agency’s policies and procedures, developed in coordination with the relevant Title VI program director(s) as set forth in § 1322.13(a), must explain how the area agency’s aging network, including service providers, will coordinate with Title VI programs to ensure compliance with section 306(a)(11)(B) (42 U.S.C. 3026(a)(11)(B)) of the Act.”

We have created a reordered paragraph § 1321.69(b) and have revised this provision to clarify the topics that the policies and procedures set forth in paragraph (a) “must at a minimum address[.]” As such, we clarify that coordination is required. We have further made edits to require how outreach and referrals will be provided to Tribal elders and family caregivers regarding services for which they may be eligible under Title III; revise “such as” to “to include” in reference to meetings, email distribution lists, presentations, and public hearings and add “Title III and other funding opportunities, technical assistance on how to apply for Title III and other funding opportunities,” to the list of communication opportunities; clarify collaboration on and sharing of program information and changes to include coordinating with service providers where applicable; add how services will be provided in a trauma-informed, as well as culturally appropriate, manner; and add “Opportunities to serve on advisory councils, workgroups, and

boards, including area agency advisory councils, as set forth in § 1321.63.” We have removed duplicate provisions that were otherwise incorporated into revised paragraph (b).

Regarding provision of Title III funding to Tribes, the amount of available Title III funding is limited to what is appropriated for such purposes. State agencies are required to distribute such funding to AAAs via an IFF in States with multiple PSAs, as required by the Act and as set forth at § 1321.49. In some States, Tribes have been designated as AAAs and receive Title III funds. Single PSA State agencies are required to distribute funds in accordance with a funds distribution plan as set forth at § 1321.51(b), and Title VI programs may receive funds under a contract or grant with a State agency in such States. State agencies and AAAs are required to establish and follow procurement policies in awarding Title III funds under the Act, which may allow for awarding of funds to Title VI grantees, Tribes, and other Tribal organizations. ACL encourages Tribes and Tribal organizations to apply to provide Title III-funded services. However, the statute does not allow for a requirement that Title III funds be provided to Title VI grantees outside of the procurement policies in place for awarding of Title III funds under the Act.

There are multiple successful examples of such coordination that ACL is committed to sharing and expanding. As such expectations were not explicitly stated in the prior regulation, we believe that the promulgation of these regulations will provide a significant opportunity to further coordination between Title III and Title VI programs, including improving ACL's monitoring of programs for compliance. ACL anticipates providing sub-regulatory guidance and technical assistance on this provision and other provisions related to coordination among Title VI and Title III programs upon promulgation of the final rule.

#### *Subpart D – Service Requirements*

##### *§ 1321.77 Purpose of services – person- and family-centered, trauma-informed.*

New § 1321.77 clarifies that services under the Act should be provided in a manner that is person-centered and trauma-informed. Consistent with the direction of amendments to section

101 of the Act as reauthorized in 2020, recipients are entitled to an equal opportunity to the full and free enjoyment of the best possible physical and mental health, which includes access to person-centered and trauma-informed services.<sup>257</sup>

*Comment:* We received comments supporting person-centered and trauma-informed services in the regulations, consistent use of these terms throughout the regulations, and in-depth training on diversity, equity, inclusion, and accessibility being offered to every person who provides services and programs for older adults.

*Response:* ACL appreciates these comments and notes that training by State agencies, AAAs, and service providers is required at § 1321.77(c). However, we defer to entities to determine the specific content of the required training.

*Comment:* Another commenter stressed that as part of person-centered supports and planning, assistance with activities of daily living and independent activities of daily living should be provided, with interagency and intergovernmental promotion of these services.

*Response:* ACL appreciates these supportive comments and notes that assistance with activities of daily living and independent activities of daily living may be provided with funds under the Act, as set forth at § 1321.85 (*Supportive services*). Further, coordination and interagency collaboration are listed as expectations under § 1321.5 (*Mission of the State agency*) and § 1321.55 (*Mission of the area agency*).

*Comment:* A commenter suggested edits regarding person-centered services.

*Response:* We appreciate this suggestion and add the following, “Person-centered services may include community-centered and family-centered approaches consistent with the traditions, practices, beliefs, and cultural norms and expectations of older adults and family caregivers” in § 1321.77(a).

*Comment:* We received other suggestions, program management recommendations, and implementation questions regarding this provision.

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<sup>257</sup> 42 U.S.C. 3001.



*Response:* We decline to make further changes to this provision and intend to address other suggestions and requests for clarification through technical assistance.

*§ 1321.81 Client eligibility for participation.*

To be eligible for services under the Act, recipients must be age 60 or older at the time of service, except in the case of limited services, such as nutrition and family caregiver support services. We received inquiries, requests for technical assistance, and comments demonstrating misunderstandings among State agencies, AAAs, service providers, and others in the aging network about eligibility requirements. For example, we received feedback expressing confusion as to whether any caregivers of adults of any age are eligible to receive Title III program services, which is not allowable under the Act.

New § 1321.81 clarifies eligibility requirements under the Act and explains that State agencies, AAAs, and service providers may adopt additional eligibility requirements, if they do not conflict with the Act, the implementing regulation, or guidance issued by the Assistant Secretary for Aging.

*Comment:* We received comments asking for the age of eligibility for services under Title III to be lowered to allow for service to Tribal elders to coincide with the age of eligibility set by the Tribe and to allow for service to individuals of young onset of Alzheimer's disease and related dementias. We also received comment requesting an increase of the age for eligibility of service to 65 years old.

*Response:* The Act defines “older individual” in section 102(40), “The term “older individual” means an individual who is 60 years of age or older.”<sup>258</sup> As such we do not have the authority to modify this provision in response to comments. Title III allows for services to family caregivers of individuals of any age with Alzheimer's or related disorder at section 302(3), “[t]he term “family caregiver” means an adult family member, or another individual, who is an informal provider of in-home and community care to an older individual or to an individual of

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<sup>258</sup> *Id.* section 3001(40).

any age with Alzheimer’s disease or a related disorder with neurological and organic brain dysfunction,”<sup>259</sup> along with service to “older relative caregivers,” as further defined below.

The regulation for services provided under Title VI at § 1322.3 provides the following definition, “*Older Indians*, means those individuals who have attained the minimum age determined by the Indian Tribe for services.”

*Comment:* One commenter expressed concern that no requirements were set forth that address service to unlawfully present individuals.

*Response:* There is no requirement that recipients of services be citizens of the United States nor be lawfully present to receive services under the OAA. In September 2022, the Department of Homeland Security (DHS) finalized a rule defining the criteria it uses when determining whether a person can be denied a visa and/or legal residency because they are likely to become a “public charge.” Services provided under the OAA are not among those considered in determining whether a person is likely to become a “public charge.”<sup>260</sup> State agencies, AAAs, and service providers under the Act should not require that recipients of services be citizens of the United States nor be lawfully present to receive services under the Older Americans Act.

*Comment:* We received comment that Ombudsman program services be included among the list of exceptions in § 1321.81(a).

*Response:* We appreciate this comment and add (4) to read, “Ombudsman program services, as provided in part 1324.”

*Comment:* We received comments asking for clarity regarding § 1321.81(a)(2). We received another comment noting that “age 55 or older” is redundant in § 1321.81(a)(2)(ii) and (iii), as that is a component of the definition of “older relative caregiver.”

*Response:* We appreciate these comments and have revised § 1321.81(a)(2)(i) to read, “Adults caring for older adults and adults caring for individuals of any age with Alzheimer’s or a

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<sup>259</sup> 42 U.S.C. 3021(3).

<sup>260</sup> Public Charge Ground of Inadmissibility, 8 CFR 212.20 *et. seq.*

related disorder[.]” We have also removed the redundant language in § 1321.81(a)(2)(ii) and (iii). To clarify, “family caregiver” does not include the following categories of individuals: (1) an individual under age 55 caring for an adult under age 60 without Alzheimer’s or a related disorder; (2) an individual under age 55 caring for a child under age 18; and (3) an individual age 55 or older who is caring for a child under age 18, where the individual’s relationship to the child is that of biological or adoptive parent, not including adoptive parents who are also grandparents.

*Comment:* We received various comments in support of this provision, as well as other suggestions, program management recommendations, and implementation questions regarding this provision.

*Response:* We appreciate the comments of support and decline to make further changes to this provision. We intend to address other suggestions and requests for clarification through technical assistance.

#### *§ 1321.85 Supportive services.*

New § 1321.85 clarifies the supportive services set forth in Title III, part B, section 321 of the Act, which includes in-home supportive services, access services, and legal services. It also clarifies allowable use of funds, including for acquiring, altering or renovating, and constructing multipurpose senior centers and that those funds must be distributed through an approved IFF or funds distribution plan, as articulated in the State plan.<sup>261</sup>

*Comment:* We received various comments noting need for the types of in-home supportive services that may be provided under this provision, including help with housework like cleaning and laundry and home maintenance and repairs. Some commenters noted that while needed, such services are not available.

*Response:* In-home supportive services provided under the Act may include homemaker services (to help with routine household tasks like cleaning and doing laundry) and repairs to and minor modification of homes to allow an older adult to age in place.

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<sup>261</sup> 42 U.S.C. 3030d.

ACL acknowledges that the need for such services is likely to exceed the available funding under the Act. With these regulations, ACL intends to clarify how funds under the Act may be used, in coordination with the other provisions set forth at §§ 1321.27 and 1321.65 regarding identifying persons in greatest economic need and greatest social need who should be prioritized in receiving services under the Act, as well as the role of public participation in guiding how funds under the Act are used in State and area plans on aging.

*Comment:* We received a comment noting need for the types of access services that may be provided under this provision, including free or affordable transportation in rural areas. The commenter noted that while needed, such services are not available.

*Response:* Access services provided under the Act may include transportation. ACL acknowledges that the need for such services is likely to exceed the available funding under the Act. With these regulations, ACL intends to clarify how funds under the Act may be used, in coordination with the other provisions set forth at §§ 1321.27 and 1321.65 regarding identifying persons in greatest economic need and greatest social need who should be prioritized in receiving services under the Act, as well as the role of public participation in guiding how funds under the Act are used in State and area plans on aging.

*Comment:* Several commenters recommended changes to this section to make clear that while expenditures for multipurpose senior centers should be allowable, a multipurpose senior center is not in and of itself a service.

*Response:* In referencing supports which may be provided with funds under the Act, multipurpose senior centers are mentioned multiple times, including in section 301(a)(1) regarding the purpose of Title III,<sup>262</sup> section 303 regarding authorization of appropriations and uses of funds,<sup>263</sup> section 304 regarding allotment and Federal share,<sup>264</sup> section 306(a)(1)

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<sup>262</sup> 42 U.S.C. 3021(a)(1).

<sup>263</sup> 42 U.S.C. 3023.

<sup>264</sup> 42 U.S.C. 3024.

regarding area plans on aging,<sup>265</sup> and in the title of Part B, “Supportive Services and Senior Centers.”<sup>266</sup> We note that some in the aging network may implement multipurpose senior centers as a service, consistent with section 321(a)<sup>267</sup>, which authorizes services that promote or support social connectedness and reduce negative health effects associated with social isolation and any other services necessary for the general welfare of older individuals;

The service of multipurpose senior centers may track measures such as number of visits, number of unduplicated persons served, and hours of staff/volunteer time. For the purposes of including multipurpose senior centers as an allowable expenditure of funds appropriated under Title III, part B as set forth at § 1321.71(a)(1) and an allowable access service to meet minimum adequate proportion provisions as set forth at § 1321.27(i), we consider multipurpose senior centers to be a supportive service and decline to make changes to this provision. We have made an edit at § 1321.3 (*Definitions*) to indicate “[...] as used in § 1321.85, facilitation of services in such a facility.”

*Comment:* We received other suggestions regarding this provision, including specifying other services that may be allowable.

*Response:* As referenced in this provision, section 321 of the Act sets forth twenty-six types of supportive services that may be provided.<sup>268</sup> State agencies and AAAs also have certain flexibility to craft service definitions and requirements to reflect their specific circumstances and meet local needs. For these reasons, we decline to make further changes to this provision and intend to address other suggestions and requests for clarification through technical assistance.

### **§ 1321.87 Nutrition services.**

New § 1321.87 clarifies the nutrition services set forth in Title III, part C of the Act— which includes congregate meals, home-delivered meals, nutrition education, nutrition

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<sup>265</sup> 42 U.S.C. 3026(a)(1).

<sup>266</sup> 42 U.S.C. Ch. 35, Subch. III, Pt. B.

<sup>267</sup> 42 U.S.C. 3030d(a).

<sup>268</sup> *Id.* section 3030d.

counseling, and other nutrition services.<sup>269</sup> Based on experiences during the COVID-19 PHE and numerous requests for flexibility in provision of meals, we set forth that meals provided under Title III, part C-1 of the Act may be used for shelf-stable, pick-up, carry-out, drive-through or similar meals, if they are done to complement the congregate meal program and comply with certain requirements as set forth.

We also clarify that home-delivered meals may be provided via home delivery, pick-up, carry-out, or drive-through and that eligibility for home-delivered meals is not limited to those who may be identified as “homebound,” that eligibility criteria may consider multiple factors, and that meal participants may also be encouraged to attend congregate meals and other activities, as feasible, based on a person-centered approach and local service availability.

We specify that nutrition education, nutrition counseling, and other nutrition services may be provided with funds under Title III, parts C-1 or C-2 of the Act. As required by section 331(1), we set forth requirements to determine the frequency of meals in areas where five or more days a week of service is not feasible.<sup>270</sup> This provision also clarifies that funds must be distributed through an approved IFF or funds distribution plan, as articulated in the State plan.

Finally, this provision sets forth requirements for NSIP allocations. NSIP allocations are based on the number of meals reported by the State agency which meet certain requirements, as specified. State agencies may choose to receive their allocation grants as cash, commodities, or a combination thereof. NSIP funds may only be used to purchase domestically produced foods (definition included in § 1321.3) used in a meal, as set forth under the Act. We intend for this provision to answer many questions we have received regarding the proper use of funds under the NSIP.

*Comment:* We received many comments for individual participants in nutrition programs funded under the Act who shared what they liked about the nutrition program and their

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<sup>269</sup> 42 U.S.C. 3030d; 42 U.S.C. 3030e; 42 U.S.C. 3030f; 42 U.S.C. 3030g.

<sup>270</sup> 42 U.S.C. 3030e(1).

suggestions for maintaining and improving the nutrition program.

*Response:* We are grateful for the feedback from individual participants and will use their feedback in promulgating these regulations, as well as in considering other technical assistance.

*Comment:* We received comments noting a technical correction needed at § 1321.87(a)(1)(ii).

*Response:* We are grateful for these comments, and revise this provision to read “Meals provided as set forth in (i) shall[.]”

*Comment:* We received various comments requesting improved meal presentation.

*Response:* ACL recognizes the importance of meals and other services provided under the Act being appealing to participants. Such services are to be person-centered, as set forth in § 1321.77. Additionally, we expect that feedback from service participants will be solicited and used to the greatest extent possible in the ongoing provision of services as set forth in § 1321.73(c). To further clarify the importance of the participant experience, we have added “[...] and preferences,” to the expectations for monitoring participant needs set forth in § 1321.73(c).

*Comment:* We received many comments expressing support for shelf-stable, pick-up, carry-out, drive through, “grab and go,” and similar options. Other commenters disagreed with broadening congregate meal program requirements, allowing for virtual congregate meals programming, and expanding the circumstances allowable for home-delivered meal service provision. We also received comment in support of groceries being included under other nutrition services.

*Response:* ACL appreciates the comments in support of various nutrition services and delivery options to meet the purposes and requirements of the Act. We also recognize the evolution of service models that were initiated during the COVID-19 PHE being adapted into ongoing practice. We note that while these regulations set forth the types of services that may be provided, State agencies, AAAs, and service providers will likely need to make decisions about what services are provided and any applicable limitations, due to limited resources available, the

need to prioritize service to individuals in the greatest economic need and greatest social need, and other factors as set forth at § 1321.81(b).

*Comment:* We received a comment expressing that local program requirements hinder the nutrition program.

*Response:* Given the wide variation in resources, needs, and available services, ACL believes that this regulation sufficiently requires establishment of policies and procedures at the State agency, AAA, and/or service provider levels as set forth in § 1321.73(a). For consistency, we have revised § 1321.87(b) to be clear that AAAs may develop policies and procedures regarding this provision as delegated by the State agency. State agencies, AAAs, and service providers may establish additional policies and procedures, as long as they are in accordance with the Act and all applicable Federal requirements. Such additional policies and procedures should further the purposes of the Act and be consistent with a person-centered manner of service provision, as set forth at § 1321.77. Additional information on how State agencies, AAAs, and service providers have implemented various policies and procedures is available at ACL's Nutrition and Aging Resource Center: <https://acl.gov/senior-nutrition>.

*Comment:* We received many comments noting the importance of the nutrition programs provided under the Act, as well as culturally appropriate meals, medically tailored meals, fresh produce, and locally sourced food. Other commenters noted support for the clarifications included in this provision.

*Response:* We appreciate these comments.

*Comment:* We received comments asking to allow State agencies and/or AAAs to make decisions on whether to provide shelf-stable, pick-up, carry-out, drive-through, or similar meals with Title III, part C-1 funds as set forth in § 1321.87(a)(1)(i), without AAAs requiring the State agency's approval, the provision of such meals statewide, or demonstration that such meals complement the congregate meal program.

*Response:* Congress appropriates separate funds for congregate and home-delivered



meals, as set forth by the Act. The State agency is responsible for policies and procedures to implement programs under the Act, as well as for making the decision about whether or not to permit the provision of shelf-stable, pick-up, carry-out, drive-through, or similar meals. The State agency is responsible for ensuring program requirements are met, including reporting to ACL. We note that nothing in this provision requires this option to be offered statewide; if State agencies choose to permit the provision of these types of meals using Title III, part C-1 funds, that decision must be incorporated into the applicable State and area plans. For these reasons, we decline to amend the requirements in the final rule. We encourage that if this option is pursued, the State agency and area agencies use streamlined processes for documenting the use of this option in State and area plans, for monitoring the use of this option, and for reporting on the use of this option.

*Comment:* We received comments asking to modify the 20 percent limit on shelf-stable, pick-up, carry-out, drive-through, or similar meals with Title III, part C-1 funds as set forth in § 1321.87(a)(1)(ii) and to clarify if the 20 percent limit is to be calculated based on the original allocation to the State or after completion of any transfers.

*Response:* Congress appropriates separate funds for congregate and home-delivered meals, as set forth by the Act. ACL believes that offering a limited number of shelf-stable, pick-up, carry-out, drive-through, or similar meals to complement the congregate meals program and meet unique needs of program participants in greatest economic need and greatest social need is allowable and aligned with the purpose of these funds as appropriated. Based on the feedback we received, we believe that a limit of up to 25 percent, to be calculated based on the final amount of the Title III, part C-1 award after all transfers as set forth in § 1321.9(c)(2)(iii), is a reasonable approach to provide some flexibility while retaining the important aspects of the congregate meals program. As a result, ACL has modified the provisions at § 1321.87(a)(1)(ii)(A) to read “Not exceed 25 percent of the funds expended by the State agency under Title III, part C-1, to be calculated based on the amount of Title III, part C-1 funds available after all transfers as set forth

in § 1321.9(c)(2)(iii) are completed;” and at § 1321.87(a)(1)(ii)(B) to read, “Not exceed 25 percent of the funds expended by any area agency on aging under Title III, part C-1, to be calculated based on the amount of Title III, part C-1 funds available after all transfers as set forth in § 1321.9(c)(2)(iii) are completed.”

*Comment:* Several commenters asked ACL to remove distinctions between funding for congregate meals and home-delivered meals. We also received comments expressing hope that if another pandemic occurs that carry-out and similar meals would be allowed without the 20% restriction.

*Response:* Congress appropriates separate funds for congregate and home-delivered meals, as set forth by the Act. ACL is unable to make changes to statutory provisions. As they did during the COVID-19 PHE through the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Congress may also enact measures that allow for flexible use of funds for specific disaster situations. Should another pandemic or large-scale disaster occur, ACL set forth at §§ 1321.99 and 1321.101 additional flexibilities that could be exercised. ACL's Nutrition and Aging Resource Center at <https://acl.gov/senior-nutrition> provides many useful resources for how existing OAA flexibilities can be utilized to manage emergencies.

*Comment:* We received request for clarification regarding meals meeting the Dietary Guidelines for Americans and Dietary Reference Intakes as set forth in section 339 of the OAA.<sup>271</sup>

*Response:* We appreciate this inquiry and confirm that meals provided with funds under the Act must meet the Dietary Guidelines for Americans and Dietary Reference Intakes as set forth in section 339.<sup>272</sup> We have revised § 1321.87(a)(1) and (2) to read “[...] are meals meeting the Dietary Guidelines for Americans and Dietary Reference Intakes as set forth in section 339 (42 U.S.C. 3030g-21) provided[.]”

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<sup>271</sup> 42 U.S.C. 3030g-21.

<sup>272</sup> *Id.*

*Comment:* Some commenters had questions on the expectations for nutrition education and nutrition counseling, including if nutrition education and nutrition counseling may also be provided with funding under Title III, part B, if these services may be provided to individuals not receiving meal services, and whether the requirements must adhere to the Nutrition Care Process of the Academy of Nutrition and Dietetics.

*Response:* ACL differentiates and sets forth requirements for nutrition education and nutrition counseling at § 1321.87(a)(3) and (4), respectively. We acknowledge that due to various issues, including limited resources and local variation, implementation decisions that are consistent with the Act and all applicable Federal requirements are determined by the State agency, AAA, and/or service provider. The provisions in this rule allow for nutrition education and nutrition counseling to be provided in various modalities, including telephonic and virtual delivery to expand access to the services. Nutrition education content is to be consistent with the Dietary Guidelines for Americans; accurate, culturally sensitive, regionally appropriate, and considerate of personal preferences; and overseen by a registered dietitian or individual of comparable expertise, as set forth in section 339(1) of the OAA.<sup>273</sup>

Section 321 of the Act sets forth supportive services that may be provided with funds under Title III, part B of the Act, including “(17) health and nutrition education services, including information concerning prevention, diagnosis, treatment, and rehabilitation of age-related diseases and chronic disabling conditions;”<sup>274</sup> and “(26) any other services necessary for the general welfare of older individuals; if such services meet standards prescribed by the Assistant Secretary and are necessary for the general welfare of older individuals.”<sup>275</sup> Expectations for nutrition education or nutrition counseling that are provided as supportive services are set forth in this rule at § 1321.85. The Act and these provisions do not require individuals receiving nutrition education and nutrition counseling to receive meal services,

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<sup>273</sup> 42 U.S.C. 3030g-21(1).

<sup>274</sup> 42 U.S.C. 3030d(a)(17).

<sup>275</sup> *Id* section 3030d(a)(26).

although nutrition education and nutrition counseling should be provided based on the needs of meal participants. For example, eligible individuals who have significant or multiple dietary restrictions for which Title III, part C meals may not be appropriate (e.g., medically required tube feedings, severe allergies which cannot be reasonably accommodated), may participate in nutrition education or nutrition counseling. The Academy of Nutrition and Dietetics does not require the Nutrition Care Process approach for documenting nutrition counseling sessions. Therefore, we have removed the requirement to follow the Nutrition Care Process approach from § 1321.87(a)(4) and have made other minor edits in this provision for consistency.

*Comment:* We received a request for clarification if § 1321.87(d)(1)(i) means that meals provided to eligible individuals receiving family caregiver support services under the Act could be reported by the State agency for use in determining the State agency's NSIP allocation.

*Response:* Yes, we confirm this is allowable, if reported in alignment with NSIP reporting requirements, as set forth by the Assistant Secretary for Aging.

*Comment:* We received comment requesting clarification that a voluntary contribution made by an individual receiving nutrition program services under the Act is not a "payment" for purposes of section 170(e)(3) of the Internal Revenue Code, which provides for deductions of qualified contributions of food inventory.

*Response:* Issues relating to the Internal Revenue Code and requirements relating to United States Department of Agriculture (USDA)-donated foods are outside the scope of this regulation. While ACL does not consider voluntary contributions under the Act to be payments, the ACL-funded National Resource Center on Nutrition & Aging fact sheet on Partnerships with Foodbanks and Other USDA Programs at [https://acl.gov/sites/default/files/nutrition/Partnerships-with-Foodbanks-and-Other-United-States-Department-of-Agriculture-non-COVID\\_508.pdf](https://acl.gov/sites/default/files/nutrition/Partnerships-with-Foodbanks-and-Other-United-States-Department-of-Agriculture-non-COVID_508.pdf) may be of interest in working with other programs and partners.

*Comment:* We received comments requesting clarity on the State agency's role regarding

provision of meals less than five days per week.

*Response:* In response to this request for clarification, we have revised the provision at § 1321.87(b) to be clear regarding the State agency's role. The State agency must establish policies and procedures that define a nutrition project and include how nutrition projects will provide meals and nutrition services five or more days per week in accordance with the Act. The definition established by the State agency must consider the availability of resources and the community's need for nutrition services as described in the State and area plans.

*Comment:* We received various comments suggesting requirements that should be used for eligibility determination, speed of service initiation, reporting, and other program management topics.

*Response:* Given the wide variation in resources, needs, and available services, ACL believes that this regulation sufficiently requires establishment of policies and procedures at the State agency, AAA, and/or service provider levels as set forth in § 1321.73(a). State agencies, AAAs, and service providers may establish additional policies and procedures, as long as they are in accordance with the Act and all applicable Federal requirements. Additional information on how State agencies, AAAs, and service providers have implemented various policies and procedures is available at ACL's Nutrition and Aging Resource Center: <https://acl.gov/senior-nutrition>.

We decline to make further changes to this provision and intend to address other suggestions and requests for clarification through technical assistance.

*§ 1321.89 Evidence-based disease prevention and health promotion services.*

New § 1321.89 clarifies evidence-based disease prevention and health promotion services set forth in Title III, part D of the Act, and states that programs funded under this provision must be evidence-based, as required in the Act as amended in 2016. It also clarifies allowable use of funds and that those funds must be distributed through an approved IFF or funds distribution plan, as articulated in the State plan.

*Comment:* We received a comment that programs that are considered to be evidence-based often do not include Native American populations. An absence of an evidence-base for programs addressing Native American populations results in further inequity and lack of service to populations in need of disease prevention and health promotion services. The commenter recommended that promising practices be allowed to serve populations where an evidence base is lacking. We received other comments that provision of evidence-based services is challenging in rural and frontier communities given the small amount of funding appropriated under the Act.

*Response:* ACL appreciates this comment. Section 361 of the Act requires evidence-based programs and allows the Assistant Secretary for Aging to provide technical assistance on the delivery of such services in different settings and for different populations.<sup>276</sup> ACL recently commissioned and is evaluating a study of the Evidence-Based Review Process to examine the existing review process and explore opportunities that would enhance the review process so it is equitable and responsive to program needs across different populations and settings, including Native American populations. The ACL-funded National Chronic Disease Self-Management Education Resource Center and National Falls Prevention Resource Center hold a bi-monthly Evidence-Based Program Advisory Council meeting that includes members of the National Resource Center on Native American Aging and Native American leadership and organizations on the unique needs of Native American populations in evidence-based programming. The ACL-supported Evidence-Based Program Registry lists health promotion and disease prevention programs that may be adapted and culturally tailored for different populations and settings. More information is available at <https://acl.gov/programs/health-wellness/disease-prevention>. Additional information on how State agencies, AAAs, and service providers can engage rural and frontier communities is available at the ACL-funded National Chronic Disease Self-Management Education Resource Center and National Falls Prevention Resource Center. ACL also intends to provide technical assistance regarding providing services under Title III, part D of the

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<sup>276</sup> 42 U.S.C. 3030m(a).

Act.

*Comment:* Some commenters asked what expenses may be covered with funds provided under Title III, part D of the Act.<sup>277</sup>

*Response:* ACL appreciates this concern and confirms that funds provided under Title III, part D of the Act may be used for reasonable, allowable, and allocable expenses necessary for the direct provision of evidence-based disease prevention and health promotion services, subject to appropriate procurement and other policies and procedures. This may include information technology systems; devices, such as laptop or tablet computers and smartphones; program licensing fees; program materials and supplies; and training of staff and volunteers.

*Comment:* We received comments recommending education and prevention activities to be considered as evidence-based programming. Some commenters suggested strategic partnerships with local health and public health entities. Other commenters noted challenges with meeting evidence-based program expectations. We received other suggestions, program management recommendations, and implementation questions regarding this provision.

*Response:* ACL recently commissioned and concluded an evaluation study of the Evidence-Based Review Process to examine the existing review process and explore opportunities that would enhance the review process. Activities alone may not qualify as evidence-based programs, as evidence-based programs must demonstrate improved the health and well-being or reduce disease, disability and/or injury among older adults over time. Additional information on how States, AAAs, and service providers have implemented various policies and procedures is available at the ACL-funded National Chronic Disease Self-Management Education Resource Center<sup>278</sup> and National Falls Prevention Resource Center.<sup>279</sup>

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<sup>277</sup> *Id.* section 3030m; 42 U.S.C. 3030n.

<sup>278</sup> *National CDSME Resource Center for Professionals*, The Nat'l Council on Aging, <https://www.ncoa.org/professionals/health/center-for-healthy-aging/national-cdsme-resource-center> (last visited October 13, 2023).

<sup>279</sup> *National Falls Prevention Resource Center for Professionals*, The Nat'l Council on Aging, <https://www.ncoa.org/professionals/health/center-for-healthy-aging/national-falls-prevention-resource-center> (last visited Oct. 13, 2023).

We decline to make further changes to this provision and intend to address other suggestions and requests for clarification through technical assistance.

*§ 1321.91 Family caregiver support services.*

In the 2000 amendments to the Act (Pub. L. 106-501), Congress added Title III, part E to set forth allowable expenses for family caregiver support services. New § 1321.91 clarifies the family caregiver support services available under the Act and eligibility requirements for respite care and supplemental services, as set forth in section 373(c)(1)(B).<sup>280</sup> It also clarifies allowable use of funds and that those funds must be distributed through an approved IFF or funds distribution plan, as articulated in the State plan.

*Comment:* One commenter expressed support for clear, consistent, and durable regulations regarding the National Family Caregiver Support Program. Other commenters stated support for regulations regarding caregiver support programs, including caring for someone with Alzheimer's disease or related dementia and the special subset of caring for someone with young onset of Alzheimer's or related dementia. Several commenters also urged ACL to align this rule with the National Strategy to Support Family Caregivers.

*Response:* We appreciate this support. ACL is committed to aligning this rule with the National Strategy to Support Family Caregivers, as appropriate.

*Comment:* One commenter requested ACL clarify the meaning of “limited basis” in the provision of supplemental services. Other commenters expressed support for the flexibility for State agencies and AAAs to determine “limited basis.”

*Response:* The rule includes the following, “State agencies and AAAs shall define “limited basis” for supplemental services and may consider limiting units, episodes or expenditure amounts when making this determination.” ACL agrees this provides sufficient guidance for State agencies and AAAs, while maintaining flexibility to respond to local needs and circumstances.

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<sup>280</sup> 42 U.S.C. 3030s-1(c)(1)(B).



*Comment:* We received comment expressing concern in providing all five services statewide given direct care worker shortages, limited funding, and other challenges.

*Response:* ACL appreciates the challenges faced by the aging network in providing services across the country. ACL's expectation is that there is a plan for all five services to be available in each PSA in each State with multiple PSAs, or that there is a plan for statewide availability of services for single PSA States, subject to availability of funds under the Act. This plan may include provision of services with funding sources other than the OAA, based on the resources and needs of local communities. For clarity, we have revised (b) to state, "State agencies shall ensure that there is a plan to provide each of the services authorized under this part in each planning and service area, or statewide in accordance with a funds distribution plan for single planning and service area States, subject to availability of funds under the Act."

*Comment:* Some commenters expressed confusion whether the term "family caregiver" also includes older relative caregivers, and if so, recommended it be clear that the same eligibility requirements apply.

*Response:* Family caregiver support services listed in § 1321.91(a)(1) through (5) may be provided to family caregivers, including older relative caregivers. In other words, "older relative caregivers" is a subset of "family caregivers." In § 1321.3, this rule includes a definition of "family caregiver" that includes older relative caregivers, as well as a definition of "older relative caregiver," since the Act includes requirements specific to services provided to non-older relative caregivers at section 373(c)(1)(B).<sup>281</sup> This rule also includes provisions at § 1321.83(c) that state service priorities as set forth in at section 373(c)(2).<sup>282</sup> In the rule, we consistently use the term "family caregiver," and we use the term "older relative caregiver" only when this level of specificity is needed. For these reasons, we decline to modify the eligibility and priority provisions set forth in this rule.

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<sup>281</sup> *Id.* section 3030s-1(c)(1)(B).

<sup>282</sup> *Id.* section 3030s-1(c)(2).

*Comment:* One commenter expressed concern for an increased threshold that limits assistance to a caregiver providing support to someone with at least two limitations in activities of daily living instead of at least two limitations in activities of daily living or independent activities of daily living.

*Response:* This provision does not represent a change from what is required by section 373(c)(1)(B) of the Act.<sup>283</sup>

*Comment:* One commenter expressed support for the inclusive definition of family caregiver to unmarried partners, friends, or neighbors, but expressed that the use of “family” may deter eligible caregivers because they do not consider themselves family. The commenter recommended consideration of terms such as “informal caregiver,” “natural support caregiver,” or “trusted personal caregiver.”

*Response:* We appreciate this comment and encourage State agencies, AAAs, and service providers to use terms that will best reach individuals in need of family caregiver support services in their outreach, marketing, and service delivery efforts.

*Comment:* We received comment requiring a correction to remove an extra word in § 1321.91(c).

*Response:* We are grateful to the commenters who noted this correction and have revised this provision to read, “[...] the individual for whom they are caring must be determined to be functionally impaired[.]”

*Comment:* We received other suggestions, program management recommendations, and implementation questions regarding this provision, including regarding evidence-informed or evidence-based caregiver assessments that may be used.

*Response:* We decline to make further changes to this provision and intend to address other suggestions and requests for clarification through technical assistance.

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<sup>283</sup> *Id.* section 3030s-1(c)(1)(B).

*§ 1321.95 Service provider Title III and Title VI coordination responsibilities.*

Consistent with § 1321.53 (*State agency Title III and Title VI coordination responsibilities*) and § 1321.69 (*Area agency on aging Title III and Title VI coordination responsibilities*), new § 1321.95 sets forth expectations for coordinating activities and delivery of services under Title III and Title VI, as articulated in sections 306(a)(11)(B),<sup>284</sup> 307(a)(21)(A),<sup>285</sup> 614(a)(11),<sup>286</sup> and 624(a)(3)<sup>287</sup> of the Act. We clarify that coordination is required under the Act and that all entities are responsible for coordination, including State agencies, AAAs, service providers, and Title VI grantees. The section complements the language at § 1321.53 for State agencies and § 1321.69 for AAAs and includes those requirements specific to service providers.

*Comment:* Commenters overwhelmingly expressed support for coordination between Title III and Title VI programs. Comments expressed concern regarding the lack of coordination with Title VI grantees, low amounts of funding provided under Title III to Tribes, and lack of technical assistance on how to apply for available Title III funds. One commenter recommended that any entities involved in provision of services under Title III of the Act to develop their procedures for outreach and coordination with the relevant Title VI program director. Another commenter expressed they thought the proposed language regarding coordination was too permissive. We received a comment recommending specifying that services should be delivered in a culturally appropriate and trauma-informed manner. Some commenters also requested technical assistance on roles and responsibilities. We also received other suggestions, program management recommendations, and implementation questions regarding this provision, including regarding examples and best practices for coordination.

*Response:* To make clear the responsibilities of service providers under the Act, explicit expectations for coordination between Title III and Title VI programs are specified in this rule.

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<sup>284</sup> 42 U.S.C. 3026(a)(11)(B).

<sup>285</sup> 42 U.S.C. 3027(a)(21)(A).

<sup>286</sup> 42 U.S.C. 3057e(a)(11).

<sup>287</sup> 42 U.S.C. 3057j(a)(3).

The provision at § 1321.95 is complementary with the provisions for State agencies and area agencies under Title III of the Act as set forth at § 1321.53 (*State agency Title III and Title VI coordination responsibilities*) and § 1321.69 (*Area agency on aging Title III and Title VI coordination responsibilities*), as well as for Title VI grantees under the Act as set forth at § 1322.31 (*Title VI and Title III coordination*). For clarity, we revise each provision to use consistent terminology, where appropriate. We explain the changes made in the following paragraphs.

We have reordered the opening paragraph in § 1321.95 as § 1321.95(a), and we have reordered the subsequent paragraphs accordingly. ACL also recognizes the variability of local circumstances, resources, and needs. We appreciate the comment recommending that Title III entities work with the relevant Title VI program directors in developing their policies and procedures regarding coordination. We have revised the language at reorganized § 1321.95(a) to read, “For locations served by service providers under Title III of the Act where there are Title VI programs, the area agency on aging’s and/or service provider’s policies and procedures, developed in coordination with the relevant Title VI program director(s), as set forth in § 1322.13(a), must explain how the service provider will coordinate with Title VI programs.”

We have created a reordered paragraph § 1321.95(b), and we have revised this provision to clarify the topics that the policies and procedures set forth in paragraph (a) “must at a minimum address[.]” As such, we clarify that coordination is required. We have further made edits to specify how the service provider will provide outreach and referrals to tribal elders and family caregivers regarding services for which they may be eligible under Title III; clarify communication opportunities to include meetings, email distribution lists, and presentations; add how services will be provided in trauma-informed, as well as culturally appropriate, manner; and add “Opportunities to serve on advisory councils, workgroups, and boards.”

As expectations for this type of coordination are not explicitly incorporated in the existing regulation, we believe that the promulgation of this final rule will provide a significant

opportunity to further coordination between Title III and Title VI programs, including improving ACL's monitoring programs for compliance. ACL anticipates providing technical assistance on this provision and other provisions related to coordination among Title VI and Title III programs upon promulgation of the final rule.

#### *Subpart E – Emergency and Disaster Requirements*

Based on input from interested parties and our experience, particularly during the COVID-19 PHE, we add Subpart E – Emergency and Disaster Requirements (§§ 1321.97 – 1321.105) to explicitly set forth expectations and clarify flexibilities that are available in a disaster situation. The previous subpart E (*Hearing Procedures for State Agencies*) is no longer necessary since we redesignate and cover the provisions in subpart E in subpart B (*State Agency Responsibilities*) of the final rule.

Although the previous regulation mentions the responsibilities of service providers in weather-related emergencies (§ 1321.65(e)), existing guidance on emergency and disaster requirements under the Act is limited and does not contemplate the evolution of what may constitute an “emergency” or “disaster” or how they may uniquely affect older adults.

If a State or Territory receives a major disaster declaration (MDD) by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act,<sup>288</sup> this MDD triggers certain disaster relief authority under section 310 of the Act.<sup>289</sup> The COVID-19 PHE for example, demonstrated the devastating impact of an emergency or disaster on the target population who receive services under the Act. During the COVID-19 PHE, all States and Territories received a MDD, and we provided guidance on flexibilities available under the Act while a MDD is in effect to meet the needs of older adults, such as those related to meal delivery systems, methods for conducting well-being checks, delivery of pharmacy, grocery, and other supplies, and other vital services.

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<sup>288</sup> Pub. L. 100-707; 42 U.S.C. 5121-5207.

<sup>289</sup> 42 U.S.C. 3030.

Throughout the COVID-19 PHE, we received inquiries and feedback that demonstrated a need for clarity on available flexibilities in an emergency. RFI and NPRM respondents also provided substantial feedback regarding limitations and the need for additional guidance and options for serving older adults during emergencies and disasters. Multiple RFI respondents noted that older adults and their service providers may be impacted by a wide range of emergencies and disasters—including natural, human-caused, climate-related, and viral disasters—and that prior regulatory guidance did not provide State agencies, area agencies, and service providers the flexibility necessary to adequately plan for emergency situations, as contemplated by the Act. Accordingly, they sought an expansion of the definition of “emergency” that better reflected their realities regarding service delivery. RFI and NPRM respondents also sought guidance on numerous aspects of program and service delivery during an emergency, such as maintaining flexibilities in meal and other service delivery introduced in response to COVID-19 PHE, increased flexibility in transferring funds, allowable spending on disaster mitigation supplies, and providing mental health services to older adults who experience disaster-related trauma. RFI respondents also asked for regulatory language describing what is expected of State agencies, area agencies, and service providers in an emergency to allow for the development of better emergency and disaster preparedness plans at State and local levels.

We considered various approaches in developing this new section. Certain flexibilities, such as allowing the use of Title III, part C-2 funds which are allocated to home-delivered meals for shelf-stable, pick-up, carry-out, drive-through, or similar meals, constitute innovative ways to deliver services that could be allowable on a regular basis within the parameters of Title III, part C-2 and without any special authorization by ACL during an emergency. Those flexibilities have been incorporated where applicable in the revised regulation for clarification purposes, for example in § 1321.87(a)(2), which addresses carry-out and other alternatives to traditional home-delivered meals. We are limited by the Act in the extent to which other flexibilities may be allowed. For example, a MDD is required for a State agency to be permitted, pursuant to section

310(c) of the Act, to use Title III funds to provide disaster relief services, which must consist of allowable services under the Act, for areas of the State where the specific MDD is authorized and where older adults and family caregivers are affected.<sup>290</sup>

We also recognize that during an event which results in a MDD, such as the COVID-19 PHE, statewide procurement or other direct expenditures by the State agency may be critical to meeting the mission of the Act. Based on our experience in responding to the COVID-19 PHE, we discuss certain options to be available to State agencies to expedite expenditures of Title III funds while a MDD is in effect, such as allowing a State agency to procure items on a statewide level, subject to certain terms and conditions.

We have administrative oversight responsibility with respect to the expenditures of Federal funds pursuant to the Act. Accordingly, in addition to the flexibilities we allow in this section, we are compelled to list requirements with respect to these flexibilities, such as the submission of State plan amendments by State agencies when they intend to exercise any of these flexibilities, as well as reporting requirements.

*Comment:* Commenters overwhelmingly expressed support for emergency and disaster preparedness and response plans, as well as clearly defined expectations and requirements before, during, and after any natural disaster.

We received other suggestions, program management recommendations, and implementation questions regarding this provision, including allowable provision of goods and services in disaster situations, establishing registries of at-risk individuals, ensuring accessible and effective communications during emergencies and disasters, and connecting with public health departments, emergency response organizations, and other long-term services and supports programs and providers.

*Response:* We appreciate these comments. Other than the changes specified in the subsequent paragraphs, we decline to make further changes to the provisions under subpart E and

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<sup>290</sup> *Id.* section 3030(c).

intend to address other suggestions, program management recommendations, implementation questions, and requests for clarification through technical assistance.

*§ 1321.97 Coordination with State, Tribal and local emergency management.*

New § 1321.97 states that State agencies and AAAs must establish emergency plans, per sections 307(a)(28)<sup>291</sup> and 306(a)(17) of the Act,<sup>292</sup> respectively, and this section specifies requirements under the Act that these plans must meet. While the Act requires emergency planning by State agencies and AAAs, the Act provides limited guidance regarding emergency planning. We also include in this section additional guidance in connection with the development of sound emergency plans (such as requirements for continuity of operations planning, taking an all-hazards approach to planning, and coordination with Tribal emergency management and other agencies that have responsibility for disaster relief delivery).

*Comment:* We received comments in support of this provision, including specifying coordination with Tribal emergency management and having policies and procedures in place at all levels of the aging network to ensure minimal disruptions to services. We received comment requesting that emergencies include climate-related and human-caused disasters. Another commenter recommended the definition of “all-hazards” be deferred to the State and that this be specified.

*Response:* ACL appreciates these comments of support and notes that the regulation specifies an “all-hazards” approach. ACL intends that includes climate-related, weather-specific, and other natural and human-caused disasters, specific to the determination of likely “all-hazards” by the State agency and AAAs.

*Comment:* One commenter recommended that service providers under the Act be included among those with whom State agencies and AAAs coordinate.

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<sup>291</sup> 42 U.S.C. 3027(a)(28).

<sup>292</sup> 42 U.S.C. 3026(a)(17).



*Response:* We appreciate this recommendation and have made revisions at § 1321.97(a)(1)(ii), (a)(3), and (b)(2) to incorporate service providers under the Act.

§ 1321.99 *Setting aside funds to address disasters.*

New § 1321.99 describes the parameters under which State agencies may set aside and use funds during a MDD, per section 310 of the Act.<sup>293</sup>

This section also clarifies that State agencies may specify that they are setting aside Title III funds for disaster relief in their IFF or funds distribution plan. It provides direction as to the process a State agency must follow in order to award such funds for use within all or part of a PSA covered by a specific MDD where Title III services are impacted, as well as requirements with respect to the awarding of such funds.

*Comment:* We received comments supporting the proposed options for State agencies to address disasters as set forth. We received comments expressing concern regarding timeframes that apply, recommending limitations to proposals to allow State agencies to set aside funds, or opposing this proposed provision. Other commenters recommended that State agencies be required to consult with AAAs prior to exercising this option. Another commenter offered an alternate approach of requiring a mandatory input period or having a provision for a AAA network appeal of the State agency's plan. One commenter asked for this option to be available for State-declared disasters or for additional flexibility for State agencies to select the best method for setting aside funds.

*Response:* ACL agrees that the ideal service delivery mechanism, as set forth by the Act, is for regular service provision through AAAs, using an approved IFF, or for single PSA States to use their approved funds distribution plan. However, we recognize that based on our experience during the COVID-19 PHE and in certain other disaster situations, circumstances may not allow for the timely and needed delivery of services to older adults and family caregivers. For example, during the COVID-19 PHE supply chain issues occurred relatively

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<sup>293</sup> 42 U.S.C. 3030.

quickly and smaller local programs and providers were at a disadvantage in procuring food, personal protective equipment, and other supplies in comparison to a larger State agency's procurement options. It is also possible that a natural disaster might result in one or more AAAs or service providers being unable to function. Requiring a mandatory input period may not allow for action to be taken in the timeframe an emergency may necessitate. We recognize that during an event which results in a MDD, statewide procurement or other direct expenditures by the State agency may be critical to meeting the mission of the Act. Therefore, we propose certain options to be available to State agencies to expedite expenditures of Title III funds only in exceptional circumstances during a MDD incident period, as set forth in paragraph (a) of this provision. ACL sought to balance maintenance of the AAAs' role with the need for expedited action in extreme circumstances.

To make clear the requirements that apply in exercising this flexibility, we have specified that up to five percent of the total Title III allocation may be used if specified in the State agency's approved IFF, funds distribution plan, or with prior approval from the Assistant Secretary for Aging. We have removed the redundant language regarding submitting a State plan amendment at § 1321.99(b)(1) and have revised the remaining items under (b) accordingly. We have also revised newly ordered § 1321.99(b)(1) to read that the set aside funds that are awarded under this provision must comply with the requirements under § 1321.101. The provision at reordered § 1321.101(b)(3)(iii)(B) requires consultation with AAAs prior to exercising this flexibility. Further, the provision at § 1321.101(b)(3)(iii)(C) requires use of set aside funding for services provided through AAAs and other aging network partners to the extent reasonably practicable.

To provide appropriate checks on this flexibility, ACL set forth the following limitations in § 1321.99 and § 1321.101: 1) this flexibility may only be exercised under a MDD, 2) up to five percent of the State agency's total Title III allocation or with prior approval of the Assistant Secretary for Aging may be set aside, 3) a State agency must submit a State plan amendment not

requiring prior approval detailing various information regarding their use of such a flexibility, 4) the State agency must use such funding for services provided through AAAs and other aging network partners to the extent reasonably practicable in the judgement of the State agency, 5) the State agency must report on the clients and units served, and services provided with such funds, and 6) if funds are set aside for this purpose, the State agency must have policies and procedures in place to award the funds through the IFF or funds distribution plan if the funds are not awarded within 30 days of the end of the fiscal year in which the funds were received, as set forth at § 1321.99(b)(2).

As set forth in § 1321.31(b) and this provision, the State plan amendment required when using funds set aside to address disasters does not require prior approval by the Assistant Secretary for Aging. ACL intends this requirement to facilitate transparency and communication in times of emergency and disaster and does not intend for response times to be hindered. When a State agency obligates funding under this provision, they should submit a State plan amendment to include the specific entities receiving such funds; the amount, source, and intended use for such funds; and other justification of the use of these funds. ACL does not find this expectation to be overly burdensome.

As a note, funds awarded within 30 days of the end of the fiscal year in which the funds were received may have a project period that extends to the length of the State agency's award, subject to the State agency's policies and procedures. For example, if FY 2024 funds set aside were not used under this provision, they would need to be awarded through the IFF or funds distribution plan by August 31, 2024. They could have a project period ending up to September 30, 2025, subject to the State agency's policies and procedures. As funds provided under Title III of the Act typically have a project period of two years, ACL believes this provides sufficient time for AAAs and service providers to use the funds. ACL encourages the State agency, AAAs, and service providers to be in communication regarding the status of and expectations for use of

these funds. We have added the cross-references for the IFF provision (§ 1321.49) and funds distribution plan (§ 1321.51(b)) to § 1321.99(b)(2) for clarity.

Additionally, use of the flexibility set forth at § 1321.99 is not required, and some State agencies may elect not to pursue this option given limited availability of funds or for other reasons. Other State agencies may provide for emergency and disaster preparedness or response through funds awarded through their existing IFFs or funds distribution plans. This provision offers an opportunity for State agencies to consult with AAAs, service providers, and the general public prior to setting aside funds to address disasters. We believe that as set forth, these provisions provide the appropriate balance of flexibility to State agencies during disaster-related emergencies, and decline to make further changes at § 1321.99.

*§ 1321.101 Flexibilities under a major disaster declaration.*

New § 1321.101 describes disaster relief flexibilities available pursuant to Title III under a MDD to provide disaster relief services for affected older adults and family caregivers. Recognizing that there is no required period of advance notice of the end of a MDD incident period, the final rule allows State agencies up to 90 calendar days after the end of a MDD incident period to obligate funds for disaster relief services or additional time with prior approval from the Assistant Secretary for Aging. We also recognize that during an event which results in a MDD, such as the COVID-19 PHE, Statewide procurement or other direct expenditures by the State agency may be critical to meeting the mission of the Act. Based on our experience in responding to the COVID-19 PHE, we set forth additional options to be available to State agencies to expedite expenditures of Title III funds while under a MDD, including allowing a State agency to procure items on a statewide level and allowing a State agency to allocate a portion of its State plan administration funds (not to exceed five percent of the total Title III grant award) to a PSA covered under a MDD to be used for direct service provision without having to allocate the funds through the IFF or funds distribution plan. We selected a cap of five

percent as State agencies are allowed under section 308(b)(2)<sup>294</sup> of the Act to apply the greater of \$750,000 or five percent of the total Title III grant award to State plan administration. For example, at the beginning of the COVID-19 PHE, we provided flexibilities where State agencies were able to provide some direct services, like food boxes, to areas in the State that were not able to access needed food for older adults and their caregivers. This flexibility allowed State agencies to quickly provide needed access to food for vulnerable populations where access was severely limited at a local level. The terms and conditions that will apply to these flexibilities also are set forth in this section, such as requirements to submit State plan amendments when a State agency intends to exercise such flexibilities (such amendments are to include the specific entities receiving the funds, the amount, the source, the intended use for the funds, and other justification for the use of the funds) and reporting requirements.

We received many comments in response to the RFI and NPRM asking that various flexibilities allowed during the COVID-19 PHE remain in place permanently. We are limited by the Act in the extent to which flexibilities may be allowed. For example, a MDD is required in order for a State agency to be permitted, pursuant to section 310(c)<sup>295</sup> of the Act, to use Title III funds to provide disaster relief services (which must consist of allowable services under the Act) for areas of the State where the specific MDD is authorized and where older adults and family caregivers are affected, and the Act contains limitations on the transfer of Title III funds among the various parts of Title III. Flexibility was provided for 100 percent of transfer of Title III nutrition services funds through separate legislation, the CARES Act, which is limited to the period of the declared Public Health Emergency for COVID-19.

*Comment:* Many commenters expressed support for allowing flexibility in the use of funds as outlined in this provision. Some commenters agreed with the timeframe proposed in § 1321.101(g). Other commenters expressed concern about the feasibility of fully obligating funds

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<sup>294</sup> 42 U.S.C. 3028(b)(2).

<sup>295</sup> 42 U.S.C. 3030(c).

under the proposed timeline. We received one comment requesting that funds provided for the Ombudsman program under part 1324, subpart A, be exempt from use under these flexibilities. One commentator asked for clarification regarding the five percent amount of State plan administration that the State agency may use and the five percent amount for direct expenditures and/or acting to procure items on a statewide level that the State agency may use. Other commenters expressed confusion regarding the intended use of these provisions.

*Response:* We appreciate these comments and have made edits to improve the clarity of this provision. We have created new paragraphs (b) and (c) and have redesignated the subsequent provisions. In paragraph (b) we have specified the flexibilities a State agency may exercise under a MDD.

Through § 1321.101(b), ACL intends to provide three distinct flexibilities that a State agency may exercise pursuant to a MDD. Section 1321.101(b)(1) allows any portion of open grant awards funds to be used for disaster relief services. For example, during the MDD for the COVID-19 PHE, this allowed AAAs and service providers to use funds originally provided for congregate meals under Title III, part C-1 of the Act to be used for home-delivered meals and other purposes that, at the time, would otherwise have been unallowable absent a MDD.

Secondly, § 1321.101(b)(2) permits the State agency to redirect and use its State plan administration funding for direct service provision. For clarity, we have revised this provision to state, “Awarding portions of State plan administration, up to a maximum of five percent of the Title III grant award or to a maximum of the amounts set forth at § 1321.9(c)(2)(iv), for use in a planning and service area[.]”

Thirdly, § 1321.101(b)(3) allows for the State agency’s awarding of funds set aside to address disasters, as set forth in § 1321.99, pursuant to a major disaster declaration incident period. This provision is in addition to and separate from the provision at § 1321.101(b)(2). For clarity, we further specify how the State agency may use the set aside funds. Section 1321.101(b)(3)(i) provides for awarding of funds to an area agency serving a PSA covered in

whole or in part under a MDD without allocation through the IFF; § 1321.101(b)(3)(ii) provides for awarding of funds to a service provider, in single PSA States, without allocation through the funds distribution plan; and § 1321.101(b)(3)(iii) provides for the State agency to use funds for direct service provision, direct expenditures, and/or procurement of items on a statewide level, subject to requirements as specified in § 1321.101(b)(3)(iii)(A) through (D).

ACL recognizes the importance of the Ombudsman program in responding to residents of long-term care facilities in times of disasters and other emergencies. ACL also recognizes that there may be times when the Ombudsman program is not able to fully use its funding during an emergency. The flexibilities described in this provision may allow a State agency to meet urgent, time sensitive needs of older adults and family caregivers, including residents of long-term care facilities. However, in recognition of the importance of proper coordination and communication between the State agency and the Ombudsman program, we have revised § 1321.101(b)(3)(iii)(B) and (f) to better incorporate the Ombudsman program.

We added a new paragraph (c) to specify the State plan amendment requirements that apply. The subsequent provisions are reordered. Section 1321.101(c) requires the State agency to submit a State plan amendment as set forth in § 1321.31(b) to justify its use of funds and to provide transparency about the use of funding flexibilities. State plan amendments required under § 1321.31(b) do not require prior approval by the Assistant Secretary for Aging. In light of commenter concerns about the timeliness of awarding funds and submitting the State plan amendment, we have revised § 1321.31(b) to clarify timeline for submission of such State plan amendments whenever necessary and within 30 calendar days of the action(s) listed in the provision.

The flexibilities under this provision enable State agencies and AAAs to provide immediate response in a disaster situation. Extending this timeframe would not be aligned with the urgent response time expected during disaster response. However, we recognize that

additional time to obligate funds may be appropriate under certain circumstances with prior approval from the Assistant Secretary for Aging, as included in the proposed rule.

*§ 1321.103 Title III and Title VI coordination for emergency and disaster preparedness.*

Section 1321.53 (*State agency Title III and Title VI coordination responsibilities*), § 1321.69 (*Area agency on aging Title III and Title VI coordination responsibilities*), and § 1321.95 (*Service provider Title III and Title VI coordination responsibilities*), set forth expectations for coordinating activities and delivery of services under Title III and Title VI, as articulated in the Act sections 306(a)(11)(B),<sup>296</sup> 307(a)(21)(A),<sup>297</sup> 614(a)(11),<sup>298</sup> and 624(a)(3).<sup>299</sup> New § 1321.103 clarifies that Title III and Title VI coordination should extend to emergency and disaster preparedness planning, response, and recovery.

*Comment:* We received comment in support of this provision. We also received recommendation that any entities involved in provision of services under Title III of the Act to develop their procedures for outreach and coordination with the relevant Title VI program director.

*Response:* We appreciate these comments, including recommending that Title III entities work with the relevant Title VI program directors in developing their policies and procedures regarding coordination. We have revised the language at § 1321.103 to read, “[...] policies and procedures, developed in communication with the relevant Title VI program director(s) as set forth in § 1322.13(c), in place[.]”

*Comment:* We received comment requesting that emergencies include climate-related and human-caused disasters in Tribal communities.

*Response:* ACL appreciates this comment and notes that the regulation specifies an “all-hazards” approach. ACL intends for “all-hazards” to include climate-related, weather-specific,

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<sup>296</sup> 42 U.S.C. 3026(a)(11)(B).

<sup>297</sup> 42 U.S.C. 3027(a)(21)(A).

<sup>298</sup> 42 U.S.C. 3057e(a)(11).

<sup>299</sup> 42 U.S.C. 3057j(a)(3).



and other natural and human-caused disasters, specific to the determination of likely “all-hazards” by the State agency, AAAs, and Title VI programs.

*§ 1321.105 Modification during major disaster declaration or public health emergency.*

New § 1321.105 states that the Assistant Secretary for Aging retains the right to modify emergency and disaster-related requirements set forth in the regulation under a Major Disaster declared by the U.S. President under The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Pub. L. 100-707; 42 U.S.C. 5121-5207), or public health emergency (PHE) as declared by the U.S. Secretary for Health and Human Services.

### **C. Deleted Provisions**

We remove the following provisions since they are no longer necessary and/or applicable, and to avoid potential confusion or conflicts due to statutory and/or regulatory changes.

*§ 1321.5 Applicability of other regulations.*

We remove § 1321.5, which lists other applicable regulations, because the provision is unnecessary and may create confusion or become outdated due to statutory or regulatory changes.

*§ 1321.75 Licenses and safety.*

We remove § 1321.75, which describes State agency and AAA responsibilities to ensure that facilities who are awarded funds for multipurpose senior center activities obtain appropriate licensing and follow required safety procedures, and that proposed alterations or renovations of multipurpose senior centers comply with applicable ordinances, laws, or building codes. The provision is no longer necessary since these responsibilities are addressed by other policies and procedures at the State and local levels.

*PART 1322—GRANTS TO INDIAN TRIBES FOR SUPPORT AND NUTRITION SERVICES*

### **Title VI General Comments**

*Comment:* Many commenters supported the updating and modernizing of the regulations. In particular, ACL received overwhelmingly positive comments supporting the

provision of services for Tribal and Hawaiian Native elders and family caregivers. Commenters shared the harsh realities for and significant needs of Tribal and Hawaiian Native elders and family caregivers and requested additional funding for Tribal organizations and Hawaiian Native grantees to provide services under the Act.

*Response:* ACL appreciates these comments of support. ACL anticipates continuing to provide technical assistance to grantees under Title VI of the Act in support of Tribal and Hawaiian Native elders and family caregivers. We acknowledge comments about funding constraints, but funding is outside the scope of this rule.

*Comment:* ACL received comments of appreciation for the proposed changes to clarify Title VI and other provisions of the Act to better allow grantees to serve Native elders and family caregivers. One commenter noted that consolidating the sections referencing Title VI services to Indian Tribes and Native Hawaiian grantees creates more clarity in the regulations, which will permit grantees to better serve Native American, Alaskan Native, and Native Hawaiian elders and family caregivers.

*Response:* ACL appreciates these comments of support.

*Comment:* One commenter recommended updating all references from “Native Americans” to “Indian Tribes.” Another commenter requested use of “Native Americans” instead of “Indians.” Other commenters expressed various beliefs and preferences regarding the appropriate terms to use regarding service to American Indian and/or Native American elders and family caregivers.

*Response:* In this rule, ACL took great care to ensure that the terms used are respectful and have appropriate meaning for practical, consistent application. We also recognize there is variation in the terms used and preferred by different individuals and organizations. In this rule, we used the terms as specified in § 1322.3 (*Definitions*). We referred to organizations in terms of “Eligible organization,” “Hawaiian Native grantee,” “Indian tribe,”<sup>300</sup> and “Tribal

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<sup>300</sup> Section 102(27) of the OAA, 42 U.S.C. 3002(27); sec. 612(c) of the OAA, 42 U.S.C. 3057c(c).

organization.”<sup>301</sup> References to “Hawaiian Native or Native Hawaiian,”<sup>302</sup> “Native Americans,”<sup>303</sup> and “Older Indians” are specific to the individual rather than the entity, except in the case of referencing a Hawaiian Native grantee. Where existing, we used the same definitions as established in the OAA and other statutes.

## **A. Provisions Revised to Reflect Statutory Changes and/or for Clarity**

### *Subpart A - Introduction*

#### *§ 1322.1 Basis and purpose of this part.*

Revised § 1322.1 explains the requirements of Title VI of the Act to provide grants to Indian Tribes and Native Hawaiian grantees. We consolidate 45 CFR part 1322 and 45 CFR part 1323 into 45 CFR part 1322 and subsequently retitle this part as “Grants to Indian Tribes and Native Hawaiian Grantees for Supportive, Nutrition, and Caregiver Services.” We revise language to affirm the sovereign government to government relationship with a Tribal organization, and similar considerations, as appropriate for Hawaiian Native grantees representing elders and family caregivers, and to ensure consistency with statutory terminology and requirements, such as adding reference to caregiver services and specifying family caregivers as a service population, as set forth in Title VI of the Act. We add language to incorporate Native Hawaiians and Native Hawaiian grantees. We also clarify that terms not otherwise defined will have meanings ascribed to them in the Act.

*Comment:* We received multiple comments expressing support for the rights of Native Americans and funding to support Native Americans as they age.

*Response:* We appreciate these comments.

*Comment:* One commenter recommended that ACL consider changes to § 1322.1(a), specifically the statement “[...] American Indian elders on Indian reservations [...]” to instead reference American Indians elders and family caregivers from a Federally or State recognized

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<sup>301</sup> Section 102(56) of the OAA, 42 U.S.C. 3002(56); sec. 612(c) of the OAA, 42 U.S.C. 3057c(c).

<sup>302</sup> Section 102(37)(B) of the OAA, 42 U.S.C. 3002(37)(B); sec. 625 of the OAA, 42 U.S.C. 3057k.

<sup>303</sup> Section 102(37) of the OAA, 42 U.S.C. 3002(37).

Tribe, as not all Tribal elders reside on a reservation.

*Response:* ACL acknowledges the population of American Indian elders and family caregivers residing outside a reservation. Other Federally recognized Tribes do not maintain Tribal reservations. The relevant service area for provision of services under Title VI of the Act is specified in the definition of “service area” in § 1322.3 and § 1322.5(b). For clarity, we have revised this provision to read, “This program is established to meet the unique needs and circumstances of American Indian and Alaskan Native elders and family caregivers and of older Native Hawaiians and family caregivers, on Indian reservations and/or in service areas as approved in § 1322.7.”

*§ 1322.3 Definitions.*

Our final rule updates the definitions of significant terms in § 1322.3 to reflect current statutory terminology and operating practice and to provide clarity. We add several definitions and revise several existing definitions. The additions and revisions are intended to reflect changes to the statute, important practices in the administration of programs under the Act, and feedback we have received from a range of interested parties. We add definitions of the following terms: “Access to services,” “Act,” “Area agency on aging,” “Domestically produced foods,” “Eligible organization,” “Family caregiver,” “Hawaiian Native or Native Hawaiian,” “Hawaiian Native grantee,” “In-home supportive services,” “Major disaster declaration,” “Multipurpose senior center,” “Native American,” “Nutrition Services Incentive Program,” “Older Native Hawaiian,” “Older relative caregiver,” “Program income,” “Reservation,” “State agency,” “Title VI director,” and “Voluntary contributions.”

We retain and make minor revisions to the terms: “Acquiring,” “Altering or renovating,” “Constructing,” “Department,” “Means test,” “Service area,” “Service provider,” and “Tribal organization.” We retain with no revisions the terms: “Budgeting period,” “Indian reservation,” “Indian Tribe,” “Older Indians,” and “Project period.”

*Comment:* We received comment expressing support for the added definitions to clarify

and provide consistency with the intersection of Title III and Title VI funding. Other commenters suggested other terms for potential definition in this rule.

*Response:* ACL appreciates these comments. We have made additional edits to definitions for consistency with Title III, where appropriate. In lieu of additional definition in this rule, grantees under Title VI of the Act may establish their own definitions, as long as they are not in conflict with applicable Federal requirements. ACL also intends to provide technical assistance to aid in the implementation of this rule.

*Comment:* One commenter recommended changing all references in part 1322 from “Tribal Organizations” to “Tribal Grantees,” due to the definition of “Tribal Organization” set forth in the Indian Self-Determination and Education Assistance Act (ISDEAA).<sup>304</sup> The commenter stated that the proposed change would reduce the potential of confusing a chartered Tribal organization as representing the governing body of the Tribe. Another commenter requested that State-recognized Tribes be included in the definition of “eligible organization.”

*Response:* Section 612(c) of the Act<sup>305</sup> expressly provides that, for purposes of Title VI, tribal has the same meaning as in section 4 of the ISDEAA.<sup>306</sup> Section 612 of the Act<sup>307</sup> also sets forth the criteria for an eligible organization to receive a grant, using the criteria in section 4 of the ISDEAA.<sup>308</sup> Accordingly, ACL uses the statutory definitions in this regulation.

*Comment:* Commenters requested expansion of the definition of in-home supportive services and that the definition be consistent with the definition in § 1321.3, to allow for collaboration with other programs. Commenters also asked for consistency in the example of “minor modification of homes” in part 1321.

*Response:* We have revised the definition of in-home supportive services in response to the comments. We similarly have amended this definition in part 1321 for consistency.

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<sup>304</sup> Pub. L. 93-638, 88 Stat. 2203 (1975); 25 U.S.C. 5301 *et. seq.*

<sup>305</sup> 42 U.S.C. 3057(c).

<sup>306</sup> 25 U.S.C. 5304.

<sup>307</sup> 42 U.S.C. 3057c.

<sup>308</sup> 25 U.S.C. 5304.

*Comment:* We received many comments supporting an inclusive definition of family caregiver, as well as suggestions for expanded wording of the definition. One commenter recommended ACL consider alternatives to the term “informal” within the “family caregiver” definition to avoid minimizing their invaluable role and avoid inaccuracy due to some receiving financial compensation.

*Response:* ACL appreciates these comments and concurs that the definition includes non-traditional families and families of choice. We believe that the definition is sufficiently broad to account for the concerns raised by commenters. To address family caregivers who may receive limited financial compensation, we have revised the definition to add, “For purposes of this part, family caregiver does not include individuals whose primary relationship with the older adult is based on a financial or professional agreement.” We have made a similar edit to the definition in part 1321.

*Comment:* We received comments questioning the use of the term “multi-purpose senior centers” to reference a service. We also received comments disagreeing with definition, including with the inclusion of virtual facilities. Other commenters expressed appreciation for the inclusion of virtual facilities to reflect a growing number of programs and services offered online after the pandemic, noting this may make programs more accessible and equitable.

*Response:* We appreciate these comments and have revised § 1322.3 to indicate “[...] as used in § 1322.25, facilitation of services in such a facility.” We also agree with commenters that allowing virtual facilities “as practicable” provides options for various service modalities to reflect local circumstances, while remaining true to the definition of multipurpose senior center as set forth in the Act.

*Comment:* One commenter expressed concern about the definition of service area and how to serve Tribal elders residing in urban areas outside of the reservation.

*Response:* Service areas are required by section 614(c)(4) of the OAA and are approved

through the funding application process.<sup>309</sup> Grantees under Title VI of the Act may facilitate service to elders and family caregivers living outside the service area through appropriate coordination with Title III and other programs.

*Comment:* We received comments and suggestions regarding clarification to the definition of “voluntary contributions.”

*Response:* We appreciate these comments and suggestions. We have revised the definition of “voluntary contributions” to read, “[...] means donations of money or other personal resources given freely, without pressure or coercion, by individuals receiving services under the Act.” We have made a similar change to the definition in part 1321 for consistency. We also intend to address other suggestions and requests for clarification through technical assistance.

#### *Subpart B – Application*

##### *§ 1322.5 Application requirements.*

We redesignated § 1322.19 of the existing regulation (*Application requirements*) as § 1322.5 and revised the provisions to reflect updates to the Act. We specify that application submissions must include program objectives; a map and/or description of the geographic boundaries of the proposed service area; documentation of supportive and nutrition services capability; certain assurances; a tribal resolution; and signature by a principal official.

*Comment:* Many commentors expressed concern with § 1322.5(d)(1) which requires eligible organizations to represent at least 50 individuals age 60 and older in order to apply for funding. Several asked that the age of an elder as established by the eligible organization be used in qualifying to apply for funds under Title VI of the Act and that no minimum number of elders be required to apply for funds.

Other commenters expressed need to amend the current funding formula for allocation of services to include the population under age 60 as it results in unfunded eligibility. One commenter noted that after COVID-19, life expectancy for American Indians decreased by 6.6

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<sup>309</sup> 42 U.S.C. 3057e(c)(4).

years. An additional commenter noted that many communities, including some Alaskan Tribes, have a great number of elders in need over the Tribal elder age of 50 but may not have at least 50 elders who are age 60. They therefore are not eligible to apply for funding.

*Response:* ACL acknowledges the decreased life expectancy and many needs of Native American elders and family caregivers. However, we are unable to make changes in this provision, as this would require statutory changes to section 612(a).<sup>310</sup> We emphasize that smaller Tribes may be eligible to apply for Title VI funding as a consortium. ACL is available to provide technical assistance regarding how Tribes with a smaller number of elders who are at least 60 years of age may apply for funding under Title VI of the Act.

*Comment:* Commenters expressed issues with inadequate funding based on current funding formula/distribution procedures. They noted that Tribal nations only receive 2% of the OAA budget and that Title VI funding should be increased and provided directly to Tribal nations through ISDEAA Title I contracts and Title V compacts to fulfill trust and treaty obligations.

*Response:* The amount of OAA funding is determined by Congress and beyond the scope of this regulation. The Act sets out the requirements for making funding awards to Tribal organizations with approved funding applications.

*Comment:* One commenter recommended including Indian Health Service maps to identify service areas as an acceptable submission under § 1322.5(b).

*Response:* Indian Health Service maps may be used to describe the geographic service area proposed. Section 614(c)(4) of the Act allows an applicant to provide an appropriate narrative description of the geographic area to be served and an assurance that procedures will be adopted to ensure against duplicate services.<sup>311</sup>

*Comment:* One commenter expressed concern that new applicants might not be able to

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<sup>310</sup> 25 U.S.C. 5304(a).

<sup>311</sup> 42 U.S.C. 3057e(c)(4).



meet the requirement § 1322.5(c) of their ability to provide supportive and nutrition services effectively or that they have provided such services for the past three years. Another commenter stated that Title VI programs may lack funding and capacity to develop and submit a Title VI application. They suggest adequate training, financial resources, and updated guidance document be provided to ensure programs fully understand what is expected.

*Response:* The application requirements in § 1322.5 are consistent with those in effect in the most recent cycle of Title VI funding and as set forth in the Act. Documentation of supportive and nutrition services capacity is an important application component. The rule provides the options of attesting to this capacity either with documentation of such services provided within the last three years or with documentation of the ability to do so.

ACL provides significant training and guidance documents on the Older Indians website, available at <https://olderindians.acl.gov>. We will continue to provide technical assistance and guidance to grantees and prospective grantees.

#### *§ 1322.7 Application approval.*

Section 1322.21 of the existing regulation (*Application approval*) is redesignated here as § 1322.7. We make minor revisions to align the provision with updates to the Act and to clarify that no less than annual performance and fiscal reporting is required.

*Comment:* We received numerous comments on the inadequacy of funding for Title VI programs.

*Response:* The amount of funding for OAA programs is determined by Congress and thus is outside the scope of this regulation.

#### *§ 1322.9 Hearing procedures.*

Section 1322.23 of the existing regulation (*Hearing procedures*) is redesignated here as § 1322.9. Section 614(d)(3) of the Act provides opportunity for a hearing when an organization's application under section 614 is denied.<sup>312</sup> As under Title III, hearings will be conducted by the

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<sup>312</sup> 42 U.S.C. 3057e.

HHS Departmental Appeals Board (DAB).

We received no comments on § 1322.9. However, we have made technical corrections to remove unnecessary words and to align the section with 45 CFR part 16.

*Subpart C – Service Requirements*

*§ 1322.13 Policies and procedures.*

We combined §§ 1322.9 (*Contributions*), 1322.11 (*Prohibition against supplantation*), and 1322.17 (*Access to information*) of the existing regulation and redesignated them as § 1322.13 (*Policies and procedures*). We also combined into § 1322.13 the areas for which a Tribal organization or Hawaiian Native grantee must have established policies and procedures.

Section 1322.13 specifies programmatic and fiscal requirements for which a Tribal organization or Hawaiian Native grantee should have established policies and procedures. These include identifying an individual to serve as the Title VI director; collecting and submission of data and other reports to ACL; ensuring that the direct provision of services meet requirements of the Act; client eligibility; coordination with area agencies on aging and other Title III and VII-funded programs; specifying a listing and definitions of services that may be provided by the Tribal organization or Hawaiian Native grantee; detailing any limitations on the frequency, amount, or type of service provided; and the grievance process for older Native Americans and family caregivers who are dissatisfied with or denied services under the Act.

We have previously provided technical assistance to Tribal organizations or Hawaiian Native grantees that were unaware of certain fiscal requirements and/or did not understand their obligations under these requirements. We add § 1322.13(c)(2) to provide clarity regarding policies and procedures for fiscal requirements such as voluntary contributions; buildings and equipment; and supplantation. In particular, § 1322.13(c)(2)(ii) addresses the need to ensure that the funding is used for allowable costs that support allowable activities; to ensure consistency in the guidance provided by ACL; and to affirm that altering and renovating activities are allowable for facilities providing services under this section.

*Comment:* Commenters expressed concern that the number of policies and procedures being asked of Title VI programs could be burdensome, that they would need additional staff to support the changes, and that they lack sufficient funds to meet the requirements of § 1322.13.

*Response:* Section 1322.13 responds to requests for technical assistance and feedback from listening sessions by clarifying the policies and procedures that grantees under Title VI of the Act must have. The provisions reflect current expectations for grantees under Title VI of the Act. ACL is committed to supporting all grantees with technical assistance so that they may comply with the requirements.

*Comment:* One commenter noted grievance processes are usually in place at the Tribal level, but they can be difficult to navigate.

*Response:* Section 1322.13(c)(1)(iv) requires there to be a grievance process for elders and family caregivers who are dissatisfied with or denied services under the Act. In deference to Tribal sovereignty, the grantee under Title VI of the Act is to specify the process to be used. ACL will provide technical assistance regarding how grievance processes can be designed for appropriate navigation by elders and family caregivers.

*§ 1322.15 Confidentiality and disclosure of information.*

Section 1322.7 of the existing regulation (*Confidentiality and disclosure of information*) is redesignated here as § 1322.15. We make minor revisions to align the provision with updates to definitions and consolidation of part 1323 regarding applicability to a Hawaiian Native grantee. We also specify that a provider of legal assistance shall not be required to reveal any information that is protected by attorney client privilege; policies and procedures are in place to maintain confidentiality of records; and information may be shared with other organizations, as appropriate, in order to provide services. The Tribal organization or Hawaiian Native grantee may also require the application of other laws and guidance for the collection, use, and exchange of both PII and personal health information.

*Comment:* A commenter expressed the need for respecting data sovereignty regarding

Tribal laws and that Tribal laws should supersede reporting requirements.

*Response:* ACL respects issues relating to sensitivity of data ownership and use with respect to Title VI programs. As such, the data addressed in § 1322.13(b) is used for program management, fiscal accountability, and budget justification purposes. ACL is committed to following appropriate data collection requirements, including meeting Paperwork Reduction Act requirements. The current data collection requirements for performance reporting are approved under OMB Control No. 0985-0007.

*Comment:* We received comments that expressed strong support for ACL's proposal to clarify the obligation of Tribal organizations and Hawaiian Native grantees and other providers to protect the confidentiality of OAA participants and to specify that policies and procedures must comply with all applicable Federal laws, codes, rules, and regulations. However, another commenter felt that as sovereign nations, Native communities should not be required to enforce the National Institutes for Standards Cybersecurity and Privacy Frameworks as well as other applicable Federal laws. Instead, they stated that Tribal entities should be allowed to determine what works best for their respective community.

*Response:* ACL appreciates these comments and has removed the National Institutes for Standards Cybersecurity and Privacy Frameworks requirement from the final rule.

*§ 1322.25 Supportive services.*

Section 1322.13 of the existing regulation (*Supportive services*) is redesignated here as § 1322.25. Revised § 1322.25 clarifies the supportive services available under Title VI, parts A and B of the Act are intended to be comparable to such services set forth in Title III of the Act. Supportive services under Title III of the Act include in-home supportive services, access services, and legal services. We clarify allowable use of funds, including for acquiring, altering or renovating, and constructing multipurpose senior centers.

We also clarify that inappropriate duplication of services be avoided for participants receiving service under both part A or B and part C and include minor language revisions for

clarity and consistency with updated definitions.

*Comment:* ACL received comment supporting the proposal to clarify the allowable use of funds and that Title VI–funded supportive services include in-home supportive, access, and legal services.

*Response:* ACL appreciates this comment.

§ 1322.27 *Nutrition services.*

Section 1322.15 of the existing regulation (*Nutrition services*) is redesignated here as § 1322.27. Revised § 1322.27 clarifies that nutrition services available under Title VI, parts A and B of the Act are intended to be comparable to services available under Title III of the Act. Section 614(a)(8) of the Act requires nutrition services to be substantially in compliance with the provisions of part C of Title III, which includes congregate meals, home-delivered meals, nutrition education, nutrition counseling, and other nutrition services.<sup>313</sup> Based on experiences during the COVID-19 PHE and numerous requests for flexibility in provision of meals, we clarify that home-delivered meals may be provided via home delivery, pick-up, carry-out, drive-through, or as determined by the Tribal organization or Hawaiian Native grantee; that eligibility for home-delivered meals is determined by the Tribal organization or Hawaiian Native grantee and not limited to those who may be identified as “homebound;” that eligibility criteria may consider multiple factors; and that meal participants may also be encouraged to attend congregate meals and other activities, as feasible, based on a person-centered approach and local service availability.

We specify that the Tribal organization or Hawaiian Native grantee must provide congregate and home-delivered meals, and nutrition education, nutrition counseling, and other nutrition services may be provided, with funds under Title VI part A or B of the Act. We also include minor clarifications for consistency.

Finally, this provision sets forth requirements for NSIP allocations. NSIP allocations are

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<sup>313</sup> 42 U.S.C. 3057e(a)(8).

based on the number of meals reported by the Tribal organization or Hawaiian Native grantee which meet certain requirements, as specified. A Tribal organization or Hawaiian Native grantee may choose to receive their allocation grants as cash, commodities, or a combination thereof. NSIP funds may only be used to purchase domestically produced foods used in a meal, as set forth under the Act. We intend for this provision to answer many questions we have received regarding the proper use of NSIP funds.

*Comment:* We received a comment asking to allow Title VI programs to use NSIP funds to purchase food directly from Tribes and Tribal organizations and for traditional foods.

*Response:* Purchase of food from Tribes and Tribal organizations in the United States is considered to be domestically produced food and consistent with § 1322.27. ACL encourages the purchase of traditional foods and other foods from Tribes and Tribal organizations in the United States and intends that the promulgation of this rule makes this clear.

*Comment:* Commenters supported ACL's proposals to clarify the provision of nutrition services. One commenter recommended additional flexibility for nutrition services requirements that limit service options in remote Tribal areas. Another commenter expressed concern about the proposed expansion of home-delivered meals to older adults who are not homebound due to concerns surrounding funding and staff capacity. One commenter noted that aligning services to the requirements of Title III may create more barriers to funding flexibility. We also received comments regarding reporting and other program implementation matters.

*Response:* ACL appreciates these comments. The OAA states that nutrition services available under Title VI, parts A and B of the Act are intended to be comparable to such services set forth in Title III of the Act. Based on comments received, we have revised § 1322.27(a)(4) to remove reference to the Nutrition Care Process, consistent with changes in part 1321. We have also made other edits for consistency with these similar provisions in part 1321.

The provisions of § 1322.13, regarding policies and procedures to implement Title VI services, offer existing flexibilities to address remote areas, as well as to set priorities for how

and to whom services will be provided given limited funds. We will provide technical assistance to address reporting concerns and other program implementation matters.

## **B. New Provisions Added to Clarify Responsibilities and Requirements Under Grants to Indian Tribes and Native Hawaiian Grantees for Supportive, Nutrition, and Caregiver Services**

The final rule includes the following new provisions to provide guidance in response to inquiries and feedback received from grantees and other interested parties and changes in the provision of services, and to clarify requirements under the Act.

### *Subpart C – Service Requirements*

#### *§ 1322.11 Purpose of services allotments under Title VI.*

New § 1322.11 specifies that services provided under Title VI consist of supportive, nutrition, and family caregiver support program services, and that funds are to assist a Tribal organization or Hawaiian Native grantee to develop or enhance comprehensive and coordinated community-based systems for older Native Americans and family caregivers. We received no comments on this section.

#### *§ 1322.17 Purpose of services – person- and family-centered, trauma-informed.*

New § 1322.17 clarifies that services under the Act should be provided in a manner that is person-centered and trauma-informed. Recipients of services are entitled to an equal opportunity to the full and free enjoyment of the best possible physical and mental health, which includes access to person-centered and trauma-informed services.

*Comment:* We received many comments expressing support for culturally sensitive, person- and family-centered, and trauma-informed approaches and practices in working with Native American elders and family caregivers. Other comments requested guidance in implementing these provisions. We also received comment that the term “holistic traditional care” would be a more appropriate term, as it implies the entire person within a setting which includes familial, cultural, and historical components.

*Response:* We appreciate these comments and have revised § 1322.17 to include culturally appropriate holistic traditional care.

*Comment:* One commenter expressed concern that the section is not clear if this provision is required for all services that are provided, given use of the terms “as appropriate” and “if applicable.”

*Response:* ACL acknowledges the comment and uses the terms “as appropriate” and “if applicable” to reflect the variety of services that may be provided and to maintain the inherent flexibility of the OAA to respond to the needs of the local Tribal communities. For example, not all services use a person-centered plan; a person-centered plan would not be appropriate for a public education service. Grantees under Title VI of the Act can implement these provisions to best meet their circumstances, as long as implementation is consistent with all applicable Federal requirements. We intend to address further questions and requests for clarification through technical assistance.

*§ 1322.19 Responsibilities of service providers.*

New § 1322.19 specifies the responsibilities of service providers to include providing service participants with an opportunity to contribute to the cost of the service; providing self-directed services to the extent feasible; acknowledging service provider responsibility to comply with local APS requirements, as appropriate; arranging for weather-related and other emergencies; assisting participants to benefit from other programs; and coordinating with other appropriate services.

*Comment:* We received comment expressing support for specifying the responsibilities of service providers and suggesting two responsibilities be added: cultural competence training and inclusion of nondiscrimination language.

*Response:* ACL appreciates this comment. Nondiscrimination policies are among the Federal requirements that apply to all service providers under the Act. ACL recognizes that cultural competence training is best offered locally to honor distinct Tribal and Hawaiian Native



differences and local availability. As such we have revised the text to include, “Receive training to provide services in a culturally competent manner and consistent with §§ 1322.13 through 1322.17.”

*§ 1322.21 Client eligibility for participation.*

To be eligible for services under the Act, participants must have attained the minimum age determined by the Tribal organization or Hawaiian Native grantee, except in the case of limited services, such as nutrition and family caregiver support services. We received inquiries, requests for technical assistance, and comments demonstrating misunderstandings among Tribal organizations and Native Hawaiian grantees, as well as from others in the aging network, about eligibility requirements for Title VI services. For example, we received feedback expressing confusion as to whether younger caregivers of adults of any age are eligible to receive Title VI part C program services, which is not allowable under the Act, as well as the circumstances under which non-Native Americans who live within a Tribal organization’s or Hawaiian Native grantee’s approved service area and are considered members of the community by the Tribal organization may be eligible to receive services under this part.

New § 1322.21 clarifies eligibility requirements under the Act and explains that a Tribal organization or Hawaiian Native grantee may adopt additional eligibility requirements, if they do not conflict with the Act, the implementing regulation, or guidance issued by the Assistant Secretary for Aging.

*Comment:* One commenter supported ACL clarifying that a Tribal organization or Native Hawaiian grantee may adopt eligibility requirements beyond those included in the OAA, as long as they don't conflict with the OAA or guidance from the Assistant Secretary for Aging. Another commenter stressed the importance of upholding Tribal sovereignty and favorably cited this provision as honoring sovereignty. We received additional comments encouraging ACL to widen the scope of service to eligible individuals based on their membership status within Federally or State recognized Tribes regardless of having a residence on Federally recognized reservations.

*Response:* These regulations do not require elders receiving services to live on a reservation of a Federally recognized Tribe. In fact, there are Federally recognized Tribes that do not have reservation lands. ACL respects Tribal sovereignty, and has included the following at § 1322.21(b), “A Tribal organization or Hawaiian Native grantee may develop further eligibility requirements for implementation of services for older Native Americans and family caregivers, consistent with the Act and other applicable Federal requirements.” Among these is “geographic boundaries” in § 1322.21(b)(2). As we believe this offers maximum flexibility to Tribes, Tribal organizations, and Hawaiian Native grantees under the Act, we make no further edits to this section.

*§ 1322.23 Client and service priority.*

We previously received numerous inquiries about how a Tribal organization or Hawaiian Native grantee should prioritize providing services to various groups. Questions included whether there was an obligation to serve everyone who sought services and whether services were to be provided on a first-come, first-served basis. Questions about prioritization were particularly prevalent in response to demand for services created in the wake of the COVID-19 Public Health Emergency (PHE). Entities sought clarification on whether they are permitted to set priorities, who is permitted to set priorities, and the degree to which entities have discretion to set their own priority parameters.

New § 1322.23 clarifies that entities may prioritize services and that they have flexibility to set their own policies based on their assessment of local needs and resources. For clarity and convenience, we list the priorities for serving family caregivers as set forth in section 631(b) of the Act.<sup>314</sup>

*Comment:* Commenters supported the flexibility given to Tribal organizations and Native Hawaiian grantees to prioritize services and set their own policies based on their assessment of local need and resources. One commenter requested that language be added to include

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<sup>314</sup> 42 U.S.C. 3057k-11(b).

assessments based on greatest social or economic needs. Another commenter recommended that ACL consider the adoption of explicit language referring to LGBTQI+ Indian and Native Hawaiian older adults, Two-Spirit older adults, and Indian and Native Hawaiian older adults with HIV and including such language in all non-discrimination provisions and in cultural competency training requirements.

*Response:* ACL appreciates these comments and encourages prioritization of services to assist elders with the greatest social and the greatest economic needs, including the populations referenced in the comments. Section 1322.23 directs grantees to conduct their own assessment of local needs and resources, as well as to identify criteria for prioritizing the delivery of services. In order to maintain flexibility of Tribal organizations and Hawaiian Native grantees, ACL declines to further specify how this is done in this rule. However, ACL will provide technical assistance in implementing these provisions.

*§ 1322.29 Family Caregiver Support Services.*

New § 1322.29 implements section 631 of the Act related to family caregiver support services.<sup>315</sup> It clarifies the services available; eligibility requirements for respite care and supplemental services; and allowable use of funds.

*Comment:* Commenters supported the breadth of § 1322.29. One commenter noted that while they support flexible definitions of family caregiving, they are concerned that as more people will be eligible for services, this would require additional funds.

*Response:* ACL appreciates these comments and notes that funding decisions are outside the scope of this rule.

*§ 1322.31 Title VI and Title III coordination.*

Consistent with § 1321.53 (*State agency Title III and Title VI coordination responsibilities*), § 1321.69 (*Area agency on aging Title III and Title VI coordination responsibilities*), and § 1321.95 (*Service provider Title III and Title VI coordination*

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<sup>315</sup> 42 U.S.C. 3057k-11.

*responsibilities*), new § 1322.31 outlines expectations for coordinating activities and delivery of services under Title VI and Title III, as articulated in sections 306(a)(11)(B),<sup>316</sup> 307(a)(21)(A),<sup>317</sup> 614(a)(11),<sup>318</sup> and 624(a)(3) of the Act.<sup>319</sup> We clarify that coordination is required under the Act and that all entities are responsible for coordination, including Tribal organizations and a Hawaiian Native grantee, State agencies, AAAs, and service providers.

*Comment:* Commenters overwhelmingly expressed support for coordination between Title VI and Title III programs. They expressed concern about the lack of coordination between Title VI grantees and State agencies, low amounts of funding provided under Title III to Tribes, and lack of technical assistance on how to apply for available Title III funds. One commenter recommended that any entities involved in provision of services under Title III of the Act develop their procedures for outreach and coordination with the relevant Title VI program director. Another commenter expressed that the proposed language regarding coordination was too permissive. A commenter recommended specifying that services should be delivered in a culturally appropriate and trauma-informed manner. Some commenters also requested technical assistance for State agencies on their roles and responsibilities. We also received other suggestions, program management recommendations, and implementation questions regarding this provision, including regarding examples and best practices for coordination.

*Response:* ACL expects coordination between Title VI and Title III programs. As stated above, § 1322.31 sets forth the same requirements for Title VI programs as are set forth in § 1321.53 for State agencies, in § 1321.69 for AAAs, and in § 1321.95 for service providers under Title III of the Act. Based on the comments received, we revised each provision to use consistent language, where appropriate. We explain the changes made in the following paragraphs.

We have reordered the opening paragraph in § 1322.31 as § 1322.31(a) and have

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<sup>316</sup> 42 U.S.C. 3026(a)(11)(B).

<sup>317</sup> 42 U.S.C. 3027(a)(21)(A).

<sup>318</sup> 42 U.S.C. 3057e(a)(11).

<sup>319</sup> 42 U.S.C. 3057j(a)(3).

reordered the subsequent paragraphs accordingly. We have further revised the language in reorganized § 1322.31(a) to read, “A Tribal organization or Hawaiian Native grantee under Title VI of the Act must have policies and procedures, developed in coordination with the relevant State agency, area agency or agencies, and service provider(s) that explain how the Title VI program will coordinate with Title III and/or VII funded services [...] A Tribal organization or Hawaiian Native grantee may meet these requirements by participating in tribal consultation with the State agency regarding Title VI programs.”

We have created a reordered paragraph § 1322.53(b) and have made revisions to clarify topics that the policies and procedures set forth in paragraph (a) “[...] must at a minimum address[.]” By using these words, ACL makes clear that coordination is required. We have further made edits to include how outreach and referrals will be provided to Tribal elders and family caregivers regarding services for which they may be eligible under Title III and/or VII; remove duplicate language which was incorporated into revised paragraph (a); revise “[...] such as [...]” to “[...] to include [...]” in reference to meetings, email distribution lists, and presentations regarding communication opportunities; add “How services will be provided in a culturally appropriate and trauma-informed manner;” and make other grammatical edits for consistency.

We have also added new § 1322.31(c) to state, “The Title VI program director, as set forth in § 1322.13(a), shall participate in the development of policies and procedures as set forth in §§ 1321.53, 1321.69, and 1321.95.”

There are multiple successful examples of such coordination that ACL is committed to sharing and expanding. We believe that the promulgation of these regulations will provide a significant opportunity to further coordination between Title VI and Title III programs, including improving ACL's monitoring programs for compliance. ACL anticipates providing technical assistance on this provision and other provisions related to coordination among Title VI and Title III programs upon promulgation of the final rule.

Regarding provision of Title III funding to Tribes, the amount of available Title III funding is limited to what is appropriated for such purposes. State agencies are required to distribute such funding to AAAs via an IFF in States with multiple PSAs, as required by the Act and as set forth at § 1321.49. In some States, Tribes have been designated as AAAs and receive Title III funds. Single PSA State agencies are required to distribute funds in accordance with a funds distribution plan as set forth at § 1321.51(b), and Title VI programs may receive funds under a contract or grant with a State agency in such States. State agencies and AAAs are required to establish and follow procurement policies in awarding Title III funds under the Act, which may allow for awarding of funds to Title VI grantees, Tribes, and other Tribal organizations.

ACL emphasizes that this new provision is included based on feedback by Tribes and Title VI-funded programs to specify that coordination is a requirement. While coordination is a requirement, there are various ways for grantees under Title VI and Title III of the Act to coordinate. ACL encourages Tribes and Tribal organizations to apply to provide Title III-funded services. However, the statute does not allow for a requirement that Title III funds be provided to Title VI grantees outside of the procurement policies in place for awarding of Title III funds under the Act.

#### *Subpart D – Emergency & Disaster Requirements*

The COVID-19 PHE highlighted the importance of the efforts of Tribal organizations and the Hawaiian Native grantee to maintain the health and wellness of older Native Americans and family caregivers. Existing guidance on emergency and disaster requirements under the Act is limited and does not contemplate the evolution of what may constitute an “emergency” or “disaster” or how emergencies and disasters may uniquely affect older Native Americans and family caregivers.

If a State or Indian Tribe (whether directly, or through association with the State) receives a MDD by the President under the Robert T. Stafford Disaster Relief and Emergency

Assistance Act, 42 U.S.C. 5121-5207, section 310 of the Act applies, and provides flexibility related to disaster relief.<sup>320</sup> The COVID-19 PHE for example, demonstrated the devastating impact on the target population of services under the Act. During the pandemic, all States and some Indian Tribes received a MDD, and we provided guidance on flexibilities available under the Act while under a MDD to meet the needs of older Native Americans and caregivers, such as those related to meal delivery systems, methods for conducting well-being checks, delivery of pharmacy, grocery, and other supplies, and other vital services.

Throughout the COVID-19 PHE we received inquiries and feedback that demonstrated a need for clarity on available flexibilities in an emergency. RFI and NPRM respondents also provided substantial feedback regarding limitations and the need for additional guidance and options for serving older adults during emergencies. Multiple RFI respondents noted that services under the Act may be impacted by a wide range of emergencies and disasters—including natural, human-caused, climate-related, and viral disasters—and that previous regulatory guidance did not provide service providers under the Act the flexibility necessary to adequately plan for emergency situations. Accordingly, the aging network sought an expansion of the definition of “emergency” that better reflected their realities regarding service delivery. RFI and NPRM respondents also sought guidance on numerous aspects of program and service delivery during an emergency, such as maintaining flexibilities in meal and other service delivery introduced in response to the COVID-19 PHE, allowable spending on disaster mitigation supplies, and providing mental health services to older adults who experience disaster-related trauma. RFI respondents also asked for regulatory language outlining what is expected of a grantee under the Act in an emergency to allow for the development of better emergency and disaster preparedness plans at all levels.

Based on input from interested parties and our experience, particularly during the COVID-19 PHE, we add Subpart D – Emergency and Disaster Requirements (§§ 1322.33 –

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<sup>320</sup> 42 U.S.C. 3030.

1322.39) to explicitly outline expectations and clarify flexibilities that are available in a disaster situation. We considered various approaches in developing this section. Certain flexibilities, such as allowing for carry-out or drive through meals, constitute innovative ways to deliver services that could be allowable on a regular basis within the parameters of Title VI part A or B and without any special authorization by ACL during an emergency. Those flexibilities have been incorporated where applicable in the revised regulation for clarification purposes (see § 1322.27, which addresses carry-out and other alternatives to traditional home-delivered meals). We are limited by the Act in the extent to which other flexibilities may be allowed. For example, a MDD is required in order for a Tribal organization or Hawaiian Native grantee to be permitted, pursuant to section 310(c) of the Act,<sup>321</sup> to use Title VI funds to provide disaster relief services (which must consist of allowable services under the Act) for areas of the service area where the specific major disaster declaration is authorized and where older Native Americans and family caregivers are affected.

*Comment:* We received comment expressing general support for inclusion of this subpart and flexibility to innovatively address disasters and emergencies.

*Response:* ACL appreciates this comment.

*§ 1322.33 Coordination with Tribal, State, and local emergency management.*

New § 1322.33 states that Tribal organizations and Hawaiian Native grantees must establish emergency plans, and this section outlines requirements that these plans must meet. While the Act requires emergency planning by State agencies and area agencies on aging, the Act provides limited guidance regarding emergency planning specific to Title VI grantees. We also include in this section additional guidance in connection with the development of sound emergency plans (such as requirements for continuity of operations planning, taking an all-hazards approach to planning, and coordination among Tribal, State, and local emergency management and other agencies that have responsibility for disaster relief delivery).

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<sup>321</sup> 42 U.S.C. 3030(c).



*Comment:* We received comments supporting ACL's proposal to require Tribal organizations and Hawaiian Native grantees to establish emergency plans, to specify the requirements those plans must meet, and to provide guidance regarding development of emergency plans. We received comment recommending any regulations directing the State agency or AAAs to develop procedures for outreach and coordination with Tribes be developed in consultation with that community's Title VI program directors. Another commenter noted there are existing Tribal emergency plans that could be used to comply with the section and that in incidences where there is an opportunity to coordinate, it could be captured with a memorandum of understanding.

*Response:* ACL appreciates these comments. The provisions in part 1322 are specific to the expectations for grantees under Title VI of the Act. Expectations for grantees under Title III of the Act are in part 1321. In response to the recommendation to consult with the appropriate Title VI program directors, we have made this change at § 1321.103. ACL agrees that existing Tribal emergency plans that address coordination with the services funded under Title VI of the Act, in accordance with these provisions, would meet these expectations. Establishing a memorandum of understanding is also a reasonable method to meet the expectations as set forth. ACL appreciates the comments identifying how implementation of these provisions can be accomplished.

*§ 1322.35 Flexibilities under a major disaster declaration.*

New § 1322.35 outlines disaster relief flexibilities available under a MDD to provide disaster relief services for affected older Native Americans and family caregivers. Recognizing that there is no required period of advance notice of the end of a MDD incident period, the final rule allows a Tribal organization or Hawaiian Native grantee up to 90 days after the expiration of a MDD to obligate funds for disaster relief services.

We received many comments in response to the RFI and NPRM asking that various flexibilities allowed during the COVID-19 PHE remain in place following the end of the PHE.

We are limited by the Act in the extent to which flexibilities may be allowed. For example, a MDD is required in order for a Title VI grantee to be permitted, pursuant to section 310(c) of the Act,<sup>322</sup> to use Title VI funds to provide disaster relief services (which must consist of allowable services under the Act) for areas of the service area where the specific MDD is authorized and where older Native Americans and family caregivers are affected.

*Comment:* We received comments in support of these changes that will better enable OAA-funded programs to serve Native elders in instances of disasters or emergencies. We also received comments with questions if a Tribal declaration needs to be recognized by the non-Tribal entities that are referenced.

*Response:* ACL appreciates these comments and intends to provide technical assistance regarding various declarations that may apply in emergency and disaster situations. We have also made edits to § 1322.35(b) for consistency with the language used in this similar provision in part 1321 and have reordered items accordingly.

*§ 1322.37 Title VI and Title III coordination for emergency and disaster preparedness.*

Section 1321.53 (*State agency Title III and Title VI coordination responsibilities*), § 1321.69 (*Area agency on aging Title III and Title VI coordination responsibilities*), and § 1321.95 (*Service provider Title III and Title VI coordination responsibilities*), outline expectations for coordinating activities and delivery of services under Title III and Title VI, as articulated in the Act sections 306(a)(11)(B),<sup>323</sup> 307(a)(21)(A),<sup>324</sup> 614(a)(11),<sup>325</sup> and 624(a)(3).<sup>326</sup> New § 1322.37 clarifies that Title VI and Title III coordination should extend to emergency and disaster preparedness planning and response.

*Comment:* We received comments supporting the clarification that Title VI and Title III coordination should extend to emergency and disaster preparedness and response. We also

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<sup>322</sup> 42 U.S.C. 3030(c).

<sup>323</sup> 42 U.S.C. 3026(a)(11)(B).

<sup>324</sup> 42 U.S.C. 3027(a)(21)(A).

<sup>325</sup> 42 U.S.C. 3057e(a)(11).

<sup>326</sup> 42 U.S.C. 3057j(a)(3).

received comment noting geographic, historical, and cultural considerations that are part of the preparedness plans developed by the Tribal aging programs that are uniquely Tribal.

*Response:* ACL appreciates these comments and confirms that specific to emergency and disaster coordination, § 1321.97 requires coordination by grantees under Title III of the Act with State, Tribal, and local emergency management, while § 1321.103 requires that State and area agencies coordinate with Title VI programs. These provisions complement this provision at § 1322.37.

*§ 1322.39 Modification during major disaster declaration or public health emergency.*

New § 1322.39 states that the Assistant Secretary for Aging retains the right to modify emergency and disaster-related requirements set forth in the regulation under a MDD or PHE.

### **C. Deleted Provisions**

*§ 1322.5 Applicability of other regulations.*

The final rule removes § 1322.5, which lists other applicable regulations, because the provision is unnecessary and may create confusion or become outdated due to statutory or regulatory changes.

## *PART 1323—GRANTS FOR SUPPORTIVE AND NUTRITIONAL SERVICES TO OLDER HAWAIIAN NATIVES*

### **A. Deleted Provisions**

The final rule removes part 1323, which is specific to Title VI, part B, which applies to one Hawaiian Native grantee. We include requirements specific to Title VI, part B in the revised part 1322. By so doing we anticipate reducing confusion and improving appropriate consistency in service provision to both older Indians and Native Hawaiians and family caregivers thereof.

*Comment:* ACL received comments of appreciation for the proposed changes to clarify Title VI and other provisions of the Act to better allow grantees to serve Native elders and family caregivers. One commenter noted that consolidating the sections referencing Title VI services to Indian Tribes and Native Hawaiian grantees creates more clarity in the regulations, which will

permit grantees to better serve Native American, Alaskan Native, and Native Hawaiian elders and family caregivers.

*Response:* ACL appreciates these comments.

## *PART 1324—ALLOTMENTS FOR VULNERABLE ELDER RIGHTS PROTECTION ACTIVITIES*

### **A. Provisions Revised to Reflect Statutory Changes and/or for Clarity**

#### *Subpart A – State Long-Term Care Ombudsman Program*

The regulation for the State Long-Term Care Ombudsman Program (Ombudsman program) was first issued in 2015. In the eight years since, ACL has provided technical assistance to State Long-Term Care Ombudsmen, State agencies, and designated local Ombudsman entities as they work to implement the regulation. The 2016 reauthorization of the Act also made changes specific to the Ombudsman program. Changes to the regulation are needed to ensure consistency with updates to the Act. Additionally, based on requests for technical assistance and comments to the NPRM, ACL has determined to clarify certain sections of part 1324, including the responsibilities and the authority of the State Long-Term Care Ombudsman (Ombudsman); duties owed to residents regarding confidentiality; and COI requirements.

*Comment:* Many commenters stated support in general for the updating of the regulations to be consistent with Title VII of the Act.

*Response:* ACL appreciates these comments of support. ACL anticipates continuing to provide technical assistance to grantees under Title VII of the Act in support of the individuals served by Title VII programs.

*Comment:* A commenter noted a need for increased funding for Ombudsman programs and legal services for older adults, adding that increased funding would help programs rely less on volunteers. Other organizations commented on the utilization of volunteers in the Ombudsman program and recommended that we establish multiple levels of certification to

account for volunteers who desire fewer responsibilities, noting that training could be adjusted as well.

*Response:* Although program funding is beyond the scope of the rule, we acknowledge the decline in volunteers over multiple years and understand the impact on program resources. The Act calls for the Ombudsman to designate representatives of the Office of the State Long-Term Care Ombudsman (the Office), without distinguishing between paid and volunteer representatives. The rule defines “representatives of the Office” as the “[...] employees or volunteers designated by the Ombudsman to fulfill the duties set forth in § 1324.19(a)[.]” Fulfillment of Ombudsman program duties is the purpose for the Ombudsman’s designation of a representative of the Office. Therefore, it would be inconsistent with this definition for an individual who does not work to resolve complaints and perform the other Ombudsman program functions to be designated by the Ombudsman as a representative of the Office.

Further, the Act requires ACL to develop training standards for representatives; in doing so as sub-regulatory guidance, we sought input from Ombudsman programs across the country to establish a minimum level of training, but several states adjusted their training to provide additional hours and content for representatives who are assigned more complex responsibilities. We have determined that Ombudsman programs have flexibility to assign volunteer duties to meet the needs of the program if they are performing duties described in the rule.

*Comment:* One commenter challenged the accuracy of Frequently Asked Questions that ACL published as sub-regulatory guidance, noting that they contradict the rule.

*Response:* While we respectfully disagree with the concern about the guidance in relation to the prior version of the Ombudsman rule, we intend to review previous sub-regulatory guidance and adjust where necessary to align with this final rule.

#### *§ 1324.1 Definitions.*

We add a new definition for “Official duties” to § 1324.1 for consistency with part 1321 of the regulation, which also contains this defined term. In both parts 1321 and 1324, this term is

used to define the duties of representatives of the Office. As currently defined at § 1324.1, representatives of the Office are the employees or volunteers designated by the Ombudsman to conduct the work of the Ombudsman program. The definition of “Official duties” is included to clarify the role of representatives of the Office. We made clarifications to address misunderstandings of the role expressed by third parties who deal with the Ombudsman program. We also made minor changes to the definition of “*Resident representative.*”

*Comment:* Most commenters agreed with the added and clarified definitions in § 1324.1. Some commenters recommended we add language to clarify that representatives of the Office may be carrying out the duties “[...] by direct delegation from, the State Long-Term Care Ombudsman” in addition to carrying out duties “[...] under the auspices and general direction of, [...] the State Long-Term Care Ombudsman.”

*Response:* We appreciate the comments. We recognize that Ombudsman programs operate in a variety of organizational structures and that direct delegation is one way that programs are managed. We have modified the definition of “Official duties” as recommended. The same change was made in part 1321.

*Comment:* One commenter recommended that we add a definition of “resolved” to support accuracy of data.

*Response:* We appreciate the commenter’s interest in accuracy. Specifying data collection requirements is outside the scope of this rule. The National Ombudsman Reporting System includes definitions for accurate data collection and is accompanied by training and a series of frequently asked questions. We will work with the National Ombudsman Resource Center to continue to refine guidance regarding data collection requirements.

*Comment:* Commenters identified incongruent sentence structure in the proposed modification to the definition of resident representative.

*Response:* We agree with the commenters’ notes about wording and have made technical corrections to that definition.

*Comment:* One commenter underscored the importance of the Ombudsman program being resident-directed and recommended the addition of a definition of “informed consent.” The commenter noted that some long-term care facilities, guardians, and others have attempted to limit the ability of the Ombudsman program to advocate on behalf of residents and that multiple understandings of the term lead to inconsistent application. They suggested including that, when seeking consent, representatives of the Ombudsman program give residents a full explanation of the facts, options, and possible outcomes.

*Response:* We agree that consent is a key to successful advocacy for residents. We will provide technical assistance for obtaining informed consent.

*§ 1324.11 Establishment of the Office of the State Long-Term Care Ombudsman.*

Section 1324.11 sets forth requirements related to the establishment of the Office of the State Long-Term Care Ombudsman (Office). We make minor changes to § 1324.11(a) and to the introductory clause of (b), as well as to (e) introductory text, (e)(1)(i) and (v); (e)(4)(i) through (iii); (e)(5) and (6); and (e)(8)(ii), to clarify the purpose of the section. Other changes to this section are discussed in more detail, below.

In fulfilling their responsibilities, representatives of the Office may need access to the medical, social and/or other records of a resident, and section 712(b) of the Act requires State agencies to ensure that representatives of the Office will have such access, as appropriate, including in the circumstance where a resident is unable to communicate consent to the review and has no legal representative.<sup>327</sup> Previously, § 1324.11 did not require policies and procedures to address access to a resident’s records in this circumstance by the Ombudsman and the representatives of the Office, and we receive many requests for technical assistance as to how to address this situation. Accordingly, we add language in § 1324.11(e)(2) to require policies and procedures to provide direction for the Ombudsman and representatives of the Office as to how to address a situation where a resident is unable to communicate consent to the review of their

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<sup>327</sup> 42 U.S.C. 3058g(b).

records and they have no legal representative who can communicate consent for them. We add the requirement for policies and procedures as § 1324.11(e)(2)(iv)(C) and renumber subsequent subsections within § 1324.11(e)(2)(iv).

A major tenet of the Ombudsman program is that it is resident-directed. This concept extends to if and how information about a resident's complaints is disclosed, and section 712(d) of the Act requires State agencies to prohibit the disclosure of the identity of a resident without their consent.<sup>328</sup> We have received many requests for technical assistance as to how to address a situation when the resident is unable to provide consent to disclose; there is no resident representative authorized to act on behalf of the resident; or the resident representative refuses consent and there is reasonable cause to believe the resident's representative has taken an action, failed to act, or otherwise made a decision that may adversely affect the resident. We add language to § 1324.11(e)(3)(iv) to require State agencies to have policies and procedures in place to provide direction for representatives of the Office as to how to address these situations.

States may have laws that require mandatory reporting of abuse, neglect, and exploitation. We have received questions as to the applicability of these requirements to the Ombudsman program, despite the prohibitions in section 712(b) of the Act against disclosure of resident records and identifying information without resident consent.<sup>329</sup> To clarify existing requirements, we add language to § 1324.11(e)(3)(v) to require State agencies to have policies and procedures in place to make clear that mandatory reporting of abuse, neglect, and exploitation by the Ombudsman program is prohibited. Subsequent subsections within § 1324.11(e)(3) have been re-numbered to reflect the new language.

Section 712 of the Act requires the Ombudsman program to represent the interests of residents before government agencies and to seek administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents.<sup>330</sup> Section 712 also provides that

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<sup>328</sup> *Id.* section 3058g(d).

<sup>329</sup> *Id.* section 3058g(b).

<sup>330</sup> *Id.* section 3058g.



the Ombudsman, personally or through representatives of the Office, is to analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other governmental policies and actions that pertain to the health, safety, welfare, and rights of the residents, with respect to the adequacy of long-term care facilities and services in the State; recommend any changes in such laws, regulations, policies, and actions as the Office determines to be appropriate; and review, and if necessary, comment on any existing and proposed laws, regulations, and other government policies and actions, that pertain to the rights and well-being of residents.<sup>331</sup> To be a strong advocate, the Ombudsman must be able to make determinations and to establish positions of the Office independently and without interference and must not be constrained by determinations or positions of the agency in which the Office is organizationally located.

In response to information ACL received about State government agencies engaging in interference prohibited under section 712 of the Act<sup>332</sup> (e.g., by requiring prior approval of positions of the Office regarding governmental laws, regulations, or policies), we add language to the introductory portion of § 1324.11(e)(8) to clarify this prohibition. Specifically, we replace the existing phrase “[...] without necessarily representing the determinations or positions of the State agency or other agency in which the Office is organizationally located” with “[...] without interference and shall not be constrained by or necessarily represent the determinations or positions of the State agency or other agency in which the Office is organizationally located.”

*Comment:* One commenter recommended the addition of language to clarify that any work for non-ombudsman services or programs must not utilize funding designated for the Ombudsman program and must not interfere with the duties and functions of the Ombudsman program.

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<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

*Response:* Section 1324.13(f) directs the Ombudsman to determine the use of fiscal resources appropriated for or otherwise available for the operation of the Office, including determining that program budgets and expenditures of local Ombudsman entities are consistent with laws, policies, and procedures governing the Ombudsman program. Further, § 1324.11(e)(1)(vi) provides that procedures that clarify fiscal responsibilities of local Ombudsman entities include clarifications about access to programmatic fiscal information by appropriate representatives of the Office. Therefore, we believe the recommendation of the commenter would be most appropriately handled through Ombudsman policies and procedures, and we have elected not to make a change to the rule.

*Comment:* Commenters recommended additional requirements for qualification to serve as the State Long-Term Care Ombudsman. Recommendations included educational requirements, minimum years of experience in the current role or in the field, expertise in the legal system and legislative process as well as organizational management and program administration, and gaps in employment with a long-term care facility.

*Response:* The rule includes several areas of expertise required of an Ombudsman as well as a one-year cooling off period after employment by a long-term care facility, as required by section 712(f)(1)(C)(iii) of the Act.<sup>333</sup> Given the statutory requirement, we have retained this provision as proposed.

*Comment:* Many commenters recommended ACL clarify in part 1324 the authority of the Ombudsman to develop policies and procedures, noting that such authority is critical to their responsibility for program operation, monitoring, and service delivery. One commenter suggested the regulations grant the Ombudsman full legal authority to establish policies and procedures.

*Response:* We have modified § 1324.11(e) to clarify that the agency shall establish Ombudsman program policies and procedures as recommended by the Ombudsman. The edit is

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<sup>333</sup> 42 U.S.C. 3058g(f)(1)(C)(iii).

designed to ensure that the Ombudsman leads development of policies and procedures. We decline to require that the Ombudsman have full legal authority to establish policy and procedures to allow for coordination and cooperation and where State law does not provide such authority.

*Comment:* One commenter recommended that ACL add a requirement for policies and procedures for emergency and disaster preparedness and response that would incorporate continuity of operations planning, all-hazards planning, and coordination with emergency management agencies.

*Response:* The COVID-19 PHE provided new opportunities for Ombudsman programs to forge relationships with emergency management agencies and public health agencies, and we agree that some programs were more equipped than others to create and implement continuity of operations plans. We appreciate the comment and have added a requirement in § 1324.11(e) that policies and procedures related to emergency planning include continuity of operations procedures. Additionally, we will provide technical assistance to Ombudsman programs to implement the new requirement.

*Comment:* One commenter recommended that ACL establish a requirement for the Ombudsman to collaborate with area agencies on aging to create a uniform system for monitoring local Ombudsman entities to assure that designated programs are performing duties as required. Another commenter noted that varied processes lead to extra requests for information that take up limited program resources. Several commenters recommended a standard frequency of monitoring, such as every one to four years or every two to three years.

*Response:* Section 1324.11(e) requires that when local Ombudsman entities are designated within area agencies on aging or other entities, the Ombudsman shall develop such policies and procedures in consultation with the agencies hosting local Ombudsman entities and with representatives of the Office. However, the rule does not clearly require consultation with

area agencies on aging when the area agency on aging is not the host agency for the local Ombudsman program. Therefore, we have amended § 1324.11(e) to add such consultation.

Further, we use this rule to make § 1324.11(e) consistent with § 1324.13(c), which requires the Ombudsman to monitor local Ombudsman entities “on a regular basis.” Specifically, we modify § 1324.11(e)(1)(iii) to require monitoring “on a regular basis” defer to the Ombudsman to define “regular” in terms of the frequency of monitoring, in consultation with area agencies on aging based on the revision to § 1324.11(e) described above. Because resources vary and there are other factors that would determine an appropriate monitoring frequency, we are not prescribing a timeframe.

*Comment:* Several commenters recommended edits to § 1324.11(e)(1)(v) to clarify the standards the Ombudsman must establish regarding response times to complaints.

*Response:* We appreciate the comments and agree that clarification of the rule will assist Ombudsman programs to establish timeframes for response to complaints made by or on behalf of residents. Therefore, we have revised the section to clarify the standards the Ombudsman must establish based on the needs and resources of the program.

*Comment:* A few organizations commented on § 1324.11(e)(1)(vi), recommending language to ensure that the Ombudsman program manager at local Ombudsman entities is involved in the budget and expenditure process and receives regular reports of fund balances and expenditures.

*Response:* Section § 1324.11(e)(1)(vi) addresses procedures regarding fiscal responsibilities of the local Ombudsman entity such as access to programmatic fiscal information by appropriate representatives of the Office. This subsection provides general guidance while allowing State agencies and Ombudsman to devise the policies and procedures that fit their specific program structures and resources. We are not changing the language but will provide targeted technical assistance in the future.

*Comment:* Commenters recommended an addition to procedural requirements to establish time frames and methods of destruction of Ombudsman program records. One commenter also suggested a statement that Ombudsman program records are not subject to public records or freedom of information requests.

*Response:* ACL has received questions from Ombudsman programs about record retention requirements and appreciates the comment raising the issue in the context of the rule. We agree that requiring Ombudsman programs to have policies and procedures regarding timeframes would help with consistent response to requests for records. Therefore, we have added a requirement at § 1324.11(e)(1)(vii) for Ombudsman programs to have procedures regarding record retention. We believe that existing provisions in section 712 of the Older Americans Act<sup>334</sup> and at § 1324.11(e)(3) support confidentiality of records. ACL intends to provide additional sub-regulatory guidance for implementation of existing requirements.

*Comment:* Some commenters recommended that § 1324.11(e)(2), which addresses procedures for access to facilities, residents, and records, be amended to require access to long-term care facilities at any time to ensure residents have unrestricted access to representatives of the Office. Other recommendations include that ACL specify that long-term care facilities must provide the Ombudsman and/or representatives of the Office with resident names, contact information, and room numbers so that representatives can quickly and easily locate residents; and to set specific maximum timeframes to produce the roster and other requested information. One commenter also recommended that ACL clarify that failure to comply would constitute willful interference.

*Response:* ACL does not have authority to establish requirements for long-term care facilities. We have determined that existing requirements for policies and procedures coupled with State agency requirements about interference at § 1324.15(i) provide sufficient guidance for Ombudsmen and State agencies to collaborate on how to ensure that representatives of the Office

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<sup>334</sup> 42 U.S.C. 3058g.

can perform their duties effectively. We appreciate the suggestions, and ACL intends to offer technical assistance and make best practices available to support Ombudsmen and representatives of the Office to fulfill their duties.

*Comment:* Many commenters expressed support for the new requirement at § 1324.11(e)(3)(iv), that policies and procedures about disclosure of files, records, and other information maintained by the Ombudsman program must include standard criteria for making determinations about disclosure of resident information when the resident is unable to provide consent and there is no resident representative or the resident representative refuses consent in certain circumstances as set forth.

*Response:* ACL appreciates the support of this provision. We note the related clarification to § 1324.11(e)(2)(iv)(C). When a resident is unable to grant or decline consent and there is no legal representative, the representative of the Office must seek approval of the Ombudsman. The clarification makes § 1324.11(e)(2)(iv)(C) consistent with § 1324.11(e)(2)(iv)(D).

*Comment:* One commenter requested that we clarify the requirement in § 1324.11(e)(3)(iv) regarding policies and procedures for obtaining consent to include non-verbal consent as an acceptable method.

*Response:* The existing rule provides for consent to be provided orally, visually, or through the use of auxiliary aids and services. ACL intends that visual or assisted communication includes non-verbal forms of communication and will retain the existing language.

*Comment:* Many commenters expressed support for the proposed clarification of § 1324.11(e)(3)(v). One commenter noted that despite long-standing requirements about disclosure and consent, mandatory reporting requirements have continued to be an issue in States where the Ombudsman program is not exempt from reporting in State rules, laws, and professional licensing requirements. One commenter recommended that we use “mandated” as that is the most common term for such provisions.

*Response:* We appreciate the comment and have made the requested modification in the final rule. In reviewing the NPRM we identified a technical error; the new provision at § 1324.11(e)(3)(v) should have replaced the language in § 1324.11(e)(3)(vi). Paragraphs have been merged and renumbered in the final rule.

*Comment:* Many commenters expressed support for the change to § 1324.11(e)(6)(i), which removed “adequately” in regard to removing or remedying COI, as it allows for less ambiguity.

*Response:* We appreciate the support of the modification.

*Comment:* One organization recommended adding that the policies and procedures regarding grievances in § 1324.11(e)(7); personnel management in § 1324.17; and COI in §1324.21 be “fair” if an Ombudsman takes adverse action on designation of a local Ombudsman entity, noting that removal of designation and certification could be arbitrary actions. They additionally recommended a requirement to provide the grievance process in writing to covered entities and individuals in advance.

*Response:* ACL believes that the regulatory language is sufficient to address the concern, and will provide technical assistance and additional guidance, if necessary, in consultation with interested parties.

*Comment:* Many commenters raised concerns that the subject of determinations identified in § 1324.11(e)(8)(i) through (iii) is too narrow and does not include other areas of Ombudsman program operations about which the Ombudsman makes determinations (e.g., complaint processing, contents of the annual report). Commenters suggested that changing “regarding” to “including” would clarify that the areas listed are not all-inclusive but are examples and suggested adding the annual report as required in § 1324.13(g). They cited instances of host agencies editing determinations. One commenter recommended seeking input from representatives of the Office when making determinations regarding systems advocacy.

*Response:* We appreciate the explanation and information about Ombudsman program experiences and note that the examples in the existing rule are also included in § 1324.13 (*Functions and responsibilities of the State Long-Term Care Ombudsman*). Therefore, we have amended § 1324.11(e)(8) to refer to the functions and responsibilities of the Ombudsman. We will provide technical assistance on practices for seeking input, including regular review of Ombudsman records, data analysis, or direct consultation with representatives of the Office.

*§ 1324.13 Functions and responsibilities of the State Long-Term Care Ombudsman.*

Section 712 of the Act sets forth the functions and roles of the Ombudsman and provides that the Ombudsman has the authority to make independent determinations in connection with these various functions.<sup>335</sup> Through technical assistance inquiries, monitoring activities, and RFI comments, we have been made aware of instances where a State agency does not understand the authority and independence of the Ombudsman, such as with respect to commenting on governmental policy. We clarify § 1324.13 to provide that the Ombudsman has the authority to lead and manage the Office. Specifically, we change the phrase in the first sentence “[...] responsibility for the leadership [...]” to “[...] responsibility and authority for the leadership [...]” to emphasize the authority of the Ombudsman to carry out the statutory functions.

Section 201(d) of the Act provides for oversight of the Ombudsman program by a Director of the Office of Long-Term Care Ombudsman Programs.<sup>336</sup> We update § 1324.13(c)(2) to take into account previous sub-regulatory guidance and require training for certification and continuing education procedures to be based on and consistent with the standards established by ACL’s Director of the Office of Long-Term Care Ombudsman Programs, as well as with any standards set forth by the Assistant Secretary for Aging.

Section 712 of the Act contains detailed requirements with which representatives of the Office must comply, such as requirements as to confidentiality of resident records, as well as

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<sup>335</sup> *Id.* section 3058g.

<sup>336</sup> 42 U.S.C. 3011(d).



limitations on disclosure of such records and on the disclosure of the identity of residents.<sup>337</sup>

Section 712 also requires that representatives receive adequate training with respect to program requirements.<sup>338</sup> We have been made aware of instances where staff of the Ombudsman program have had access to resident records without training or certification as a representative of the Office. Pursuant to the statutory requirements, and to address instances of noncompliance, § 1324.13(c)(2)(iii) and (d) require that all staff and volunteers of the Ombudsman program who will have access to resident records, as well as other files, records, and information subject to disclosure requirements, be trained and certified as designated representatives of the Office, so that individuals with access to confidential information will be accountable to the Ombudsman for their actions. The subsequent subsection in § 1324.13(c)(2) is re-numbered accordingly.

The Act affords the Ombudsman discretion in determining whether to disclose the files, records, or other information of the Office. ACL often receives requests for technical assistance regarding criteria for such determinations. In response, we add to § 1324.13(e)(2) the following criteria to assist the Ombudsman in making this determination: whether the disclosure has the potential to cause retaliation, to undermine the working relationships between the Ombudsman program and other entities, or to undermine other official duties of the Ombudsman program.

We are aware of an apparent conflict between provisions of the Developmental Disabilities Act, which affords protection and advocacy programs access to resident records, and provisions of the OAA which prohibit the Ombudsman from disclosing resident-identifying information and afford the Ombudsman discretion in determining whether to disclose the files, records, or other information of the Office.<sup>339</sup> Consistent with our authority to interpret these two statutes, we have worked with protection and advocacy and Long-Term Care Ombudsman programs to collect additional information on the experiences and circumstances of grantees related to this issue. As a result of these efforts, ACL has offered technical assistance to

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<sup>337</sup> 42 U.S.C. 3058g.

<sup>338</sup> *Id.*

<sup>339</sup> 42 U.S.C. 15043.

individual States as issues arise to assist protection and advocacy and Ombudsman programs to come to an agreement on how to handle these questions. ACL technical assistance centers have co-branded a toolkit on collaboration between Ombudsman programs and protection and advocacy agencies.<sup>340</sup> We encourage such collaboration.

Section 712(h) of the Act provides that the State agency must require the Ombudsman program to submit an annual report that, among other things, describes the activities carried out by the Office, evaluates problems experienced by residents, analyzes the success of the Ombudsman program, and makes recommendations to improve the quality of life of residents.<sup>341</sup> This information is separate from and in addition to the data reported annually to ACL through the national data reporting system known as the National Ombudsman Reporting System (NORS). We have found that some Ombudsman programs do not understand that the annual report required by section 712 differs from the annual NORS reporting. We add language to § 1324.13(g) to clarify the distinction between reports required by section 712 and NORS.

The Ombudsman program's effectiveness in advocacy relies on relationships with other entities that can assist residents. Section 712 of the Act also requires that the Ombudsman program will coordinate services with legal assistance providers and others, as appropriate, and enter into a memorandum of understanding with legal assistance providers.<sup>342</sup> We revise § 1324.13(h)(1)(i) to require the adoption of memoranda of understanding with legal assistance programs provided under section 306(a)(2)(C) of the Act<sup>343</sup> that address, at a minimum, referral processes and strategies to be used when the Ombudsman and a legal assistance programs are both providing services to a resident.

Further, the final rule requires memoranda of understanding with facility and long-term care provider licensing and certification programs to address communication protocols and

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<sup>340</sup> *Long-Term Care Ombudsman Programs and Protection & Advocacy Agencies Collaboration Toolkit*, The Nat'l Consumer Voice for Long Term Care, [https://ltombudsman.org/omb\\_support/pm/collaboration/ltcop-protection-and-advocacy-agencies-collaboration-toolkit](https://ltombudsman.org/omb_support/pm/collaboration/ltcop-protection-and-advocacy-agencies-collaboration-toolkit) (last visited Oct. 13, 2023).

<sup>341</sup> 42 U.S.C. 3058g(h).

<sup>342</sup> *Id.* section 3058g.

<sup>343</sup> 42 U.S.C. 3026(a)(2)(C).

procedures to share information, including procedures for access to copies of licensing and certification records maintained by the State. Federal nursing home regulations require interaction between Ombudsman programs and licensing and certification programs. The goal of this requirement is to foster consistency in the relationships among Ombudsman programs and regulators across the country and support communication about all types of long-term care providers regulated by the State. Language regarding this requirement is set forth in § 1324.13(h)(1)(ii).

We also clarify that memoranda of understanding are recommended with other organizations, programs and systems as set forth in § 1324.13(h)(2). Elements of § 1324.13(h) have been re-numbered in connection with these changes. We also make minor changes to § 1324.13(a)(7)(vii) and (h) for clarity.

*Comment:* A few commenters expressed support for clarification of the Ombudsman's authority to lead and manage the Office, noting that the update would increase program effectiveness by limiting barriers in program implementation.

*Response:* We appreciate the support and have finalized the rule as proposed.

*Comment:* Commenters expressed support for existing language requiring Ombudsman review and approval of plans and contracts governing local Ombudsman entities, noting appreciation for oversight by the Ombudsman as well as support for the updated language about training.

*Response:* ACL appreciates the support.

*Comment:* Commenters expressed support for the language at § 1324.13(c)(2)(iii) that removes ambiguity and ensures that staff and volunteers who have access to records are trained and designated. One commenter asked whether ACL requires the Office to use the training curriculum developed by the National Ombudsman Resource Center. One commenter recommended that ACL require supervision during training only when the trainee is working directly with residents and facility staff and not during documentation or administrative duties.

*Response:* The rule at § 1324.13(c)(2)(iii) has been finalized as proposed. ACL does not require Ombudsman programs to use the model training that was developed to assist programs and inform a State-specific curriculum if the training curriculum used complies with the minimum standards developed and issued as sub-regulatory guidance. We defer to the Ombudsman to determine implementation of the supervision requirement that meets the needs of the program. ACL will provide technical assistance as needed.

*Comment:* Commenters proposed language requiring the Ombudsman to work with designated program coordinators at local Ombudsman entities to create and revise local program budgets and to work with host agencies to ensure programs have regular access to reports on income and expenditures. One commenter recommended that ACL require certification from the Ombudsman program manager at local Ombudsman entities that they have consulted on and approved the expenditures of the local Ombudsman entity.

*Response:* Section 1324.11(e)(1) requires that procedures clarify access to programmatic fiscal information by appropriate representatives of the Office, and §§ 1324.11(e)(1)(iii), 1324.13(c)(1)(iii) require monitoring of local Ombudsman entities on a regular basis. ACL will provide technical assistance to programs as needed to ensure compliance.

*Comment:* Many commenters expressed support for the proposed clarification of the annual reporting requirement in addition to the data report submitted to ACL. Commenters additionally recommended the addition of “dissemination” of the report and reference to the requirement for independent development.

*Response:* We appreciate the suggested edit and have added dissemination to § 1324.13(g).

*Comment:* Many commenters provided feedback on the proposed new requirement at § 1324.13(h) to establish a memorandum of understanding with the State entity responsible for licensing and certification of long-term care facilities (State survey agencies). Some responses supported the proposal without modification. There was also a suggestion to include State mental

health departments and others with a role in providing access to LTC facilities or community-based services. Others recommended modification to require State survey agencies to provide Ombudsman programs with unredacted records and all records. Additionally, some commenters objected to the provision for communication protocols and sharing of information to be included in the memorandum of understanding.

*Response:* We agree with the suggestion to include mental health authorities as an optional entity with which to execute a memorandum of understanding and have added this at § 1324.13(h)(2)(x). Ombudsman programs have reported an increase in residents of LTC facilities who have mental illness and substance use disorders.

ACL does not have authority to require State survey agencies to release information to Ombudsman programs. The memorandum of understanding, however, will help clarify the information that can be shared and how it will be shared, and will support formalized protocols for communication to create consistency and to eliminate the gaps that Ombudsman programs report. Therefore, we have finalized the rule as proposed and will provide technical assistance to address the concerns raised by commenters.

*Comment:* One commenter asked for clarification of the difference between the memorandum of understanding requirement with legal assistance providers and the suggested agreement with the legal assistance developer. They raised concerns about the need to have a separate agreement with each legal assistance provider in a State that does not have a centralized legal assistance program.

*Response:* Due to the variety of structures of both Ombudsman programs and legal assistance programs, we defer to the Ombudsman to determine how to implement the requirement within the State-specific structure and community resources. We refer commenters to the existing toolkit for collaboration between Ombudsman programs and legal services. ACL will continue to provide technical assistance through our legal assistance and ombudsman resource centers.

*Comment:* Commenters expressed concern that § 1324.13(i), which defines activities to be performed by the Ombudsman to include activities determined by the Assistant Secretary to be appropriate, could lead to “mission drift.” They recommended qualifying language that such other activities must not conflict with the duties and responsibilities of the Ombudsman program and must be relevant to the program and residents.

*Response:* We accept the comment and have revised this provision accordingly.

*§ 1324.15 State agency responsibilities related to the Ombudsman program.*

Section 712 of the Act sets forth State agency responsibilities for the Ombudsman program.<sup>344</sup> Section 712(g) of the Act requires the State agency to ensure that adequate legal counsel is available with respect to the program, and § 1324.15(j) explains those requirements.<sup>345</sup> We include minor changes to this section for clarity. For example, the requirements and detail about the scope of responsibility of legal counsel are reorganized to clarify that legal counsel is to be available for consultation on program matters, as well as consultation to the program on the legal needs of residents. The regulations modify the provision for attorney-client privilege to specify that the privilege applies to communications between the Ombudsman and their legal counsel, not between the Ombudsman and counsel for the resident.

We receive many requests for technical assistance with respect to the requirement in section 712 of the Act that the Ombudsman be responsible for fiscal management of the Office.<sup>346</sup> Revised § 1324.15(k) addresses specific components of fiscal management and codifies best practices. Specifically, the State agency must notify the Ombudsman of all sources of funds for the program and requirements for those funds and must ensure that the Ombudsman has full authority to determine the use of fiscal resources for the Office and to approve allocation to designated local Ombudsman entities before distribution of funds. In addition, the revised section requires the Ombudsman to determine that program budgets and expenditures of the

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<sup>344</sup> 42 U.S.C. 3058g.

<sup>345</sup> *Id.* section 3058g(g).

<sup>346</sup> *Id.* section 3058g(a)(2).

Office and local Ombudsman entities are consistent with laws, policies, and procedures governing the Ombudsman program. ACL anticipates providing training and technical assistance for the implementation of these requirements. The section immediately following new § 1324.15(k) is re-numbered accordingly.

We also replace the word “of” with “for” in the last sentence of § 1324.15(e) to correct a typographical error relating to reasonable requests “for” reports by the State agency as it conducts its monitoring responsibilities.

*Comment:* Many commenters recommended modification to § 1324.15(b) to ensure that State agencies implement requirements of part 1324 in the establishment and operation of the Ombudsman program with the necessary authority to perform its functions. The recommended amendment would add a requirement for State agencies to ensure that the Office acts independent of the State agency, or other agency in which the Office is organizationally located, in the performance of the Ombudsman program’s functions, responsibilities, and duties. Another commenter recommended that State agency monitoring include a review and documentation of the Ombudsman program’s systems advocacy activities through a request for examples.

*Response:* The rule requires the State agency to ensure that the Ombudsman program has sufficient authority and access to fully perform all the functions, responsibilities, and duties of the Office. As stated earlier § 1324.11 requires establishment of the Office of the State Long-Term Care Ombudsman as a distinct, separately identifiable entity that authorizes the Ombudsman, as head of the Office, to make independent determinations and establish positions that do not necessarily represent the determinations or positions of the agency in which it is located. We reiterate that we have accepted comments to clarify that § 1324.11(e)(8) applies to all determinations. Further, § 1324.15(e) requires the State agency to assess as part of its monitoring whether the Ombudsman program is performing all the functions, responsibilities, and duties set forth in §§ 1324.13 and 1324.19. Therefore, ACL believes that the rule provides

both clear requirements for functional autonomy and for assurance of implementation. ACL intends to provide technical assistance on implementation of monitoring responsibilities.

*Comment:* Many commenters expressed support for § 1324.15(j) regarding legal counsel and the State agency's role in ensuring that effective legal representation and consultation is available. Commenters also stated that local representatives of the Office need to have an attorney present when participating in legal proceedings such as depositions and hearings.

*Response:* We appreciate support for § 1324.15(j). ACL will defer to the Ombudsman and the attorneys it chooses to work with on specific matters related to representation.

*Comment:* Many commenters expressed strong support for clarifying language at § 1324.15(k) that defines the expectations for the State agency to provide critical information for the Ombudsman to manage the fiscal components of the Ombudsman program efficiently and effectively. One commenter noted that the revision will help eliminate confusion and disparities around the country. Another recommended adding a requirement for the Ombudsman program manager of the local Ombudsman entity to approve initial budgets, expenditures, and changes and to certify that the manager has been involved in and approved expenditures as well as being provided with access to fiscal information throughout the year.

*Response:* We believe that the recommendation regarding § 1324.15(k) is addressed in § 1324.11(e)(1)(vi) and in § 1324.13(f), which discuss policies and procedures and fiscal responsibility. We decline to make the change.

*§ 1324.17 Responsibilities of agencies hosting local Ombudsman entities.*

We did not propose any changes to § 1324.17, which sets forth the responsibilities of agencies hosting local Ombudsman entities for the personnel management policies and procedures. This section prohibits host agencies from establishing policies and procedures that prohibit the representative of the Office from performing their duties as authorized by law.



*Comment:* A few commenters expressed concern that some local host agencies do not support representatives of the Office performing systems advocacy and recommended explicit language to ensure that local representatives of the Office are insulated from interference.

*Response:* As noted above, § 1324.17 prohibits policies and procedures that would interfere with the representative of the Office's performance of their duties. Section 1324.11(e)(5) discusses the duty to engage in systems advocacy. Further, § 1324.19(a)(7) requires representatives of the Office to carry out other activities that the Ombudsman determines to be appropriate. Taken together with §§ 1324.11 and 1324.13, which authorize the Ombudsman to make determinations and establish positions of the Office, these sections support engaging in systems advocacy related to the determinations and positions established by the Ombudsman. The ACL Office of Long-Term Care Ombudsman Programs learns about these types of program barriers through technical assistance and review of State Ombudsman annual reports. As needed, these issues are addressed through additional technical assistance, training, and requests for corrective action.

*§ 1324.19 Duties of the representatives of the Office.*

This section addresses the duties of the representatives of the Office and provides detailed instructions as to the processing of complaints by representatives of the Office. Minor revisions are made to § 1324.19(b)(2)(ii) and (b)(5) for clarity.

*Comment:* One commenter recommended editing § 1324.19(a)(7) to ensure that representatives of the Office are not required to perform activities that are inconsistent with the program requirements.

*Response:* We have accepted the comment.

*Comment:* One commenter requested that we clarify that providing consent to complaint processing includes non-verbal consent.

*Response:* The rule allows consent to be provided orally, visually, or using auxiliary aids and services. ACL intends that visual or assisted communication includes non-verbal forms of communication, and we have finalized the rule as written.

*Comment:* One commenter identified various mechanisms that authorize an individual to serve as a representative for a resident and suggested the Ombudsman be required to provide guidance to representatives of the Office about these mechanisms.

*Response:* We thank the commenter for the suggestion. ACL training standards already require training about the role of resident representatives, resident decision-making supports and options, State laws on third-party decision makers, communication with resident representatives, and ascertaining the extent of the resident representative's authority.

*§ 1324.21 Conflicts of interest.*

Section 712(f) of the Act sets forth requirements related to individual and organizational COI, and § 1324.21 implements the statutory provision. COI provisions promote credibility and effectiveness of the Ombudsman program.<sup>347</sup>

Section 1324.21(a) sets out as organizational conflicts the placement of an Ombudsman program in specified organizations. These include an organization that is responsible for licensing, surveying, or certifying long-term care services, including facilities; that provides long-term services and supports under a Medicaid waiver or a Medicaid State plan; that conducts preadmission screening for long-term care facility admissions; that provides long-term care coordination or case management services in settings that include long-term care facilities; that sets reimbursement rates for long-term care services; or that is responsible for eligibility determinations for the Medicaid program carried out under title XIX of the Social Security Act.<sup>348</sup>

We make minor clarifying changes to § 1324.21(b)(3). We remove the last sentence of §

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<sup>347</sup> *Id.* section 3058g(f).

<sup>348</sup> 42 U.S.C. 1396-1396v

1324.21(b)(5), which repeats language included in § 1324.21(b)(3).

We clarify in § 1324.21(c) situations that create an individual COI, consistent with section 712(f)(1)(C) of the Act.<sup>349</sup>

*Comment:* Most commenters expressed support for aligning the regulations regarding COI with the underlying statutory provisions. One expressed concern about separating Ombudsman program staff from agency staff serving people with greatest economic or social need, noting that such separation increases the difficulty of all staff to understand and benefit from the valuable role of the Ombudsman program. Another commented that it is acceptable for Ombudsman programs and APS to be in the same agency with appropriate firewalls. One commenter recommended adding a definition of long-term care services and noted that the expanded list could narrow the list of entities willing to house the program in a decentralized model.

*Response:* As stated, § 1324.21 is consistent with the COI provisions in section 712 of the Act.<sup>350</sup> We will update our sub-regulatory guidance as State agencies and Ombudsman programs work to implement the requirements. We refer commenters to section 102 of the Older Americans Act and § 1324.1 for definitions.<sup>351</sup>

## **B. New Provisions Added to Clarify Responsibilities and Requirements Under Allotments for Vulnerable Elder Rights Protection Activities**

### *Subpart B – Programs for Prevention of Elder Abuse, Neglect, and Exploitation*

*§ 1324.201 State agency responsibilities for the prevention of elder abuse, neglect, and exploitation.*

Title VII, chapter 3 of the Act sets forth requirements that State agencies must meet with respect to the development and enhancement of programs to address elder abuse, neglect, and

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<sup>349</sup> 42 U.S.C. 3058g(f)(1)(C).

<sup>350</sup> 42 U.S.C. 3058g.

<sup>351</sup> 42 U.S.C. 3002.

exploitation.<sup>352</sup> New § 1324.201 clarifies that as a condition of receiving Federal funds under this chapter State agencies must comply with all applicable provisions of the Act, including those of section 721(c), (d), (e), as well as with all other applicable Federal requirements.<sup>353</sup>

*Comment:* ACL received comments on this section supportive of the addition. They also recommended that ACL consider the prevalence of elder abuse within LGBTQI+ and HIV positive communities, including residents of long-term care facilities. One commenter recommended that State agencies partner with and support State and Tribal elder justice coalitions to ensure coordination and guidance from interested parties in development of the elder justice system, dissemination of information and educational resources, and to provide policy consultation and research.

*Response:* ACL appreciates the support. Section 721 of the Act requires coordination, and ACL has elected not to repeat statutory language.<sup>354</sup>

### *Subpart C – State Legal Assistance Development*

#### *§ 1324.301 Definitions.*

New § 1324.301 states definitions set forth in § 1321.3 apply to subpart C, and terms used in subpart C but not otherwise defined will have the meanings ascribed to them in the Act.

#### *§ 1324.303 Legal Assistance Developer.*

We add a new regulation under Title VII, § 1324.303 to implement section 731 of the Act regarding the position of Legal Assistance Developer (LAD).<sup>355</sup> The State agency designates the LAD and describes the office and its duties as well as activities in the State plan. The regulation sets forth the duties of the LAD, including training and technical assistance to legal assistance providers and coordination with the Ombudsman program. The final rule includes COI prohibitions, including a prohibition against undertaking responsibilities that might compromise

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<sup>352</sup> 42 U.S.C. 3058i.

<sup>353</sup> *Id.* section 3058i(c), (d), (e).

<sup>354</sup> *Id.* section 3058i.

<sup>355</sup> 42 U.S.C. 3058j.

the performance of duties as LAD. COI may arise if the LAD serves as the director of the APS program, legal counsel to the Ombudsman program, or counsel or a party to administrative appeals related to long-term care settings. COI may also arise, for example, if the LAD serves as the administrator of a public guardianship program; hearing officer in Medicaid appeals related to LTSS delivered under Medicaid authorities including waiver programs and Medicaid State plan, and/or nursing home eligibility; or serves as the Ombudsman.

The LAD oversees advice, training, and technical assistance support for the provision of legal assistance provided by the State agency; coordinates with all legal assistance and representation for all priority areas described in the Act; and coordinates with the legal assistance resource center established pursuant to section 420 of the Act.<sup>356</sup>

*Comment:* Section 1324.303 sets forth the requirements for the LAD, pursuant to section 731 of the OAA.<sup>357</sup> Several commenters were appreciative of the clarification regarding the roles and responsibilities of the LAD. Most, however, discussed challenges facing the position, including a lack of adequate funding and its designation as a part-time position. Some described the LAD as wearing many hats and noted that many LADs are not lawyers, potentially hindering their ability to support the needs of the legal assistance program, including support for legal assistance and elder rights education, and coordination with the Ombudsman program and APS. One commenter stated that it is a misnomer to designate subpart C of the regulations as a State Legal Assistance Development Program, since the Act refers only to the designation of a person as LAD, and to the optional activities a State agency may choose to have the LAD undertake. Additionally, most LAD positions are not full-time, and section 731 of the Act only refers to an individual working as the LAD. Commenters requested that the regulations require the LAD to be a full-time position staffed by an attorney.

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<sup>356</sup> 42 U.S.C. 3032i.

<sup>357</sup> 42 U.S.C. 3058j.

*Response:* ACL appreciates the comments. It is our intent to set out expectations for the duties of the LAD, including coordination of the provision of legal assistance, consistent with the provisions of the Act. However, it is outside the scope of the regulations to address funding issues. We also cannot mandate that the LAD be a full-time position and/or staffed by an attorney. Nevertheless, we remind State agencies that § 1324.303(b) requires them to ensure that the LAD has the knowledge, resources, and capacity to carry out the functions of the position. The Act does not require professional qualifications for the individual a State agency designates as the LAD, nor does the Act require, as it does for other statutorily designated positions, such as the Ombudsman, that the LAD be a full-time position. Accordingly, these matters are beyond the scope of our regulatory authority.

We have made one change to the regulatory text in response to the comments. Given that section 731 of the OAA<sup>358</sup> requires the State agency to provide the assistance of an individual, rather than a program, we have modified the title of subpart C of these regulations to State Legal Assistance Development. The title mirrors the title of section 731 of the OAA.

*Comment:* Commenters appreciated that § 1324.303(a)(4)(ii) requires LADs to promote alternatives to guardianship. One commenter noted that supported decision making can be used both formally through contractual agreement and informally. The commenter recommended that the section refer to supported decision making, rather than supported decision making agreements as the proposed regulatory text reads.

*Response:* ACL accepts the comment. ACL agrees that decision supports are available through a range of tools and approaches and each adult has the right to determine which tool or approach suits their needs, or to determine that they do not want to adopt such a tool. We refer to all such tools and approaches as decision supports.

*Comment:* Proposed § 1324.303(d) defines standards to address COI. One commenter objected to these provisions related to the legal assistance developer, which “stringently prohibit

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<sup>358</sup> *Id.*

‘dual hatting’ of the LAD positions with other responsibilities,” as being unduly burdensome, given the lack of dedicated funding authorized in the Act for the position. The same commenter was concerned that the lack of dedicated funding made it cost-prohibitive for the LAD to carry out the roles and responsibilities set forth in the regulation.

*Response:* We do not prohibit LADs from assuming additional functions, as long as these functions do not pose actual or perceived COI. For the reasons stated earlier, we believe that the COI provisions are necessary to protect the interests of older people and the integrity of the LAD position. We expect State agencies to include their conflict mitigation strategies for this position in their policies and procedures. State agencies may also review and prioritize the roles and responsibilities of the LAD position to meet the needs of the State, provided that their priorities are clearly described in the State plan.

### **III. Required Regulatory Analyses**

*Comment:.* ACL received several comments indicating concerns with implementation costs and administrative burden in implementing the final rule, as well as concerns regarding ongoing costs to monitor compliance with the final rule. Some State agencies commented that they anticipate that consultants and/or additional staff will need to be hired and/or that changes will need to be made to information technology systems. Some State agencies asserted that ACL has greatly underestimated both the cost, and the amount of time needed, to come into compliance with the rule; some have included cost estimates in their comments of hundreds of thousands dollars or more (in some cases these are expressed as annual costs and not so in others).

*Response:* For the reasons discussed below, we maintain the Regulatory Impact Analysis (RIA) as proposed, except that we have updated the analysis with more recent data.

As noted in the RIA, the most recent reauthorization of the OAA was enacted during Federal Fiscal Year 2020, and the baseline for the analysis was Federal Fiscal Year 2019. Most of the changes to 45 CFR parts 1321, 1322, and 1324 modernize the OAA regulations to bring

them into conformity with reauthorizations of the OAA that were enacted prior to the 2020 reauthorization and to provide clarity of administration for ACL and its grantees with respect to aspects of the OAA that were enacted under previous reauthorizations. A limited number of substantive changes were made by the 2020 reauthorization to the implementation of programs by State agencies and area agencies, and as more particularly discussed in the RIA, we anticipate that any costs to a State agency associated with these changes will be de minimis. We also note that public comments that provided State-specific cost estimates to implement and administer the final rule did not clearly differentiate between costs attributable to the statute and the incremental costs of implementing the final rule, which makes it difficult to incorporate this information in the final RIA.

In addition to areas where we better align regulation with statute, as also described in more detail in the RIA below, the final rule benefits State agencies by modernizing the regulatory text to provide greater flexibility to State agencies and area agencies and to reflect ongoing feedback from interested parties and responses to our RFI in areas where our prior regulations did not address the evolving needs of Title III, VI, and VII grantees and the older adults and family caregivers they serve.

While State agencies and AAAs should review their practices, policies, and procedures to ensure they comply with the final rule, we note again that a majority of this rule updates prior regulations to conform to longstanding statutory requirements. State agencies and AAAs also already should be engaging in monitoring activities for compliance with the Act. In addition, the final rule grants significant discretion to the State or area agency (as applicable) in how to implement many provisions. Similarly, a majority of the provisions of this final rule that apply to Title VI grantees and to service providers bring the prior regulation into conformity with what is already required by the Act.

However, in consideration of comments related to the time required for implementation of the rule, we have decided to delay the compliance date of this rule until October 1, 2025. This



should give all regulated entities sufficient time to come into compliance with these regulations. It will also allow time for State and area plans on aging that will be effective as of October 1, 2025, to incorporate the requirements of this final rule into new or amended plans. As noted previously, State agencies that need additional time to comply with one or more provisions of the rule may submit a request to proceed under a corrective action plan. A request should include the reason the State needs additional time, the steps the State will take to reach full compliance, and how much additional time the State anticipates needing. The corrective action plan process is intended to be highly collaborative and flexible. Under a corrective action plan, States agencies and ACL will jointly identify progress milestones and a feasible timeline for the State agency to come into compliance with the provision(s) of the rule incorporated into the corrective action plan. State agencies must make a good faith effort at compliance to continue operating under a corrective action plan. Requests for corrective action plans will be reviewed after April 1, 2024, and ACL will provide guidance on this process after this rule takes effect.

*Comment:* One commenter proposed allowing State agencies to request waivers from having to meet the requirements set forth in the final rule if they could otherwise meet the intent of the Act.

*Response:* ACL has determined not to make any changes to the regulatory text in response to this comment. Most of the changes to 45 CFR part 1321 modernize the OAA regulations to bring them into conformity with the requirements of the OAA. Accordingly, we decline to allow State agencies to request waivers from meeting provisions in the final rule (unless otherwise explicitly allowed).

*Comment:* ACL received a comment expressing concern that the rule may have Federalism implications.

*Response:* Pursuant to Executive Order 13132, ACL has considered the impact of the final rule on State and local governments. Our analysis of the potential federalism implications of the final rule is set forth in Section III.C below.

## **Regulatory Impact Analysis**

### **1. Overall Impact**

We have examined the impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), Executive Order 14094 entitled “Modernizing Regulatory Review” (April 6, 2023), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96-354), section 1102(b) of the Social Security Act (42 U.S.C. 1302(b)), section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA; March 22, 1995; Pub. L. 104-4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (CRA; 5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The Executive Order 14094 entitled “Modernizing Regulatory Review” (hereinafter, the Modernizing E.O.) amends section 3(f) of Executive Order 12866 (Regulatory Planning and Review). The amended section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action that is likely to result in a rule: (1) having an annual effect on the economy of \$200 million or more in any 1 year (adjusted every 3 years by the Administrator of the Office of Management and Budget’s (OMB) Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product), or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities; (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the

President's priorities or the principles set forth in this Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

A RIA must be prepared for significant rules. Based on our estimates, OIRA has determined that this rulemaking is "significant" per section 3(f) of Executive Order 12866. Therefore, OMB has reviewed these proposed regulations, and the Departments have provided the following assessment of their impact. Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act, 5 U.S.C 801 et seq.) OIRA has determined that this rule does not meet the criteria set forth in 5 U.S.C. 804(2).

### **1. Summary of Costs and Transfers**

This analysis describes costs and transfers under this final rule and quantifies several categories of costs to grantees (State agencies under Title III and Title VII and Tribal organizations and Hawaiian Native grantees under Title VI) and subrecipients (area agencies and service providers under Title III and where applicable, Title VII). Specifically, we quantify costs associated with grantees and subrecipients revising policies and procedures, conducting staff training, and revising State plan documentation accessibility practices. As discussed in greater detail in this analysis, we estimate that the final rule will result in one-time costs of approximately \$17.43 million, including costs associated with covered entities revising policies and procedures, and costs associated with training.

The analysis also includes a discussion of costs we do not quantify, and a discussion of the potential benefits under the rule that we similarly do not quantify.

### **Baseline Conditions and Changes Due to Reauthorization**

The most recent reauthorization of the OAA was enacted during Federal Fiscal Year (FFY) 2020; therefore, the baseline used for the analysis is FFY 2019. A main impact of the 2020 reauthorization of the OAA was to increase the authorized appropriations available to be distributed to the State agencies for the implementation of programs and services under Titles III,

VI, and VII. A limited number of substantive changes were made by the 2020 reauthorization to the implementation of programs by State agencies and area agencies, including: requiring outreach efforts to Asian-Pacific American, Native American, Hispanic, and African-American older individuals, and older sexual and gender minority populations and the collection of data with respect thereto; requiring State agencies to simplify the process for transferring funds for nutrition services to reduce administrative barriers and direct resources to where the greatest need is for such services; broadening allowable services under Title III, part B, such as screening for traumatic brain injury and the negative effects of social isolation; clarifying that a purpose of the Title III, part C program is to reduce malnutrition; clarifying the allowability of reimbursing volunteer Ombudsman representatives under Title VII for costs incurred; and expanding the examples of allowable elder justice activities under section 721<sup>359</sup> to include community outreach and education as well as the support and implementation of innovative practices, programs, and materials in communities to develop partnerships for the prevention, investigation, and prosecution of abuse, neglect, and exploitation.

The OAA initially was passed in 1965. The prior regulations for programs authorized under the OAA are from 1988 and have not been substantially altered since that time (other than portions of 45 CFR part 1321 and 45 CFR part 1324 regarding the State Long-Term Care Ombudsman Program, which were promulgated in 2015). Following its initial passage, the OAA has been reauthorized and amended sixteen times prior to the 2020 reauthorization, including five times since the regulations were promulgated in 1988.

Many changes have been made in the implementation of the OAA since 1988 as a result of these reauthorizations. State agencies, area agencies, and Title VI grantees should already be aware of programmatic and fiscal requirements in the reauthorizations and should have established policies and procedures to implement them. Accordingly, substantially all of the changes to 45 CFR parts 1321, 1322, and 1324 modernize the OAA regulations to bring them

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<sup>359</sup> 42 U.S.C. 3058i.

into conformity with reauthorizations of the OAA that were enacted prior to the 2020 reauthorization and provide clarity of administration for ACL and its grantees with respect to aspects of the OAA that were enacted under previous reauthorizations.

In addition to areas where we better align regulation with statute, we make modifications to regulatory text that modernize our rule to provide greater flexibility to State agencies and area agencies and to reflect ongoing feedback from interested parties and responses to our RFI in areas where our prior regulations did not address the evolving needs of Title III, VI, and VII grantees and the older adults and family caregivers they serve. For example, we modernize our nutrition regulations to better support grantees' efforts to meet the needs of older adults. Our previous sub-regulatory guidance has indicated that meals are either consumed on-site at a congregate meal setting or delivered to a participant's home. This previous guidance does not take into account those who may leave their homes to pick up a meal but are not able to consume the meal in the congregate setting for various reasons, including safety concerns such as those experienced during the COVID-19 PHE. The COVID-19 PHE brought to light limitations in our prior nutrition regulations, which we have addressed in § 1321.87 to allow for shelf-stable, pick-up, carry-out, drive-through, or similar meals where a participant will be able to collect their meal from a congregate site and return to the community off-site to enjoy it. Our final rule is a direct response to feedback from interested parties, including as gathered from the RFI and NPRM comment period, and appropriately reflects the evolving needs of both grantees and OAA participants.

Another example of a modification to regulatory text that modernizes our rule is the new definition of "greatest economic need." Focusing OAA services toward individuals who have the greatest economic need is one of the basic tenets of the OAA. The definition of "greatest economic need" in the OAA incorporates income and poverty status. However, the definition in the OAA is not intended to preclude State agencies from taking into consideration populations that experience economic need due to other causes. A variety of local conditions and individual

situations, other than income, could factor into an individual's level of economic need. State agencies and AAAs are in the best position to understand the conditions and factors in their State and local areas that contribute to individuals falling within this category. Accordingly, this definition will allow State agencies and AAAs to make these determinations.

A detailed discussion of costs and transfers associated with the rule follows.

## **i. 2020 Reauthorization**

### **a. New Requirements for State agencies and area agencies**

The 2020 reauthorization imposed the following new requirements on grantees: required outreach efforts to Asian-Pacific American, Native American, Hispanic, and African-American older individuals, and older lesbian, gay, bisexual, and transgender (LGBT) populations and the collection of data with respect thereto; required State agencies to simplify the process for transferring funds for nutrition services to reduce administrative barriers and direct resources to where the greatest need is for such services; and clarified that reducing malnutrition is a purpose of the OAA Title III, part C program.

We do not associate any additional costs for the agencies with respect to these requirements. The agencies were required to conduct outreach to minority populations prior to the 2020 reauthorization, and State agencies already have been reaching out to the LGBTQI+ population.<sup>360</sup> For those agencies that have not been reaching out to LGBTQI+ communities, we believe any additional cost to conduct outreach to this population will be de minimis, as they already have processes in place to reach out to underserved populations. The data collection cost likewise will be minimal as agencies already have data collection systems and practices in place.

The cost to State agencies to comply with the requirement that they simplify the process for transferring funds for nutrition services to reduce administrative barriers and direct resources

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<sup>360</sup> For example, in its plan on aging that was effective October 1, 2018, the California State agency noted a focus on developing strategies to better serve LGBTQI+ populations; the Ohio State agency sought input regarding the needs of LGBTQI+ populations in connection with the preparation of its State plan on aging for FFY 2019 – 2022; and the New York State agency's plan on aging for FFY 2019 – 2023 references ongoing efforts to work with area agencies on aging to conduct outreach to the LGBTQI+ community.

to where the greatest need is for such services is not quantifiable. Each State agency must comply with its State-level procurement requirements, and it is not possible for us to determine what any State agency may be able to change in this regard or at what cost. It is in each State agency's interest to improve this process for transferring nutrition services funds, and we believe that State agencies engage in ongoing efforts to improve their fiscal management processes generally, within allowable parameters. Accordingly, we anticipate that any costs to a State agency associated with this requirement will be de minimis.

We do not associate any costs to State agencies, AAAs, or Title VI grantees with respect to the clarification that a purpose of the Title III, part C program is to reduce malnutrition. Grantees already were screening for older adults who are at high nutrition risk and have been offering nutrition counseling and nutrition education, as appropriate, and this clarification is not expected to impose additional costs on OAA grantees or subrecipients.

## **ii. Final Rule**

### **a. Revising Policies and Procedures**

This analysis anticipates that the final rule will result in one-time costs to State agencies, AAAs, service providers, and Title VI grantees to revise policies and procedures. The obligations of State agencies and AAAs under the OAA are more extensive than are those of Title VI grantees under the OAA. Accordingly, the Title III rule is considerably more extensive than is the Title VI rule, and we address State agencies and AAAs separately from Title VI grantees. We also address service providers separately, as we anticipate that the scope of the review needed for service providers will be narrower than that needed for State agencies and AAAs.

In addition to changes to the existing regulations, we add several new provisions to the regulations in the following areas: 45 CFR part 1321 (Title III): State Agency Responsibilities, Area Agency Responsibilities, Service Requirements, Emergency and Disaster Requirements; 45 CFR part 1322 (Title VI): Service Requirements, Emergency and Disaster Requirements; and 45 CFR part 1324 (Title VII): Programs for Prevention of Elder Abuse, Neglect, and Exploitation

and State Legal Assistance Development. However, substantially all of these new provisions update the OAA regulations to bring them into conformity with reauthorizations of the OAA that were enacted prior to the 2020 reauthorization and provide clarity of administration for ACL and its grantees with respect to aspects of the OAA that were enacted under previous reauthorizations. We associate one-time costs to State agencies, AAAs, service providers, and Title VI grantees to update their policies and procedures and to train employees on the updated policies and procedures, as discussed below. State agencies, AAAs, service providers, and Title VI grantees already should be aware of these requirements and already should have established policies and procedures in place. Accordingly, we otherwise associate no cost to them as a result of these new provisions.

### ***State Agencies and AAAs***

In clarifying requirements for State agency and AAA policies and procedures under the OAA, ACL anticipates that all 56 State agencies and 615 AAAs (671 aggregate State agencies and AAAs) will revise their policies and procedures under the final rule, with half of these State agencies or AAAs requiring fewer revisions. We estimate that State agencies or AAAs with more extensive revisions will spend forty-five (45) total hours on revisions per agency. Of these, forty (40) hours in the aggregate will be spent by one or more mid-level manager(s) equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43-1011),<sup>361</sup> at a cost of \$59.02 per hour after adjusting for non-wage benefits and indirect costs,<sup>362</sup> while an average of five (5) hours will be spent by executive staff equivalent to a general and operations manager (BLS Occupation code 11-1021),<sup>363</sup> at a cost of \$94.32 per hour after adjusting for non-wage benefits and indirect costs.<sup>364</sup> For State agencies or AAAs with less extensive revisions, we

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<sup>361</sup> U.S. Dep't. of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 43-1011 First-Line Supervisors of Office and Administrative Support Workers (May 2022), <https://www.bls.gov/oes/current/oes431011.htm>.

<sup>362</sup> This hourly cost was determined by multiplying the median wage of \$29.51 by 2.

<sup>363</sup> U.S. Dep't. of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 11-1021 General and Operations Managers (May 2022), <https://www.bls.gov/oes/current/oes111021.htm>.

<sup>364</sup> This hourly cost was determined by multiplying the median wage of \$47.16 by 2.



assume that twenty-five (25) total hours will be spent on revisions per agency. Of these, twenty (20) hours will be spent by one or more mid-level manager(s), and five (5) hours will be spent by executive staff.

We monetize the time that will be spent by State agencies and AAAs on revising policies and procedures by estimating a total cost per entity as follows:

336 State agencies/AAAs – more extensive revisions:		
First-Line Supervisor: 40 hours @ \$59.02/hr:		\$2,360.80
General and Operations Manager: 5 hours @ \$94.32/hr:		<u>471.60</u>
		\$2,832.40 per agency
335 State agencies/AAAs – less extensive revisions:		
First-Line Supervisor: 20 hours @ \$59.02/hr:		\$1,180.40
General and Operations Manager: 5 hours @ \$94.32/hr:		<u>471.60</u>
		\$1,652.00 per agency

For the approximately 336 State agencies or AAAs with more extensive revisions, we estimate a cost of approximately \$951,686.40. For the 335 State agencies or AAAs with less extensive revisions, we estimate a cost of approximately \$553,420.00. We estimate the total cost associated with revisions with respect to the final rule for State agencies and AAAs of \$1,505,106.40.

### ***Service Providers***

According to data submitted to ACL by the State agencies, there were 17,438 service providers during FFY 2021, and we use that figure for this analysis. We anticipate that all 17,438 service providers will review their existing policies and procedures to confirm that they comply the rule and will update their policies and procedures, as needed, in order to bring them into compliance. We estimate that the scope of the review needed for service providers will be narrower than that needed for State agencies and AAAs and will be limited to areas related to their provision of direct services, such as person-centered and trauma-informed services, eligibility for services, client prioritization, and client contributions. Like State agencies, AAAs and Title VI grantees, service providers already should be aware of the fiscal and programmatic changes that have been made to the OAA since 1988, and to the extent required, they already

should have established policies and procedures with respect to the OAA requirements that apply to them.

We estimate that service providers will spend seven (7) total hours on revisions per agency. Of these, five (5) hours in the aggregate will be spent by one or more mid-level manager(s) equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43-1011),<sup>365</sup> at a cost of \$59.02 per hour after adjusting for non-wage benefits and indirect costs,<sup>366</sup> while an average of two (2) hours would be spent by executive staff equivalent to a general and operations manager (BLS Occupation code 11-1021),<sup>367</sup> at a cost of \$94.32 per hour after adjusting for non-wage benefits and indirect costs.<sup>368</sup>

We monetize the time spent by service providers on revising policies and procedures by estimating a total cost per entity as follows:

First-Line Supervisor: 5 hours @ \$59.02/hr:	\$295.10
General and Operations Manager: 2 hours @ \$94.32/hr	<u>188.64</u>
	\$483.74 per agency

We estimate the total cost associated with revisions with respect to the final rule for 17,438 service providers of \$8,435,458.12.

### ***Title VI Grantees***

This analysis anticipates that the final rule also will result in one-time costs to Title VI grantees to revise policies and procedures. In clarifying requirements for Title VI grantee policies and procedures under the OAA, ACL anticipates that all 290 Title VI grantees will revise their policies and procedures under the final rule, with approximately one-third of these Title VI grantees requiring fewer revisions. We estimate that Title VI grantees with more extensive revisions will spend thirty (30) total hours on revisions per agency. All of these 30

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<sup>365</sup> U.S. Dep't. of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 43-1011 First-Line Supervisors of Office and Administrative Support Workers (May 2022), <https://www.bls.gov/oes/current/oes431011.htm>.

<sup>366</sup> This hourly cost was determined by multiplying the median wage of \$29.51 by 2.

<sup>367</sup> U.S. Dep't of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 11-1021 General and Operations Managers (May 2022), <https://www.bls.gov/oes/current/oes111021.htm>.

<sup>368</sup> This hourly cost was determined by multiplying the median wage of \$47.16 by 2.

hours will be spent by a mid-level manager equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43-1011),<sup>369</sup> at a cost of \$59.02 per hour after adjusting for non-wage benefits and the indirect costs. For Title VI grantees with less extensive revisions, we assume fifteen (15) total hours spent on revisions per agency. All of these hours will be spent by a mid-level manager equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43-1011),<sup>370</sup> at a cost of \$59.02 per hour after adjusting for non-wage benefits and indirect costs.<sup>371</sup>

We monetize the time spent by Title VI grantees on revising policies and procedures as follows:

196 Title VI grantees – more extensive revisions:		
First-Line Supervisor: 30 hours @ \$59.02/hr:		\$1,770.60 per grantee
94 Title VI grantees – less extensive revisions:		
First-Line Supervisor: 15 hours @ \$59.02/hr:		\$ 885.30 per grantee

For the approximately 196 Title VI grantees with more extensive revisions, we estimate a cost of approximately \$347,037.60. For the 94 Title VI grantees with less extensive revisions, we estimate a cost of approximately \$83,218.20. We estimate the total cost associated with revisions of policies and procedures for Title VI grantees with respect to the final rule of \$430,255.80.

The above estimates of time and number of State agencies, AAAs and Title VI grantees that will revise their policies under the regulation are approximate estimates based on ACL’s extensive experience working with the agencies (including providing technical assistance), feedback and inquiries that we have received from State agencies, AAAs, and Title VI grantees, as well as ACL staff’s prior experience working with OAA programs at State agencies and AAAs. Due to variation in the types and sizes of State agencies, AAAs, and Title VI grantees, the above estimates of time and number of entities that will revise their policies under the

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<sup>369</sup> U.S. Dep’t of Labor, Bureau of Labor Statistics. Occupational Employment and Wages, 43-1011 First-Line Supervisors of Office and Administrative Support Workers (May 2022), <https://www.bls.gov/oes/current/oes431011.htm>.

<sup>370</sup> *Id.*

<sup>371</sup> These hourly costs were determined by multiplying the median wage of \$29.51 by 2.

regulation is difficult to calculate precisely.

## **b. Training**

ACL estimates that State agencies, AAAs, service providers and Title VI grantees will incur one-time costs with respect to training or re-training employees under the final revised rule. For reasons similar to the discussion above with respect to revisions to policies and procedures, we address State agencies and AAAs separately from Title VI grantees. We also address service providers separately, as we anticipate that the training needed for service providers will be less extensive than that needed for State agencies and AAAs.

### ***State Agencies and AAAs***

#### **Costs to prepare and conduct trainings of their own staff**

Consistent with our estimates relating to the number of agencies that will require extensive revision of their policies, we estimate that 50 percent of the State agencies and AAAs program management staff will require more extensive staff training regarding the rule. Based on our experience working with State agencies and AAAs, we estimate that, for State agencies and AAAs that need more extensive trainings, one (1) employee per agency, equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43-1011)<sup>372</sup> will spend three (3) total hours to prepare the training, and five (5) hours to provide the training, at a cost of \$59.02 per hour after adjusting for non-wage benefits and indirect costs, and that for those needing less extensive trainings, one (1) employee per agency, equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43-1011)<sup>373</sup> will spend two (2) total hours to prepare the training, and two (2) hours to provide the training, at a cost of \$59.02 per hour after adjusting for non-wage benefits and indirect costs.<sup>374</sup>

We monetize the time spent by State agencies and AAAs to prepare and conduct trainings

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<sup>372</sup> U.S. Dep't of Labor, Bureau of Labor Statistics. Occupational Employment and Wages, 43-1011 First-Line Supervisors of Office and Administrative Support Workers (May 2022), <https://www.bls.gov/oes/current/oes431011.htm..>

<sup>373</sup> *Id.*

<sup>374</sup> These hourly costs were determined by multiplying the median wage of \$29.51 by 2.

for their own employees as follows:

336 State agencies/AAAs – more extensive trainings:  
First-Line Supervisor: 8 hours @ \$59.02/hr: \$472.16 per agency

335 State agencies/AAAs – less extensive trainings:  
First-Line Supervisor: 4 hours @ \$59.02/hr: \$ 236.08 per agency

For the approximately 336 State agencies or AAAs with more extensive needed training, we estimate a cost of approximately \$158,645.76. For the 335 State agencies or AAAs with less extensive training needs, we estimate a cost of approximately \$79,086.80. We estimate the total cost associated with the preparation and conduct of trainings with respect to the final rule for State agencies and AAAs of \$237,732.56.

### **Costs to receive trainings by their own staff**

As noted above, we estimate that 50 percent of the State agencies and AAAs program management staff will require more extensive staff training regarding the rule. Based on our experience working with State agencies and AAAs, we estimate that State agencies and AAAs with more extensive trainings will spend five (5) total hours on trainings per agency, and that those with less extensive trainings will spend two (2) hours on trainings per agency. We estimate that five (5) employees per agency, equivalent to social and community service managers (BLS Occupation code 11-9151),<sup>375</sup> will receive training at a cost of \$ 71.38 per hour per employee after adjusting for non-wage benefits and indirect costs,<sup>376</sup> and that one (1) employee per agency, equivalent to a business operations specialist (BLS Occupation code 13-1199),<sup>377</sup> will receive training at a cost of \$73.06 per hour after adjusting for non-wage benefits and indirect costs.<sup>378</sup>

We monetize the time spent in the receipt of trainings as follows:

336 State agencies/AAAs – more extensive trainings:  
Social & Community Service Manager: 5 staff x 5 hours @ \$71.38/hr: \$1,784.50  
Business Operations Specialist: 1 staff x 5 hours @ \$73.06/hr: 365.30

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<sup>375</sup> U.S. Dep’t. of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 11-9151 Social and Community Service Managers (May 2022), <https://www.bls.gov/oes/current/oes119151.htm>.

<sup>376</sup> This hourly cost was determined by multiplying the median wage of \$35.69 by 2.

<sup>377</sup> U.S. Dep’t of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 13-1199 Business Operations Sepcialists, All Other (May 2022), <https://www.bls.gov/oes/current/oes131199.htm>.

<sup>378</sup> This hourly cost was determined by multiplying the median wage of \$36.53 by 2.

\$2,149.80/

agency

335 State agencies/AAAs – less extensive trainings:

Social & Community Service Manager: 5 staff x 2 hours @ \$71.38/hr: \$713.80

Business Operations Specialist: 1 staff x 2 hours @ \$73.06/hr: 146.12

\$859.92/agency

For the approximately 336 State agencies or AAAs with more extensive trainings, we estimate a cost of approximately \$722,332.80. For the 335 State agencies or AAAs with less extensive trainings, we estimate a cost of approximately \$288,073.20. We estimate the total cost associated with receipt of training by employees with respect to revisions to policies and procedures under the final rule of \$1,010,406.00.

### **Costs to conduct trainings of AAAs by State agencies**

We estimate that each of the forty-seven (47) State agencies that have AAAs will conduct one (1) training for their AAAs. We estimate that two (2) State agency employees per agency, each equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43-1011),<sup>379</sup> will spend three (3) total hours to conduct the training, at a cost per employee of \$59.02 per hour after adjusting for non-wage benefits and indirect costs.<sup>380</sup> As the State agencies already will have created trainings for their own employees, we do not associate any costs with the creation of trainings for the AAAs. We monetize the time spent by the 47 State agencies to train AAAs by estimating a cost per agency of \$354.12 (2 staff x 3 hours x \$59.02/hr). We estimate the total cost to the State agencies to train AAAs to be \$16,643.64.

We estimate that each of the 615 AAAs will arrange for two (2) AAA employees, each equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43-1011),<sup>381</sup> to attend the three (3) hour trainings conducted by the State agency, at a cost per

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<sup>379</sup> U.S. Dep't. of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 43-1011 First-Line Supervisors of Office and Administrative Support Workers (May, 2022), <https://www.bls.gov/oes/current/oes431011.htm>.

<sup>380</sup> This hourly cost was determined by multiplying the median wage of \$29.51 by 2.

<sup>381</sup> U.S. Dep't. of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 43-1011 First-Line Supervisors of Office and Administrative Support Workers (May, 2022), <https://www.bls.gov/oes/current/oes431011.htm>.

employee of \$59.02 per hour after adjusting for non-wage benefits and indirect costs.<sup>382</sup> We monetize the time spent by the 615 AAAs to attend the State agency trainings by estimating a cost per agency of \$354.12 (2 staff x 3 hours x \$59.02/hr). We estimate the total cost associated to the AAAs to receive training from the State agencies to be \$217,783.80. We estimate the total costs associated with the training by State agencies of AAAs to be \$234,427.44.

### ***Service Providers***

#### **Cost to conduct trainings**

We estimate that the 615 AAAs, as well as the 9 State agencies in single PSA States that do not have AAAs, will provide training to their service providers with respect to revisions to policies and procedures under the final rule. We estimate that two (2) AAA or State agency employees per agency, as applicable, each equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43-1011),<sup>383</sup> will spend two (2) total hours to conduct one (1) training, at a cost of \$59.02 per hour after adjusting for non-wage benefits and indirect costs.<sup>384</sup> As the State agencies and AAAs already will have created trainings for their own employees, we do not associate any costs with the creation of trainings for the service providers. We monetize the time spent by the 615 AAAs and the 9 State agencies to train service providers by estimating a cost per agency of \$236.08 (2 staff x 2 hours x \$59.02/hr). We estimate the total cost associated with the conduct of trainings of service providers to be \$147,313.92.

#### **Cost to receive training**

We estimate that all 17,438 service providers will receive training regarding revised policies and procedures in connection with the final rule. We estimate that two (2) employees per agency, equivalent to social and community service managers (BLS Occupation code

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<sup>382</sup> This hourly cost was determined by multiplying the median wage of \$29.51 by 2.

<sup>383</sup> U.S. Dep't. of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 43-1011 First-Line Supervisors of Office and Administrative Support Workers (May, 2022), <https://www.bls.gov/oes/current/oes431011.htm>.

<sup>384</sup> This hourly cost was determined by multiplying the median wage of 29.51 by 2.

11-9151),<sup>385</sup> will receive two (2) hours of training at a cost per employee of \$71.38 per hour after adjusting for non-wage benefits and indirect costs.<sup>386</sup>

We monetize the time spent by service providers to receive training with respect to revised policies and procedures by estimating a total cost per entity of \$285.52 (2 staff x 2 hours x \$71.38/hr). We estimate the total cost associated with receipt of training with respect to the final rule for 17,438 service providers of \$4,978,897.76.

### ***Title VI Grantees***

#### **Costs to prepare and conduct trainings of their own staff**

Consistent with our estimates relating to the number of Title VI grantees that will require extensive revision of their policies, we estimate that two thirds of the Title VI grantees' program management staff will require more extensive staff training regarding the rule. Based on our experience working with Title VI grantees, we estimate that, for Title VI grantees that need more extensive trainings, one (1) employee per agency, equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43-1011)<sup>387</sup> will spend three (3) total hours to prepare the training, and five (5) hours to provide the training, at a cost of \$59.02 per hour after adjusting for non-wage benefits and indirect costs, and that for those needing less extensive trainings one (1) employee per agency, equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43-1011)<sup>388</sup> will spend two (2) total hours to prepare the training, and two (2) hours to provide the training, at a cost of \$59.02 per hour after adjusting for non-wage benefits and indirect costs.<sup>389</sup>

We monetize the time spent by Title VI grantees to prepare and conduct trainings for their own employees by estimating a total cost per entity of \$472.16 (1 staff x 8 hours x

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<sup>385</sup> U.S. Dep't. of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 11-9151 Social and Community Service Managers (May, 2022), <https://www.bls.gov/oes/current/oes119151.htm>.

<sup>386</sup> This hourly cost was determined by multiplying the median wage of \$36.59 by 2.

<sup>387</sup> U.S. Dep't. of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 43-1011 First-Line Supervisors of Office and Administrative Support Workers (May, 2022), <https://www.bls.gov/oes/current/oes431011.htm>.

<sup>388</sup> *Id.*

<sup>389</sup> These hourly costs were determined by multiplying the median wage of \$29.51 by 2.



\$59.02/hr) or \$251.92 (1 staff x 4 hours x \$59.02/hr), depending on the extent of the training needed. For the approximately 196 Title VI grantees with more extensive needed training, we estimate a cost of approximately \$92,543.36. For the 94 Title VI grantees with less extensive training needs, we estimate a cost of approximately \$22,191.52. We estimate the total cost associated with the preparation and conduct of trainings with respect to the final rule for Title VI grantees of \$114,734.88.

**Cost to receive trainings by their own staff**

As noted above, we estimate that two thirds of the Title VI grantees’ program management staff will require more extensive staff training regarding the rule. Based on our experience working with Title VI grantees, we estimate that those grantees with more extensive trainings will spend five (5) total hours on the receipt of training per agency, and that those with less extensive trainings will spend two (2) hours on the receipt of trainings per agency. We estimate that three (3) employees per agency, equivalent to social and community service managers (BLS Occupation code 11-9151),<sup>390</sup> will receive training at a cost per employee of \$71.38 per hour after adjusting for non-wage benefits and indirect costs,<sup>391</sup> and that one (1) employee per agency, equivalent to a business operations specialist (BLS Occupation code 13-1199),<sup>392</sup> will receive training at a cost of \$73.06 per hour after adjusting for non-wage benefits and indirect costs.<sup>393</sup>

We monetize the time spent on receipt of training as follows:

196 Title VI Grantees – more extensive trainings:

Social & Community Service Manager: 3 staff x 5 hours @ \$71.38/hr:	\$1,070.70
Business Operations Specialist: 1 staff x 5 hours @ \$73.06/hr:	<u>365.30</u>
	\$1,436/grantee

94 Title VI Grantees – less extensive trainings:

Social & Community Service Manager: 3 staff x 2 hours @ \$71.38/hr:	\$428.28
Business Operations Specialist: 1 staff x 2 hours @ \$73.06/hr:	<u>146.12</u>
	\$574.40/grantee

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<sup>390</sup> U.S. Dep’t. of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 11-9151 Social and Community Service Managers (May, 2022), <https://www.bls.gov/oes/current/oes119151.htm>.

<sup>391</sup> This hourly cost was determined by multiplying the median wage of \$35.69 by 2.

<sup>392</sup> U.S. Dep’t. of Labor, Bureau of Labor Statistics, Occupational Employment and Wages, 13-1199 Business Operations Specialists, All Other (May, 2022), <https://www.bls.gov/oes/current/oes131199.htm>.

<sup>393</sup> This hourly cost was determined by multiplying the median wage of \$36.53 by 2.

For the approximately 196 Title VI grantees with more extensive trainings, we estimate a cost of approximately \$281,456.00. For the 94 Title VI grantees with less extensive trainings, we estimate a cost of approximately \$53,993.60. We estimate the total cost associated with receipt of training of employees with respect to revisions to policies and procedures under the final rule of \$335,449.60.

The above estimates of the time needed by State agencies, AAAs, and Title VI grantees for training of employees with respect to the final rule, as well as the number of employees to be trained, are approximate estimates based on ACL's extensive experience working with the agencies, including providing technical assistance as well as ACL staff's prior experience working with OAA programs at State agencies and AAAs. Due to variation in the types and sizes of State agencies, AAAs, and Title VI grantees, the above estimates of time needed for training and the number of employees to be trained with respect to the final rule is difficult to calculate precisely.

### **c. Making State Plan Documentation Available**

Section 305(a)(2) of the OAA,<sup>394</sup> together with existing 45 CFR 1321.27, require State agencies, in the development and administration of the State plan, to obtain and consider the input of older adults, the public, and recipients of services under the OAA. Section 1321.29 of the final regulation requires State agencies to ensure that documents which are to be available for public review in connection with State plans and State plan amendments, as well as final State plans and State plan amendments, be available in a public location, as well as available in print by request.

Based on ACL's extensive experience working with State agencies in their development of State plans and State plan amendments, we estimate that most State agencies already comply with the requirements to make such documentation accessible in a public place. It is common

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<sup>394</sup> 42 U.S.C. 3025(a)(2).

practice for State agencies to post the documents on their public websites.<sup>395</sup> For those that do not already post the documents on their websites, we estimate that it will take less than one hour of time spent by a computer and information system employee to post the documents on their websites. Accordingly, we believe this cost will be minimal and do not quantify it.

Occasionally, a member of the public may request a print copy of a State plan. State plan documents can vary widely in length; based on our experience, we estimate that on average each State plan contains 75 pages, including exhibits. At an estimated cost of \$.50 per page for copies, each paper copy will cost approximately \$37.50. Today, documents typically are shared electronically, rather than via print copies, and we estimate that each State agency will receive few requests for print copies of their State plans. In addition, all States have established laws that allow access to public records.<sup>396</sup> Therefore, we also believe this cost will be minimal and do not quantify it.

#### **d. State Plan Amendments and Disaster Flexibilities**

Based on input from interested parties and our experience, particularly during the COVID-19 PHE, we add Subpart E – Emergency and Disaster Requirements (§§ 1321.97 – 1321.105) to set forth expectations and clarify flexibilities that are available in certain disaster situations. Similarly, § 1322.35 will provide for flexibilities to be available to Title VI grantees during certain emergencies and will require Title VI grantees to report separately on expenditures of funds when exercising such flexibilities. ACL estimates that some State agencies, AAAs, and Title VI grantees will incur costs to comply with the new provision. For reasons similar to the discussion above with respect to revisions to policies and procedures, we address State agencies and area agencies separately from Title VI grantees.

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<sup>395</sup> For example, the State agencies from Alabama, Arizona, California, Florida, Georgia, Illinois, Massachusetts, Montana, North Dakota, New York, and Ohio, in addition to others, post their plans on aging on their websites.

<sup>396</sup> *Public Records*, Natl. Assn. of Attorneys General, <https://www.naag.org/issues/civil-law/public-records/> (last visited Oct. 24, 2023); *State Public Records Laws*, FOIAdvocates, <http://www.foiadvocates.com/records.html> (last visited Oct. 24, 2023). States may charge fees in order to provide copies of public records; e.g., New Jersey’s Open Public records Law, N.J.S.A. 47:1A-1 *et seq.*

### ***State Agencies and AAAs***

ACL has administrative oversight responsibility with respect to the expenditures of Federal funds pursuant to the OAA, and these flexibilities involve exceptions to certain programmatic and fiscal requirements under the OAA. Accordingly, in addition to the flexibilities we allow in this section, we are compelled to set forth that State agencies be required to submit State plan amendments when they intend to exercise any of these flexibilities, as well to comply with reporting requirements. We believe the cost to a State agency to prepare and submit a State plan amendment will be quite minimal, in particular in comparison to the benefits to older adults in emergency situations as a result of these flexibilities. We, therefore, do not quantify the cost to a State agency to prepare and submit such a State plan amendment. We likewise do not quantify the cost to a State agency to comply with reporting requirements, as sound fiscal and data tracking policies and principles, outside of the OAA, should be in place for all State agency expenditures of Federal funds, regardless of the source.

### ***Title VI Grantees***

Similarly, § 1322.35 will provide for flexibilities to be available to Title VI grantees during certain emergencies and will require Title VI grantees to report separately on expenditures of funds when exercising such flexibilities. Again, we do not quantify the cost to a Title VI grantee to comply with reporting requirements, as sound fiscal and data tracking policies and principles, outside of the OAA, should be in place for all Title VI grantee expenditures of Federal funds, regardless of the source.

### **iii. Total Quantified Costs of the Final Rule**

The table below sets forth the total estimated cost of the final rule:<sup>397</sup>

<b>Item of Cost</b>	<b>State Agencies and AAAs (\$)</b>	<b>Service Providers (\$)</b>	<b>Title VI Grantees (\$)</b>
2020 OAA Reauthorization	0.00	0.00	0.00

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<sup>397</sup> For information regarding the calculations of the amounts set forth in this table, please see the RIA discussion above.

Revise Policies and Procedures	1,505,106.40	8,435,458.12	430,255.80
Prepare/Conduct Training for Own Staff	237,732.56	N/A	114,734.88
Receipt of Training for Own Staff	1,010,406.00	4,978,897.76	335,449.60
SUA Training of AAAs	234,427.44	N/A	N/A
SUA/AAA Training of Service Providers	147,313.92	N/A	N/A
Available Documentation	--		--
State Plan Amendments for Disaster Flexibilities	--		--
<b>TOTAL</b>	<b>3,134,986.32</b>	<b>13,414,355.88</b>	<b>880,440.28</b>

As the table above indicates, the costs attributable to the final rule, in the aggregate amount, are estimated at \$17,429,782.50. ACL estimates quantified costs attributable to the final rule of \$3.13 million for State agencies and AAAs (at an average cost of \$4,484 per State agency in States that have AAAs, \$4,488 per State agency in States with no AAAs, and \$4,694 per area agency), \$13.4 million for service providers (at an average cost of \$769 per service provider), and \$0.88 million for Title VI grantees (at an average cost of \$3,036 per Title VI grantee). These costs would consist of staff time to revise policies and procedures and to create, provide and receive trainings. Assuming annual productive time per full time employee (FTE) of 1,650 hours (based on average weekly hours worked of 33 hours per week<sup>398</sup> and 50 weeks worked per annum), these estimated costs would equate to approximately four percent of one (1) FTE's annual time for each State agency and area agency, three percent of one (1) FTE's annual time for each Title VI grantee, and .7 percent of one (1) FTE's annual time for each service provider.

## 2. Discussion of Benefits

The benefits from this final rule are difficult to quantify. We anticipate that the rule will provide clarity of administration for State agencies, AAAs, and Title VI grantees with respect to

<sup>398</sup> Average weekly hours worked information per U.S. Dep't. of Labor, Bureau of Labor and Statistics, Labor Productivity and Cost Measures – Major Sectors nonfarm business, business, nonfinancial corporate, and manufacturing (Feb. 2, 2023), <https://www.bls.gov/productivity/tables/home.htm>.

aspects of the OAA that were enacted under previous reauthorizations. This clarity likely will reduce time spent by grantees in implementing and managing OAA programs and services and result in improved program and fiscal management.

Additional benefits are anticipated from our modifications to regulatory text that modernize our rule to provide greater flexibility to State agencies and AAAs, as well as to reflect ongoing feedback from interested parties and responses to our RFI and NPRM in areas where our prior regulations did not address the evolving needs of Title III, VI, and VII grantees and the older adults and family caregivers they serve. The rule's allowance for shelf-stable, pick-up, carry-out, drive-through, or similar meals, where a participant will be able to collect their meal from a congregate site and return to the community off-site to enjoy it, is a direct response to feedback from interested parties, including as gathered from the RFI, and appropriately reflects the evolving needs of both grantees and OAA participants. We anticipate increased participation in the Title III nutrition programs, which in turn will lead to better nutritional health for a new group of older adults that does not currently participate in the program.

Another example of a modification to regulatory text that will modernize our rule is the new definition of "greatest economic need," which will allow State agencies and AAAs to take into consideration populations that experience economic need due to a variety of local conditions and individual situations, other than income, that could factor into an individual's level of economic need. State agencies and AAAs are in the best position to understand the conditions and factors in their State and local areas that contribute to individuals falling within this category. Accordingly, this definition will allow State agencies and AAAs to make these determinations.

The flexibilities to be afforded to State agencies and Title VI grantees in certain emergency and disaster situations will allow funding to be directed more efficiently where it is needed most to better assist older adults in need.

We have determined that the many anticipated benefits of the final rule are not

quantifiable, given the variation in the types and sizes of State agencies, AAAs, and Title VI grantees, as well as the variation in conditions and situations at the State and local level throughout the U.S.

## **B. Regulatory Flexibility Act**

Under the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) (5 U.S.C. 601 et seq.), agencies must consider the impact of regulations on small entities and analyze regulatory options that would minimize a rule's impacts on these entities. Alternatively, the agency head may certify that the final rule will not have a significant economic impact on a substantial number of small entities. ACL estimates the costs that would result from the final rule to be \$4,879 per State agency in States that have area agencies, \$4,883 per State agency in States with no area agencies, \$5,104 per area agency, \$856 per service provider, and \$3,247 per Title VI grantee. These costs would consist of staff time to revise policies and procedures and to create, provide and receive trainings. Assuming annual productive time per full time employee (FTE) of 1,650 hours (based on average weekly hours worked of 33 hours per week<sup>399</sup> and 50 weeks worked per annum), these estimated costs would equate to approximately four percent of one (1) FTE's annual time for each State agency and area agency, three percent of one (1) FTE's annual time for each Title VI grantee, and .7 percent of one (1) FTE's annual time for each service provider. HHS certifies that this final rule will not have a significant economic impact on a substantial number of small businesses and other small entities.

## **C. Executive Order 13132 (Federalism)**

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement describing the agency's considerations.

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<sup>399</sup> *Id.*

### *Consultations With State and Local Officials*

Executive Order 13132 requires meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. As discussed in the preamble, the proposed regulations were developed with input from interested parties, including State and local officials.

We issued a Request for Information (RFI) on May 6, 2022, seeking input from the aging network, Indian Tribes, States, and Territories on challenges they face administering services, as well as feedback from individuals and other interested parties on experiences with services, providers, and programs under the Act. ACL received comments from over 90 entities in response to the RFI.

In addition, ACL conducted a listening session on April 18, 2022, at the national conference for Tribal organization grantees under Title VI of the OAA. We also promoted the RFI and the NPRM with Title VI grantees and Indian Tribes, and a Tribal consultation meeting took place at the National Title VI Conference April 12, 2023.

On June 16, 2023, the Federal Register published a notice of proposed rulemaking (NPRM) regarding OAA Titles III, VI, and VII (88 FR 39568). Through the NPRM, ACL sought feedback regarding ACL's proposal to modernize the implementing regulations of the OAA, which have not been substantially altered since their promulgation in 1988. ACL received 780 public comments on the NPRM.

The goal of the processes outlined above was to hear from all interested entities, including State and local officials, the public, and professional fields about their experience with OAA services and about the proposed regulations. Interested parties were provided with opportunities to give input as to areas where our prior regulations did not address the evolving needs of Title III, VI, and VII grantees and the older adults and family caregivers they serve, as well as input into the content of the final rule. We carefully reviewed comments received in response to the RFI and the NPRM from State and local officials, considered concerns raised in



developing the final rule, and made changes to several of the final rule's provisions based on public comments. Our final rule is a direct response to feedback from interested parties and reflects the evolving needs of both grantees and OAA program participants.

*Nature of Concerns and the Need to Issue This Proposed Rule*

The final rule modifies existing OAA regulations 45 CFR parts 1321, 1322, and 1324 and removes 45 CFR part 1323. Most of these changes modernize the OAA regulations to bring them into conformity with the reauthorized OAA and to provide clarity of administration for ACL and its grantees. In addition to areas where we better align regulation with current statute, we make modifications to regulatory text that modernize our rule to provide greater flexibility to State agencies.

Commenters overwhelmingly supported most provisions in the proposed rule. Many commenters expressed general support for our updates to modernize the regulations. Some commenters appreciated the flexibilities in the rule, while others appreciated the additional clarity offered by the rule.

Some commenters asked that ACL be more prescriptive in the final rule and that the final rule be revised to allow less discretion to State agencies in implementing the Act. The preamble notes several instances where ACL declined such requests, in order to provide flexibility to State agencies in implementing the final rule.

We received comments that the final rule would be challenging to implement absent additional funding. We seriously considered these views in developing the final rule. We also completed a regulatory impact analysis to fully assess costs and benefits of the new requirements. We recognize that some of the new proposed regulatory provisions may create administrative and monetary burden in updating policies and procedures, as well as a potential need for changes to some States' laws or regulations. However, this burden should be a one-time expense, some policies are at the States' option to adopt, and States will have significant discretion to implement the proposed provisions in the manner best suited to State needs. Much

of this final rule codifies the policies and procedures that State agencies already have, or should have, in place to administer programs and deliver services under the OAA, and we believe that many State agencies already are in substantial compliance with the final rule.

*Extent To Which We Meet Those Concerns*

The 2020 OAA reauthorization increased the amount of OAA funding that State agencies<sup>400</sup> may use to administer the Act from the greater of (i) 5% of Title III B, C, D, and E funding and (ii) \$500,000 to the greater of (i) 5% of Title III B, C, D, and E funding and (ii) \$750,000.<sup>401</sup> In addition, we believe that many States already are in substantial compliance with the final rule, most of which brings the regulations into conformity with the OAA. We also believe the benefits of the final rule will be significant: the rule provides considerable latitude to State agencies to determine how best to implement the OAA in order to respond to local needs and circumstances, and it increases the flexibility available to States in administering the OAA.

**D. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)**

ACL will fulfill its responsibilities under Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” Executive Order 13175 requires Federal agencies to establish procedures for meaningful consultation and coordination with Tribal officials in the development of Federal policies that have Tribal implications. ACL conducted a listening session at the National Title VI Conference on April 18, 2022. We also promoted the RFI and NPRM with Title VI grantees and Indian Tribes. A Tribal consultation meeting took place at the National Title VI Conference April 12, 2023. ACL continued to solicit input from affected Federally recognized Indian Tribes as we developed these updated regulations. ACL conducted a Tribal consultation meeting on Thursday June 22, 2023, from 2:00 pm to 4:00 pm eastern time. Additional details were made available at <https://olderindians.acl.gov/events/>.

*Comment:* Commenters expressed concern that proposed service policies and procedures

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<sup>400</sup> This excludes Guam, American Samoa, the United States Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands, which have lower administrative caps.

<sup>401</sup> 42 U.S.C. 3028(b).

were not added through consultation and do not honor Tribal sovereignty. Another commenter noted the numerous acts of Congress that require Federal agencies to consider the administrative burden and infrastructure inequities faced by Tribes. A commenter noted that there should be additional Tribal consultation with Alaskan and Hawaiian programs given the volume and special circumstances that they could speak to on the impact of the proposed regulations.

*Response:* ACL honors Tribal sovereignty and offered formal Tribal consultation and other engagements with Tribal grantee input prior to issuing the NPRM. ACL conducted a listening session at the National Title VI Conference on April 18, 2022. We also promoted the RFI with Title VI grantees and Indian Tribes until it closed on June 6, 2022. A Tribal consultation meeting took place at the National Title VI Conference April 12, 2023. ACL also conducted a Tribal briefing on June 22, 2023. These activities were conducted in addition to the weekly announcements made by ACL’s Office of American Indian, Alaskan Native, and Native Hawaiian Programs once the NPRM was released on June 16, 2023, and the formal Tribal consultation requested and received on the NPRM on August 9, 2023, following a “Dear Tribal Leader” sent from ACL.

ACL is committed to honoring Tribal sovereignty while offering opportunities to directly engage with program contacts and leaders regularly.

ACL works to maintain a strong government to government relationship with opportunities to provide meaningful and timely input on areas that have a direct impact to their programs. ACL used comments received from Tribal grantees and other commentators through the RFI process to ensure that cultural and traditional practices were incorporated into the proposed regulations. ACL sent a Tribal Leader Letter to Tribal leaders on July 14, 2023, sharing a direct link to make comments and hosted a Tribal consultation regarding the proposed regulations on August 9, 2023. ACL notes that much of what is in the final rule is codifying what is in the Act.

## **E. Unfunded Mandates Reform Act of 1995**

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. In 2023, that threshold is approximately \$177 million. If a covered agency must prepare a budgetary impact statement, section 205 further requires that it select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with the statutory requirements. In addition, section 203 requires a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule. We have determined that this rule would not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of more than \$177 million in any one year. Accordingly, we have not prepared a budgetary impact statement, specifically addressed the regulatory alternatives considered, or prepared a plan for informing and advising any significantly or uniquely impacted small governments.

#### **F. Plain Language in Government Writing**

Pursuant to Executive Order 13563 of January 18, 2011, and Executive Order 12866 of September 30, 1993, Executive Departments and Agencies are directed to use plain language in all proposed and final rules. ACL believes it has used plain language in drafting of the proposed and final rule.

#### **G. Paperwork Reduction Act (PRA)**

The final rule contains an information collection in the form of State plans on aging under Title III and Title VII of the Act and applications for funding by eligible organizations to serve older Native Americans and family caregivers under Title VI of the Act. ACL intends to update guidance regarding State plans on aging and applications for funding under Title VI of the Act when the final rule is published.

The requirement for each State agency to submit a multi-year State plan on aging, for a

two, three, or four-year period, is a core function of State agencies and a long-standing requirement to receive funding under the Act. State agencies use funds provided under the Act to prepare State plans on aging. In preparing and submitting State plans on aging, State agencies compile information and obtain public input. They coordinate with State, Tribal, AAA, service providers, local government, and other interested parties.

ACL will submit a PRA request to the Office of Management and Budget (OMB) for the development of the State plans on aging. Respondents include 55 State agencies located in each of the 50 States as well as the District of Columbia, Guam, Puerto Rico, American Samoa, and the Mariana Islands. ACL estimates 40 burden hours per response. Due to the multi-year nature of the plans, ACL estimates a total of 683 hours in the aggregate to meet State plan requirements by State agencies each year. Based on our years of experience, we anticipate for each State agency 171 hours of executive staff time equivalent to a general and operations manager (Occupation code 11-1021), at a cost of \$55.41 per hour unadjusted hourly wage, \$110.82 adjusted for non-wage benefits and indirect costs, and 512 hours of first-line supervisor time (Occupation code 43-1011), at a cost of \$30.47 per hour unadjusted hourly wage, \$60.94 adjusting for non-wage benefits and indirect costs. We monetize the cost of meeting State plan requirements at \$50,151.50 per year.

This final rule contains an information collection under OMB control number 0985-0064 Application for Older Americans Act, Title VI parts A/B and C Grants with an expiration date of November 30, 2025. The OAA requires the Department to promote the delivery of supportive services and nutrition services to Native Americans. ACL is responsible for administering the Title VI part A/B (Nutrition and Supportive Service) and part C (Caregiver) grants. This information collection (0985-0064) gathers information on the ability of Federally recognized American Indian, Alaskan Native and Native Hawaiian organizations to provide nutrition, supportive, and caregiver services to elders within their service area. Title VI grant applications are required once every three (3) years, with 545 respondents taking 4.25 hours per response.

ACL estimates the burden associated with this collection of information as 395.4 annual burden hours.

Following publication of this rule, ACL will update guidance regarding State plans on aging and applications for funding under Title VI of the Act. In accordance with the regulations implementing the PRA, sections § 1320.11 and § 1320.12, ACL will submit any material or substantive revisions under 0985-0064 and 0985-New to the Office of Management and Budget for review, comment, and approval.

### **List of Subjects in 45 CFR Parts 1321, 1322, 1323, and 1324**

Administrative practice and procedure, Aged, Area agencies on aging, Elder rights, Family caregivers, Grant programs—social programs, Indians, Native Hawaiian programs, Tribal organizations and a Native Hawaiian grantee.

For the reasons discussed in the preamble, ACL amends 45 CFR chapter XIII as follows:

1. Revise part 1321 to read as follows:

### **PART 1321—GRANTS TO STATE AND COMMUNITY PROGRAMS ON AGING**

Sec.

#### **Subpart A – Introduction**

1321.1 Basis and purpose of this part.

1321.3 Definitions.

#### **Subpart B – State Agency Responsibilities**

1321.5 Mission of the State agency.

1321.7 Organization and staffing of the State agency.

1321.9 State agency policies and procedures.

1321.11 Advocacy responsibilities.

1321.13 Designation of and designation changes to planning and service areas.

1321.15 Interstate planning and service area.

1321.17 Appeal to the Departmental Appeals Board on planning and service area designation.

1321.19 Designation of and designation changes to area agencies.

1321.21 Withdrawal of area agency designation.

1321.23 Appeal to the Departmental Appeals Board on area agency on aging withdrawal of designation.

1321.25 Duration, format, and effective date of the State plan.

1321.27 Content of State plan.

1321.29 Public participation.

- 1321.31 Amendments to the State plan.
- 1321.33 Submission of the State plan or plan amendment to the Assistant Secretary for Aging for approval.
- 1321.35 Notification of State plan or State plan amendment approval or disapproval for changes requiring Assistant Secretary for Aging approval.
- 1321.37 Notification of State plan amendment receipt for changes not requiring Assistant Secretary for Aging approval.
- 1321.39 Appeals to the Departmental Appeals Board regarding State plan on aging.
- 1321.41 When a disapproval decision is effective.
- 1321.43 How the State agency may appeal the Departmental Appeals Board's decision.
- 1321.45 How the Assistant Secretary for Aging may reallocate the State agency's withheld payments.
- 1321.47 Conflicts of interest policies and procedures for State agencies.
- 1321.49 Intrastate funding formula.
- 1321.51 Single planning and service area States.
- 1321.53 State agency Title III and Title VI coordination responsibilities.

### **Subpart C – Area Agency Responsibilities**

- 1321.55 Mission of the area agency.
- 1321.57 Organization and staffing of the area agency.
- 1321.59 Area agency policies and procedures.
- 1321.61 Advocacy responsibilities of the area agency.
- 1321.63 Area agency advisory council.
- 1321.65 Submission of an area plan and plan amendments to the State agency for approval.
- 1321.67 Conflicts of interest policies and procedures for area agencies on aging.
- 1321.69 Area agency on aging Title III and Title VI coordination responsibilities.

### **Subpart D – Service Requirements**

- 1321.71 Purpose of services allotments under Title III.
- 1321.73 Policies and procedures.
- 1321.75 Confidentiality and disclosure of information.
- 1321.77 Purpose of services – person- and family-centered, trauma-informed.
- 1321.79 Responsibilities of service providers under State and area plans.
- 1321.81 Client eligibility for participation.
- 1321.83 Client and service priority.
- 1321.85 Supportive services.
- 1321.87 Nutrition services.
- 1321.89 Evidence-based disease prevention and health promotion services.
- 1321.91 Family caregiver support services.
- 1321.93 Legal assistance.
- 1321.95 Service provider Title III and Title VI coordination responsibilities.

### **Subpart E – Emergency and Disaster Requirements**

- 1321.97 Coordination with State, Tribal, and local emergency management.
- 1321.99 Setting aside funds to address disasters.
- 1321.101 Flexibilities under a major disaster declaration.
- 1321.103 Title III and Title VI coordination for emergency and disaster preparedness.

1321.105 Modification during major disaster declaration or public health emergency.

**Authority:** 42 U.S.C. 3001 et seq.

**Subpart A – Introduction**

**§ 1321.1 Basis and purpose of this part.**

(a) The purpose of this part is to implement Title III of the Older Americans Act, as amended (the Act) (42 U.S.C. 3001 et seq.). This part prescribes requirements State agencies shall meet to receive grants to develop comprehensive and coordinated systems for the delivery of the following services: supportive, nutrition, evidence-based disease prevention and health promotion, caregiver, legal, and, where appropriate, other services. These services are provided via State agencies, area agencies on aging, and local service providers under the Act. These requirements include:

- (1) Responsibilities of State agencies;
- (2) Responsibilities of area agencies on aging;
- (3) Service requirements; and
- (4) Emergency and disaster requirements.

(b) The requirements of this part are based on Title III of the Act. Title III provides for formula grants to State agencies on aging, under approved State plans described in § 1321.27, to develop or enhance comprehensive and coordinated community-based systems resulting in a continuum of person-centered services to older persons and family caregivers, with special emphasis on older individuals with the greatest economic need and greatest social need, with particular attention to low-income minority older individuals. A responsive community-based system of services shall include collaboration in planning, resource allocation, and delivery of a comprehensive array of services and opportunities for all older adults in the community. Title III funds are intended to be used as a catalyst to bring together public and private resources in the community to assure the provision of a full range of efficient, well-coordinated, and accessible person-centered services for older persons and family caregivers.



(c) Each State designates one State agency to:

(1) Develop and submit a State plan on aging, as set forth in § 1321.33;

(2) Administer Title III and VII funds under the State plan and the Act;

(3) Be responsible for planning, policy development, administration, coordination, priority setting, monitoring, and evaluation of all State activities related to the Act;

(4) Serve as an advocate for older individuals and family caregivers;

(5) Designate planning and service areas;

(6) Designate an area agency on aging to serve each planning and service area, except in single planning and service area States; and

(7) Provide funds as set forth in the Act to either:

(i) Area agencies on aging under approved area plans on aging, in States with multiple planning and service areas, for their use in fulfilling requirements under the Act and distribution to service providers to provide direct services,

(ii) Service providers, in single planning and service area States, to provide direct services, or

(iii) The Ombudsman program, as set forth in part 1324 of this chapter.

(d) Terms used, but not otherwise defined, in this part will have the meanings ascribed to them in the Act.

### **§ 1321.3 Definitions.**

*Access to services or access services*, as used in this part and sections 306 and 307 of the Act (42 U.S.C. 3026 and 3027), means services which may facilitate connection to or receipt of other direct services, including transportation, outreach, information and assistance, options counseling, and case management services.

*Acquiring*, as used in the Act, means obtaining ownership of an existing facility.

*Act*, means the Older Americans Act of 1965, as amended.

*Altering or renovating*, as used in this part, means making modifications to or in

connection with an existing facility which are necessary for its effective use. Such modifications may include alterations, improvements, replacements, rearrangements, installations, renovations, repairs, expansions, upgrades, or additions, which are not in excess of double the square footage of the original facility and all physical improvements.

*Area agency on aging*, as used in this part, means a single agency designated by the State agency to perform the functions specified in the Act for a planning and service area.

*Area plan administration*, as used in this part, means funds used to carry out activities as set forth in section 306 of the Act (42 U.S.C. 3026) and other activities to fulfill the mission of the area agency as set forth in § 1321.55, including development of private pay programs or other contracts and commercial relationships.

*Best available data*, as used in section 305(a)(2)(C) of the Act (42 U.S.C. 3025(a)(2)(C)), with respect to the development of the intrastate funding formula, means the most current reliable data or population estimates available from the U.S. Decennial Census, American Community Survey, or other high-quality, representative data available to the State agency.

*Constructing*, as used in this part, means building a new facility, including the costs of land acquisition and architectural and engineering fees, or making modifications to or in connection with an existing facility which are in excess of double the square footage of the original facility and all physical improvements.

*Conflicts of interest*, as used in this part, means:

(1) One or more conflicts between the private interests and the official responsibilities of a person in a position of trust;

(2) One or more conflicts between competing duties of an individual, or between the competing duties, services, or programs of an organization, and/or portion of an organization;  
and

(3) Other conflicts of interest identified in guidance issued by the Assistant Secretary for Aging and/or by State agency policies.

*Cost sharing*, as used in section 315(a) of the Act (42 U.S.C. 3030c–2(a)), means requesting payment using a sliding scale, based only on an individual’s income and the cost of delivering the service, in a manner consistent with the exceptions, prohibitions, and other conditions laid out in the Act.

*Department*, means the U.S. Department of Health and Human Services.

*Direct services*, as used in this part, means any activity performed to provide services directly to an older person or family caregiver, groups of older persons or family caregivers, or to the general public by the staff or volunteers of a service provider, an area agency on aging, or a State agency whether provided in-person or virtually. Direct services exclude State or area plan administration and program development and coordination activities.

*Domestically produced foods*, as used in this part, means Agricultural foods, beverages and other food ingredients which are a product of the United States, its Territories or possessions, the Commonwealth of Puerto Rico, or the Trust Territories of the Pacific Islands (hereinafter referred to as “the United States”), except as may otherwise be required by law, and shall be considered to be such a product if it is grown, processed, and otherwise prepared for sale or distribution exclusively in the United States except with respect to minor ingredients. Ingredients from nondomestic sources will be allowed to be utilized as a United States product if such ingredients are not otherwise:

- (1) Produced in the United States; and
- (2) Commercially available in the United States at fair and reasonable prices from domestic sources.

*Family caregiver*, as used in this part, means an adult family member, or another individual, who is an informal provider of in-home and community care to an older individual; an adult family member, or another individual, who is an informal provider of in-home and community care to an individual of any age with Alzheimer’s disease or a related disorder with neurological and organic brain dysfunction; or an older relative caregiver. For purposes of this

part, family caregiver does not include individuals whose primary relationship with the older adult is based on a financial or professional agreement.

*Fiscal year*, as used in this part, means the Federal fiscal year.

*Governor*, as used in this part, means the chief elected officer of each State and the mayor of the District of Columbia.

*Greatest economic need*, as used in this part, means the need resulting from an income level at or below the Federal poverty level and as further defined by State and area plans based on local and individual factors, including geography and expenses.

*Greatest social need*, as used in this part, means the need caused by noneconomic factors, which include:

- (1) Physical and mental disabilities;
- (2) Language barriers;
- (3) Cultural, social, or geographical isolation, including due to:
  - (i) Racial or ethnic status;
  - (ii) Native American identity;
  - (iii) Religious affiliation;
  - (iv) Sexual orientation, gender identity, or sex characteristics;
  - (v) HIV status;
  - (vi) Chronic conditions;
  - (vii) Housing instability, food insecurity, lack of access to reliable and clean water supply, lack of transportation, or utility assistance needs;
  - (viii) Interpersonal safety concerns;
  - (ix) Rural location; or
  - (x) Any other status that:
    - (A) Restricts the ability of an individual to perform normal or routine daily tasks; or
    - (B) Threatens the capacity of the individual to live independently; or

(4) Other needs as further defined by State and area plans based on local and individual factors.

*Immediate family*, as used in this part pertaining to conflicts of interest, means a member of the household or a relative with whom there is a close personal or significant financial relationship.

*In-home supportive services*, as used in this part, references those supportive services provided in the home as set forth in the Act, to include:

- (1) Homemaker, personal care, home care, home health, and other aides;
- (2) Visiting and telephone or virtual reassurance;
- (3) Chore maintenance;
- (4) Respite care for families, including adult day care; and
- (5) Minor modification of homes that is necessary to facilitate the independence and health of older individuals and that is not readily available under another program.

*Local sources*, as used in the Act and *local public sources*, as used in section 309(b)(1) of the Act (42 U.S.C. 3029(b)(1)), means tax-levy money or any other non-Federal resource, such as State or local public funding, funds from fundraising activities, reserve funds, bequests, or cash or third-party in-kind contributions from non-client community members or organizations.

*Major disaster declaration*, as used in this part and section 310 of the Act (42 U.S.C. 3030), means a Presidentially declared disaster under the Robert T. Stafford Relief and Emergency Assistance Act (42 U.S.C. 5121-5207).

*Means test*, as used in the Act, means the use of the income, assets, or other resources of an older person, family caregiver, or the households thereof to deny or limit that person's eligibility to receive services under this part.

*Multipurpose senior center*, as used in the Act, means a community facility for the organization and provision of a broad spectrum of services, which shall include provision of health (including mental and behavioral health), social, nutritional, and educational services and

the provision of facilities for recreational activities for older individuals, as practicable, including as provided via virtual facilities; as used in § 1321.85, facilitation of services in such a facility.

*Native American*, as used in the Act, means a person who is a member of any Indian Tribe, band, nation, or other organized group or community of Indians (including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) who:

(1) Is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; or

(2) Is located on, or in proximity to, a Federal or State reservation or rancheria; or is a person who is a Native Hawaiian, who is any individual any of whose ancestors were natives of the area which consists of the Hawaiian Islands prior to 1778.

*Nutrition Services Incentive Program*, as used in the Act, means grant funding to State agencies, eligible Tribal organizations, and Native Hawaiian grantees to support congregate and home-delivered nutrition programs by providing an incentive to serve more meals.

*Official duties*, as used in section 712 of the Act (42 U.S.C. 3058g) with respect to representatives of the Long-Term Care Ombudsman Program, means work pursuant to the Long-Term Care Ombudsman Program authorized by the Act, 45 CFR part 1324, subpart A, and/or State law and carried out under the auspices and general direction of, or by direct delegation from, the State Long-Term Care Ombudsman.

*Older relative caregiver*, as used in section 372(a)(4) of the Act (42 U.S.C. 3030s(a)(4)), means a caregiver who is age 55 or older and lives with, is the informal provider of in-home and community care to, and is the primary caregiver for, a child or an individual with a disability;

(1) In the case of a caregiver for a child is:

(i) The grandparent, step-grandparent, or other relative (other than the parent) by blood, marriage, or adoption, of the child;

(ii) Is the primary caregiver of the child because the biological or adoptive parents are

unable or unwilling to serve as the primary caregivers of the child; and

(iii) Has a legal relationship to the child, such as legal custody, adoption, or guardianship, or is raising the child informally; and

(2) In the case of a caregiver for an individual with a disability, is the parent, grandparent, step-grandparent, or other relative by blood, marriage, or adoption of the individual with a disability.

*Periodic*, as used in this part to refer to the frequency of client assessment and data collection, means, at a minimum, once each fiscal year, and as used in section 307(a)(4) of the Act (42 U.S.C. 3027(a)(4)) to refer to the frequency of evaluations of, and public hearings on, activities and projects carried out under State and area plans, means, at a minimum once each State or area plan cycle.

*Planning and service area*, as used in section 305 of the Act (42 U.S.C. 3025), means an area designated by a State agency under section 305(a)(1)(E) (42 U.S.C. 3025(a)(1)(E)), for the purposes of local planning and coordination and awarding of funds under Title III of the Act, including a single planning and service area.

*Private pay programs*, as used in section 306(g) of the Act (42 U.S.C. 3026(g)), are a type of contract or commercial relationship and are programs, separate and apart from programs funded under the Act, for which the individual consumer agrees to pay to receive services under the programs.

*Program development and coordination activities*, as used in this part, means those actions to plan, develop, provide training, and coordinate at a systemic level those programs and activities which primarily benefit and target older adult and family caregiver populations who have the greatest social needs and greatest economic needs, including development of contracts, commercial relationships, or private pay programs.

*Program income*, means gross income earned by the non-Federal entity that is directly generated by a supported activity or earned as a result of the Federal award during the period of

performance except as otherwise provided under Federal grantmaking authorities. Program income includes but is not limited to income from fees for services performed, the use or rental of real or personal property acquired under Federal awards, the sale of commodities or items fabricated under a Federal award, license fees and royalties on patents and copyrights, and principal and interest on loans made with Federal award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in Federal statutes, regulations, or the terms and conditions of the Federal award, program income does not include rebates, credits, discounts, and interest earned on any of them. *See also* 35 U.S.C. 200-212 (which applies to inventions made under Federal awards).

*Reservation*, as used in section 305(b)(2) of the Act (42 U.S.C. 3025(b)(2)) with respect to the designation of planning and service areas, means any Federally or State recognized American Indian Tribe's reservation, pueblo, or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), and Indian allotments.

*Service provider*, means an entity that is awarded funds, including via a grant, subgrant, contract, or subcontract, to provide direct services under the State or area plan.

*Severe disability*, as used to carry out the provisions of the Act, means a severe, chronic disability attributable to mental or physical impairment, or a combination of mental and physical impairments, that:

- (1) Is likely to continue indefinitely; and
- (2) Results in substantial functional limitation in three or more of the following major life activities: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, economic self-sufficiency, cognitive functioning, and emotional adjustment.

*Single planning and service area State*, means a State which was approved on or before October 1, 1980, as such and continues to operate as a single planning and service area.



*State*, as used in this part, means one or more of the 50 States, the District of Columbia, and the Territories of Guam, Puerto Rico, the United States Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands, unless otherwise specified.

*State agency*, as used in this part, means the designated State unit on aging for each of the 50 States, the District of Columbia, and the Territories of Guam, Puerto Rico, the United States Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands, unless otherwise specified.

*State plan administration*, as used in this part, means funds used to carry out activities as set forth in section 307 of the Act (42 U.S.C. 3027) and other activities to fulfill the mission of the State agency as set forth in § 1321.5.

*Supplemental foods*, as used in this part, means foods that assist with maintaining health, but do not alone constitute a meal. Supplemental foods include liquid nutrition supplements or enhancements to a meal, such as additional beverage or food items, and may be specified by State agency policies and procedures. Supplemental foods may be provided with a meal, or separately, to older adults who participate in either congregate or home-delivered meal services.

*Voluntary contributions*, as used in section 315(b) of the Act (42 U.S.C. 3030c–2(b)), means donations of money or other personal resources given freely, without pressure or coercion, by individuals receiving services under the Act.

## **Subpart B – State Agency Responsibilities**

### **§ 1321.5 Mission of the State agency.**

(a) The Act intends that the State agency shall be a leader on all aging issues on behalf of all older individuals and family caregivers in the State. The State agency shall proactively carry out a wide range of functions, including advocacy, planning, coordination, inter-agency collaboration, information sharing, training, monitoring, and evaluation. The State agency shall lead the development or enhancement of comprehensive and coordinated community-based systems in, or serving, communities throughout the State. These systems shall be designed to

assist older individuals and family caregivers in leading independent, meaningful, and dignified lives in their own homes and communities.

(b) In States with multiple planning and service areas, the State agency shall designate area agencies on aging to assist in carrying out the mission described above for the State agency at the sub-State level. The State agency shall designate as area agencies on aging only those non-State agencies having the capacity and making the commitment to fully carry out the mission described for area agencies in § 1321.55.

(c) The State agency shall assure that the resources made available to area agencies on aging under the Act are used to carry out the mission described for area agencies in § 1321.55.

#### **§ 1321.7 Organization and staffing of the State agency.**

(a) The State shall designate a sole State agency to develop and administer the State plan required under this part and part 1324 of this chapter and to serve as the effective and visible advocate for older adults within the State.

(b) The State agency shall have an adequate number of qualified staff to fulfill the functions prescribed in this part.

(c) The State agency shall establish, contract, or otherwise arrange with another agency or organization as permitted by section 307(a)(9)(A) of the Act (42 U.S.C. 3027(a)(9)(A)), an Office of the State Long-Term Care Ombudsman. Such Office must be headed by a full-time Ombudsman and consist of other staff as appropriate to fulfill responsibilities as set forth in part 1324, subpart A, of this chapter.

(d) If a State statute establishes an Ombudsman program which will perform the functions of section 307(a)(9)(A) of the Act (42 U.S.C. 3027(a)(9)(A)), the State agency continues to be responsible for assuring that the requirements of this program under the Act and as set forth in part 1324, subpart A, of this chapter, are met, notwithstanding any additional requirements or funding related to State law. In such cases where State law may conflict with the Act, the Governor shall confirm understanding of the State agency's continuing obligations under

the Act through an assurance in the State plan.

(e) The State agency shall have as set forth in section 307(a)(13) (42 U.S.C. 3027(a)(13)) and section 731 of the Act (42 U.S.C. 3058j) and 45 CFR part 1324, subpart C, a Legal Assistance Developer, and such other personnel as appropriate to provide State leadership in developing legal assistance programs for older individuals throughout the State.

### **§ 1321.9 State agency policies and procedures.**

(a) The State agency on aging shall develop policies and procedures governing all aspects of programs operated as set forth in this part and part 1324 of this chapter. These policies and procedures shall be developed in consultation with area agencies on aging, program participants, and other appropriate parties in the State. Except for the Ombudsman program as set forth in 45 CFR part 1324, subpart A and where otherwise indicated, the State agency policies may allow for such policies and procedures to be developed at the area agency on aging level. The State agency is responsible for implementing, monitoring, and enforcing policies and procedures, where:

(1) The policies and procedures developed by the State agency shall address how the State agency will monitor the programmatic and fiscal performance of all programs and activities initiated under this part for compliance with all requirements, and for quality and effectiveness. As set forth in sections 305(a)(2)(A) and 306(a) of the Act (42 U.S.C. 3025(a)(2)(A) and 3026(a)), and consistent with section 305(a)(1)(C) (42 U.S.C. 3025(a)(1)(C)), the State agency shall be responsible for monitoring the program and financial activities of subrecipients and subgrantees to ensure that grant awards are used for the authorized purposes and in compliance with Federal statutes, regulations, and the terms and conditions of the grant award, including:

(i) Evaluating each subrecipient's risk of noncompliance to ensure proper accountability and compliance with program requirements and achievement of performance goals;

(ii) Reviewing subrecipient policies and procedures; and

(iii) Ensuring that all subrecipients and subgrantees complete audits as required in 2 CFR part 200, subpart F and 45 CFR part 75, subpart F.

(2) The State agency may not delegate to another agency the authority to award or administer funds under this part.

(3) The State Long-Term Care Ombudsman shall be responsible for monitoring the files, records, and other information maintained by the Ombudsman program, as set forth in part 1324, subpart A. Such monitoring may be conducted by a designee of the Ombudsman. Neither the Ombudsman nor a designee shall disclose identifying information of any complainant or long-term care facility resident to individuals outside of the Ombudsman program, except as otherwise specifically provided in § 1324.11(e)(3) of this chapter.

(b) The State agency shall ensure policies and procedures are aligned with periodic data collection and reporting requirements, including ensuring service and unit definitions are consistent with definitions set forth in these regulations, policy guidance, and other information developed by the Assistant Secretary for Aging.

(c) Policies and procedures developed and implemented by the State agency shall address:

(1) Direct service provision for services as set forth in §§ 1321.85, 1321.87, 1321.89, 1321.9, and 1321.93, including:

(i) Requirements for client eligibility, periodic assessment, and person-centered planning, where appropriate;

(ii) A listing and definitions of services that may be provided in the State with funds received under the Act;

(iii) Limitations on the frequency, amount, or type of service provided;

(iv) Definition of those within the State in greatest social need and greatest economic need;

(v) Specific actions the State agency will use or require the area agency to use to target services to meet the needs of those in greatest social need and greatest economic need;

(vi) How area agencies on aging may request to provide direct services under provisions of § 1321.65(b)(7), where appropriate;

(vii) Actions to be taken by area agencies and direct service providers to implement requirements as set forth in paragraphs (c)(2)(x) through (xi) of this section; and

(viii) The grievance process for older individuals and family caregivers who are dissatisfied with or denied services under the Act.

(2) Fiscal requirements including:

(i) *Intrastate funding formula (IFF)*. Distribution of Title III funds via the intrastate funding formula or funds distribution plan and of Nutrition Services Incentive Program funds as set forth in § 1321.49 or § 1321.51 shall be maintained by the State agency where funds must be promptly disbursed.

(ii) *Non-Federal share (match)*. As set forth in sections 301(d)(1) (42 U.S.C. 3021(d)(1)), 304(c) (42 U.S.C. 3024(c)), 304(d)(1)(A) (42 U.S.C. 3024(d)(1)(A)), 304(d)(1)(D) (42 U.S.C. 3024(d)(1)(D)), 304(d)(2) (42 U.S.C. 3024(d)(2)), 309(b) (42 U.S.C. 3029(b)), 316(b)(5) (42 U.S.C. 3030c-3(b)(5)), and 373(h)(2) (42 U.S.C. 3030s-2(h)(2)) of the Act, the State agency shall maintain statewide match requirements, where:

(A) The match may be made by State and/or local public sources except as set forth in paragraph (c)(2)(ii)(C) of this section.

(B) Non-Federal shared costs or match funds and all contributions, including cash and third-party in-kind contributions must be accepted if the funds meet the specified criteria for match. A State agency may not require only cash as a match requirement.

(C) State or local public resources used to fund a program which uses a means test shall not be used to meet the match.

(D) Proceeds from fundraising activities may be used to meet the match as long as no Federal funds were used in the fundraising activity. Fundraising activities are unallowable costs without prior written approval, as set forth in 2 CFR 200.442.

(E) A State agency may use State and local funds expended for a non-Title III funded program to meet the match requirement for Title III expenditures when the non-Title III funded

program:

- (1) Is directly administered by the State or area agency;
- (2) Does not conflict with requirements of the Act;
- (3) Is used to match only the Title III program and not any other Federal program; and
- (4) Includes procedures to track and account expenditures used as match for a Title III

program or service.

(F) Match requirements for area agencies are determined by the State agency.

(G) Match requirements for direct service providers are determined by the State and/or area agency.

(H) A State or area agency may determine a match in excess of required amounts.

(I) Other Federal funds may not be used to meet required match unless there is specific statutory authority.

(J) The required statewide match for grants awarded under Title III of the Act is as follows:

(1) *Administration.* Federal funding for State, Territory, and area plan administration may not account for more than 75 percent of the total funding expended and requires a 25 percent match. As set forth in 2 CFR 200.306(c), prior written approval is hereby granted for unrecovered indirect costs to be used as match.

(2) *Supportive services and nutrition services.* (i) Federal funding for services funded under supportive services as set forth in § 1321.85, less the portion of funds used for the Ombudsman program, may not account for more than 85 percent of the total funding expended, and requires a 15 percent match;

(ii) Federal funding for services funded under nutrition services as set forth in § 1321.87, less funds provided under the Nutrition Services Incentive Program, may not account for more than 85 percent of the total funding expended, and requires a 15 percent match;

(iii) One-third (1/3) of the 15 percent match must be met from State resources, and the

remaining two-thirds (2/3) match may be met by State or local resources;

(iv) The match for supportive services and nutrition services may be pooled.

(3) *Family caregiver support services*. The Federal funding for services funded under family caregiver support services as set forth in § 1321.91 may not account for more than 75 percent of the total dollars expended and requires a 25 percent match.

(4) *Services not requiring match*. Services for which no match is required include:

(i) Evidence-based disease prevention and health promotion services as set forth in § 1321.89;

(ii) The Nutrition Services Incentive Program; and

(iii) The portion of funds from supportive services used for the Ombudsman program.

(iii) *Transfers*. Transfer of service allotments elected by the State agency which must meet the following requirements:

(A) A State agency must provide notification of the transfer amounts elected pursuant to guidance as set forth by the Assistant Secretary for Aging;

(B) A State agency shall not delegate to an area agency on aging or any other entity the authority to make a transfer;

(C) A State agency may only elect to transfer between the Title III, part B Supportive Services and Senior Centers, part C-1 Congregate Nutrition Services, and part C-2 Home-Delivered Nutrition Services grant awards;

(I) The State agency may elect to transfer up to 40 percent between the Title III, part C-1 and part C-2 grant awards, per section 308(b)(4)(A) of the Act (42 U.S.C. 3028(b)(4)(A));

(i) The State agency must request and receive approval of a waiver from the Assistant Secretary for Aging to exceed the 40 percent transfer limit.

(ii) The State agency may request a waiver up to an additional 10 percent between the Title III part C-1 and part C-2 grant awards, per section 308(b)(4)(B) of the Act (42 U.S.C. 3028(b)(4)(B)).

(2) The State agency may elect to transfer up to 30 percent between Title III, parts B and C, per section 308(b)(5)(A) of the Act (42 U.S.C. 3028(b)(5)(A)); and

(i) The State agency must request and receive approval of a waiver from the Assistant Secretary for Aging to exceed the 30 percent limitation between parts B and C, per section 316(b)(4) of the Act (42 U.S.C. 3030c-3(b)(4));

(D) Percentages subject to transfer are calculated based on the total original Title III award allotted;

(E) Transfer limitations apply to the State agency in aggregate;

(F) State agencies, in consultation with area agencies, shall:

(I) Ensure the process used by the State agencies in transferring funds under this section (including requirements relating to the authority and timing of such transfers) is simplified and clarified to reduce administrative barriers; and

(2) With respect to transfers between parts C-1 and C-2, direct limited resources to the greatest nutrition service needs at the community level; and

(G) State agencies do not have to apply equal limitations on transfers to each area agency on aging.

(iv) *State, Territory, and area plan administration.* State and Territory plan administration maximum allocation requirements must align with the approved intrastate funding formula or funds allocation plan as set forth in § 1321.49 or § 1321.51, as applicable. In addition:

(A) *State and Territory plan administration maximum allocation amounts.* State and Territory plan administration maximum allocation amounts may be taken from any part of the overall allotment to a State agency under Title III of the Act. Maximum allocation amounts are determined by the State agency's status as set forth in this paragraph (c)(2)(iv)(A) and paragraph (c)(2)(iv)(B) of this section:

(I) A State agency which serves a State with multiple planning and service areas may use the greater of \$750,000, per section 308(b)(2)(A) of the Act (42 U.S.C. 3028(b)(2)(A)), or five



percent of the total Title III Award.

(2) A State agency which serves a single planning and service area State and is not listed in (3) below may elect to be subject to paragraph (c)(2)(iv)(A)(1) of this section or to the area plan administration limit of ten percent of the overall allotment to a State agency under Title III, as specified in section 308(a)(3) (42 U.S.C. 3028(a)(3)) of the Act.

(3) Guam, the United States Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands shall have available the greater of \$100,000 or five percent of the total final Title III Award, as set forth in section 308(b)(2)(B) (42 U.S.C. 3028(b)(2)(B)) of the Act.

(B) *Area plan administration maximum allocation amounts.* Area plan administration maximum allocation amounts may be allocated to any part of the overall allotment to the State agency under Title III, with the exception of part D, for use by area agencies on aging for activities as set forth in sections 304(d)(1)(A) and 308 of the Act (42 U.S.C. 3024(d)(1)(A) and 3028) and in § 1321.57(b). Single planning and service area States may elect amounts for either State plan administration or area plan administration, as set forth in the Act and paragraph (c)(2)(iv)(A)(2) of this section.

(1) The State agency will determine the maximum amount of funding available for area plan administration from the total Title III allocation after deducting the amount of funding allocated for State plan administration and calculating a maximum of ten percent of this amount;

(2) The State agency may make no more than the amount calculated in paragraph (c)(2)(iv)(B)(1) of this section available to area agencies on aging for distribution in accordance with the intrastate funding formula as set forth in § 1321.49; and

(3) Any amounts available to the State agency for State plan administration which the State agency determines are not needed for that purpose may be used to supplement the amount available for area plan administration (42 U.S.C. 3028(a)(2)).

(v) *Minimum adequate proportion.* The State agency will meet expectations for the

minimum adequate proportion of funds expended by each area agency on aging and State agency to provide the categories of services of access services, in-home supportive services, and legal assistance, as identified in the approved State plan as set forth in § 1321.27(i).

(vi) *Maintenance of effort.* The State agency will meet expectations regarding maintenance of effort, where:

(A) The State agency must expend for both services and administration at least the average amount of State funds reported and certified as expended under the State plan for these activities for the three previous fiscal years for Title III;

(B) The amount certified must at least meet minimum match requirements from State resources;

(C) Any amount of State resources included in the Title III maintenance of effort certification that exceeds the minimum amount mandated becomes part of the permanent maintenance of effort; and

(D) Excess State match reported on the Federal financial report does not become part of the maintenance of effort unless the State agency certifies the excess.

(vii) *The State Long-Term Care Ombudsman Program.* The State agency shall maintain State Long-Term Care Ombudsman Program funding requirements, where:

(A) *Minimum Certification of Expenditures.* The State agency must expend annually under Title III and Title VII of the Act, respectively, for the Ombudsman program no less than the minimum amounts that are required to be expended by section 307(a)(9) of the Act (42 U.S.C. 3027(a)(9));

(B) *Expenditure Information.* The State agency must provide the Ombudsman with verifiable expenditure information for the annual certification of minimum expenditures and for completion of annual reports; and

(C) *Fiscal management and determination of resources.* Fiscal management and determination of resources appropriated or otherwise available for the operation of the Office are

in compliance as set forth at § 1324.13(f) of this chapter.

(viii) *Rural minimum expenditures.* The State agency shall maintain minimum expenditures for services for older individuals residing in rural areas, where:

(A) The State agency shall establish a process and control for determining the definition of “rural areas” within their State;

(B) For each fiscal year, the State agency must spend on services for older individuals residing in rural areas the minimum annual amount that is not less than the amount expended for such services, as required by the Act; and

(C) The State agency must project the cost of providing such services for each fiscal year (including the cost of providing access to such services) and must specify a plan for meeting the needs for such services for each fiscal year.

(ix) *Reallotment.* The State agency shall maintain requirements for reallotment of funds, where:

(A) The State agency must annually review and notify the Assistant Secretary for Aging prior to the end of the fiscal year in which grant funds were awarded if there is funding that will not be expended within the grant period for Title III or VII that the State agency will release to the Assistant Secretary for Aging.

(B) The State agency must annually review and notify the Assistant Secretary for Aging of the amount of any released Title III or VII funding from other State agencies that the State agency requests to receive and expend within the grant period from the Assistant Secretary for Aging.

(C) The State agency must use its intrastate funding formula or funds distribution plan, as set forth in § 1321.49 or § 1321.51, to distribute any Title III funds that the Assistant Secretary for Aging reallots pursuant to the State agency’s notification under paragraph (c)(2)(ix)(B) of this section.

(x) *Voluntary contributions.* Voluntary contributions shall be allowed and may be

solicited for all services for which funds are received under this Act, consistent with section 315(b) (42 U.S.C. 3030c-2(b)). Policies and procedures related to voluntary contributions shall address these requirements:

(A) Suggested contribution levels. The suggested contribution levels shall be based on the actual cost of services;

(B) Individuals encouraged to contribute. Voluntary contributions shall be encouraged for individuals whose self-declared income is at or above 185 percent of the Federal poverty level. Assets, savings, or other property owned by an older individual or family caregiver may not be considered when seeking voluntary contributions from any older individual or family caregiver;

(C) Solicitation. The method of solicitation must be noncoercive, and the solicitation:

(1) Must meet all the requirements of this provision; and

(2) Be conducted in such a manner so as not to cause a service recipient to feel intimidated, or otherwise feel pressured into making a contribution.

(D) Provisions to all service recipients. All recipients of services shall be provided:

(1) An opportunity to voluntarily contribute to the cost of the service;

(2) Clear information, including information in alternative formats and in languages other than English in compliance with Federal civil rights laws, explaining there is no obligation to contribute, and the contribution is voluntary;

(3) Protection of privacy and confidentiality of each recipient with respect to the recipient's income and contribution or lack of contribution.

(E) Prohibition on means testing. Means testing, as defined in § 1321.3, is prohibited;

(F) Prohibition on denial of services. Services shall not be denied because the older individual or family caregiver will not or cannot make a voluntary contribution;

(G) Procedures to be established. Appropriate procedures to safeguard and account for all contributions are established; and

(H) Collection of program income. Amounts collected are considered program income

and are subject to the requirements in 2 CFR 200.307 and in § 1321.9(c)(2)(xii).

(xi) *Cost sharing.* A State agency is permitted under section 315(a) of the Act (42 U.S.C. 3030c-2(a)), to implement cost sharing for services funded by the Act by recipients of the services, except as provided for in paragraph (c)(2)(xi)(D) of this section. If the State agency allows for cost sharing, the State agency shall address these requirements:

(A) *Policies and procedures.* The State agency shall develop policies and procedures to be implemented statewide, including how an area agency on aging may request and receive a waiver of cost sharing policies, if the area agency on aging adequately demonstrates:

(1) A significant proportion of persons receiving services under the Act have incomes below the threshold established in State agency policies and procedures; or

(2) That cost sharing would be an unreasonable administrative or financial burden upon the area agency on aging.

(B) *Sliding contribution scale.* The State agency shall establish a sliding contribution scale and a description of the criteria to participate in cost sharing to be implemented statewide, which shall:

(1) Meet all the requirements of this provision;

(2) Be based solely on individual income and the cost of delivering services;

(3) Be communicated including in written materials and in alternative formats upon request;

(4) Explain there is no obligation to contribute, and the contribution is voluntary;

(5) Be conducted in such a manner so as not to cause a service recipient to feel intimidated, or otherwise feel pressured into making a contribution;

(6) Protect the privacy and confidentiality of each recipient with respect to the recipient's income and contribution or lack of contribution.

(C) *Individuals eligible to cost share.* Individuals shall be determined eligible to cost share based solely on a confidential declaration of income and with no requirement for verification;

(D) Prohibitions on cost sharing. Cost sharing is prohibited as follows:

(1) By a low-income older individual if the income of such individual is at or below the Federal poverty level;

(2) If State agency policies and procedures specify other low-income individuals within the State excluded from cost sharing;

(3) For the following services:

(i) Information and assistance, outreach, benefits counseling, or case management services;

(ii) Ombudsman, elder abuse prevention, legal assistance, or other consumer protection services;

(iii) Congregate and home-delivered meals; and

(iv) Any services delivered through Tribal organizations.

(E) Prohibition on means testing. Means testing, as defined in § 1321.3, is prohibited;

(F) Prohibition on denial of services. Services shall not be denied because the older individual or family caregiver will not or cannot make a cost sharing contribution;

(G) Procedures to be established. Appropriate procedures to safeguard and account for all cost sharing contributions are established; and

(H) Collection of program income. All cost sharing contributions collected are considered program income and are subject to the requirements of 2 CFR 200.307, 45 CFR 75.307, and in § 1321.9(c)(2)(xii).

(xii) *Use of program income.* Program income is subject to the requirements in 2 CFR 200.307 and 45 CFR 75.307 and as follows:

(A) Voluntary contributions and cost sharing payments are considered program income;

(B) Program income collected must be used to expand a service funded under the Title III grant award pursuant to which the income was originally collected;

(C) The State agency must use the addition alternative as set forth in 2 CFR 200.307(e)(2)

and 45 CFR 75.307(e)(2) when reporting program income, and prior approval of the addition alternative from the Assistant Secretary for Aging is not required;

(D) Program income must be expended or disbursed prior to requesting additional Federal funds; and

(E) Program income may not be used to match grant awards funded by the Act without prior approval.

(xiii) *Private pay programs.* The State agency shall maintain requirements for private pay programs, where:

(A) State agencies, area agencies on aging, and service providers may provide private pay programs, subject to State and/or area agency policies and procedures;

(B) The State agency requires area agencies and service providers under the Act that establish private pay programs to develop policies and procedures to:

(1) Promote equity, fairness, inclusion, and adherence to the requirements of the Act, including:

(i) Meeting conflict of interest requirements;

(ii) Meeting financial accountability requirements;

(iii) Prohibiting use of funds for direct services under Title III to support provision of service via private pay programs, except as a part of routine information and assistance or case management referrals; and

(2) Require that persons who receive information about private pay programs and who are eligible for services provided with Title III funds in the planning and service area be made aware of Title III-funded and any similar voluntary contributions-based service options, even if there is a waiting list for those services, on an initial and periodic basis to allow individuals to determine whether they will select voluntary contributions-based services or private pay programs.

(xiv) *Contracts and commercial relationships.* The State agency shall maintain

requirements for contracts and commercial relationships, where:

(A) State agencies, area agencies on aging, and service providers may enter into contracts and commercial relationships, subject to State and/or area agency policies and procedures and guidance as set forth by the Assistant Secretary for Aging, including through:

- (1) Contracts with health care payers;
- (2) Private pay programs; or
- (3) Other arrangements with entities or individuals that increase the availability of home- and community-based services and supports.

(B) The State agency shall require area agencies and service providers under the Act that establish contracts and commercial relationships to develop policies and procedures to:

- (1) Promote fairness, inclusion, and adherence to the requirements of the Act, including:
  - (i) Meeting conflict of interest requirements; and
  - (ii) Meeting financial accountability requirements.
- (2) With the approval of the State and/or area agency, allow use of funds for direct services under Title III to support provision of service via contracts and commercial relationships when:

(i) All requirements for direct services provision are maintained, as set forth in this part and the Act, or

(ii) In compliance with the requirements of the Act, as set forth in section 212 (42 U.S.C. 3020c), and all other applicable Federal requirements.

(C) The State agency shall, through the area plan or other process, develop policies and procedures for area agencies on aging and service providers to receive approval to establish contracts and commercial relationships and participate in activities related to contracts and commercial relationships.

(xv) *Buildings, alterations or renovations, maintenance, and equipment.* Buildings and equipment, where costs incurred for altering or renovating, utilities, insurance, security,



necessary maintenance, janitorial services, repair, and upkeep (including Federal property unless otherwise provided for) to keep buildings and equipment in an efficient operating condition, including acquisition and replacement of equipment, may be an allowable use of funds, and the following apply:

(A) Costs are only allowable to the extent not payable by third parties through rental or other agreements;

(B) Costs must be allocated proportionally to the benefiting grant program;

(C) Construction and acquisition activities are only allowable for multipurpose senior centers. In addition to complying with the requirements of the Act, as set forth in section 312 (42 U.S.C. 3030b), as well as with all other applicable Federal laws, the grantee or subrecipient as applicable must file a Notice of Federal Interest in the appropriate official records of the jurisdiction where the property is located at the time of acquisition or prior to commencement of construction, as applicable. The Notice of Federal Interest must indicate that the acquisition or construction, as applicable, has been funded with an award under Title III of the Act, that the requirements set forth in section 312 of the Act (42 U.S.C. 3030b) apply to the property, and that inquiries regarding the Federal Government's interest in the property should be directed in writing to the Assistant Secretary for Aging;

(D) Altering and renovating activities are allowable for facilities providing direct services with funds provided as set forth in §§ 1321.85, 1321.87, 1321.89, and 1321.91 subject to Federal grant requirements under 2 CFR part 200 and 45 CFR part 75;

(E) Altering and renovating activities are allowable for facilities used to conduct area plan administration activities with funds provided as set forth in paragraph (c)(2)(iv)(B) of this section, subject to Federal grant requirements under 2 CFR part 200 and 45 CFR part 75; and

(F) Prior approval by the Assistant Secretary for Aging does not apply.

(xvi) *Supplement, not supplant.* Funds awarded under the Act for services provided under sections 306(a)(9)(B) (42 U.S.C. 3026(a)(9)(B)), 315(b)(4)(E) (42 U.S.C. 3030c-2(b)(4)(E)),

321(d) (42 U.S.C. 3030d(d)), 374 (42 U.S.C. 3030s-2), and 705(a)(4) (42 U.S.C. 3058d(a)(4)), must be used to supplement, not supplant existing Federal, State, and local funds expended to support those activities.

(xvii) *Monitoring of State plan assurances.* Monitoring for compliance for assurances identified in the approved State plan as set forth in § 1321.27.

(xviii) *Advance funding.* If the State agency permits the advance of funding to meet immediate cash needs of area agencies on aging and service providers, the State agency shall have policies and procedures which comply with all applicable Federal requirements, including timeframes and amount limitations that may apply.

(xix) *Fixed amount subawards.* Fixed amount subawards up to the simplified acquisition threshold are allowed.

(3) The State plan process, including compliance with requirements as set forth in §§ 1321.27 and 1321.29.

(4) In States with multiple planning and service areas, the area plan process, including compliance with requirements as set forth in § 1321.65.

### **§ 1321.11 Advocacy responsibilities.**

(a) The State agency shall:

(1) Review, monitor, evaluate, and comment on Federal, State, and local plans, budgets, regulations, programs, laws, levies, hearings, policies, and actions which affect or may affect older individuals or family caregivers, and recommend any changes in these which the State agency considers to be aligned with the interests identified in the Act;

(2) Provide technical assistance and training to agencies, organizations, associations, or individuals representing older individuals and family caregivers; and

(3) Review and comment on applications to State and Federal agencies for assistance relating to meeting the needs of older individuals and family caregivers.

(b) No requirement in this section shall be deemed to supersede a prohibition contained in

a Federal appropriation on the use of Federal funds to lobby.

**§ 1321.13 Designation of and designation changes to planning and service areas.**

(a) The State agency is responsible for designating distinct planning and service areas within the State.

(b) No State agency may designate the entire State as a single planning and service area, except for States designated as such on or before October 1, 1980.

(c) State agencies must have policies and procedures regarding designation of and changes to planning and service areas in accordance with the Act. Such policies and procedures should provide due process to affected parties, accountability, and transparency. Such policies and procedures must address the following:

(1) The application process to change a planning and service area, if initiated outside of the State agency;

(2) How notice to interested parties will be provided;

(3) How need for the action will be documented;

(4) Provisions for conducting a public hearing;

(5) Provisions for involving area agencies on aging, service providers, and older individuals in the action or proceeding, such as offering other opportunities for feedback from interested parties;

(6) The appeals process for affected parties; and

(7) Timeframes that apply to each of the items under this paragraph (c).

(d) State agencies that seek to change one or more planning and service area designations must consider the following:

(1) The geographical distribution of older individuals in the State;

(2) The incidence of the need for services under the Act;

(3) The distribution of older individuals who have greatest economic need and greatest social need (with particular attention to low-income older individuals, including low-income

minority older individuals, older individuals with limited English proficiency, and older individuals residing in rural areas) residing in such areas;

(4) The distribution of older individuals who are Native Americans residing in such areas;

(5) The distribution of resources available to provide such services under the Act;

(6) The boundaries of existing areas within the State which were drawn for the planning or administration of services under the Act;

(7) The location of units of general purpose local government, as defined in section 302(4) of the Act (2 U.S.C. 3022(4)), within the State; and

(8) Any other relevant factors.

(e) When the State agency issues a decision to change planning and service areas, it shall provide an explanation of its consideration of the factors in paragraph (d) of this section. Such explanations must be included in the State plan amendment submitted as set forth in § 1321.31(b) or State plan submitted as set forth in § 1321.33.

#### **§ 1321.15 Interstate planning and service area.**

(a) An interstate planning and service area is an agreement between the State agencies that have responsibility for administering the programs within the interstate area, in which the agreement increases the allotment of the State agency or agencies with lead responsibility and decreases the allotment of the State agency or agencies without the lead responsibility. The Governor of any State in which a planning and service area crosses State boundaries, or in which an interstate Indian reservation is located, may apply to the Assistant Secretary for Aging to request redesignation as an interstate planning and service area comprising the entire metropolitan area or Indian reservation. If the Assistant Secretary for Aging approves such an application, the Assistant Secretary for Aging shall adjust the State agency allotments of the areas within the planning and service area in which the interstate planning and service area is established to reflect the number of older individuals within the area who will be served by an interstate planning and service area not within the State.

(b) Before requesting permission of the Assistant Secretary for Aging to designate an interstate planning and service area, the Governor of each State shall execute a written agreement that specifies the State agency proposed to have lead responsibility for administering the programs within the interstate planning and service area and lists the conditions, agreed upon by each State agency, governing the administration of the interstate planning and service area.

(c) The lead State agency shall request permission of the Assistant Secretary for Aging to designate an interstate planning and service area by submitting the request, together with a copy of the agreement as part of its State plan or as an amendment to its State plan.

(d) Prior to the Assistant Secretary for Aging's approval for State agencies to designate an interstate planning and service area, the Assistant Secretary for Aging shall determine that all applicable requirements and procedures in §§ 1321.27 and 1321.29 are met.

(e) If the request is approved, the Assistant Secretary for Aging, based on the agreement between the State agencies, will increase the allocation(s) of the State agency or agencies with lead responsibility for administering the programs within the interstate area and will reduce the allocation(s) of the State agency or agencies without lead responsibility by one of these methods:

(1) Reallocation of funds in proportion to the number of individuals age 60 and over for funding provided under Title III, parts B, C, and D and in proportion to the number of individuals age 70 and over for funding provided under Title III, part E for that portion of the interstate planning and service area located in the State without lead responsibility; or

(2) Reallocation of funds based on the intrastate funding formula of the State agency or agencies without lead responsibility.

(f) Each State agency that is a party to an interstate planning and service area agreement shall review and confirm their agreement as a part of their State plan on aging as set forth in § 1321.27.

**§ 1321.17 Appeal to the Departmental Appeals Board on planning and service area designation.**

(a) This section sets forth the procedures for providing hearings to applicants for designation as a planning and service area under § 1321.13, whose application is denied by the State agency or § 1321.15, whose application is denied by the Assistant Secretary for Aging.

(b) Any applicant for designation as a planning and service area whose application is denied, and who has been provided a hearing and a written decision by the State agency, may appeal the denial to the Departmental Appeals Board (DAB) in writing following receipt of the State agency's written decision, in accordance with the procedures set forth in 45 CFR part 16. The applicant must, at the time of filing an appeal with the DAB, mail a copy of the appeal to the State agency, if appealing subject to § 1321.13, or the Assistant Secretary for Aging, if appealing subject to § 1321.15, and include a certificate of service with its initial filing. The DAB may refer an appeal to its Alternative Dispute Resolution Division for mediation prior to making a decision.

**§ 1321.19 Designation of and designation changes to area agencies.**

(a) The State agency is responsible for designating an area agency on aging to serve each planning and service area. Only one area agency on aging shall be designated to serve each planning and service area. An area agency on aging may serve more than one planning and service area. An area agency that serves more than one planning and service area must maintain separate funding, planning, and advocacy responsibilities for each planning and service area. State agencies shall have policies and procedures regarding designation of area agencies on aging and changes to an agency's designation as an area agency on aging in accordance with the Act. Such policies and procedures should provide due process to affected parties, accountability, and transparency and must address the following:

(1) Provisions for designating an area agency on aging, including:

(i) The application process;

(ii) How notice to interested parties will be provided;

(iii) How views offered by the unit(s) of general purpose local government in such area

will be obtained and considered;

(iv) How the State agency will provide the right of first refusal to a unit of general purpose local government if:

(A) Such unit demonstrates ability to meet the requirements as set forth by the State agency, in accordance with the Act; and

(B) The boundaries of such a unit and the boundaries of the area are reasonably contiguous.

(v) How the State agency shall then give preference to an established office on aging if the unit of general purpose local government chooses not to exercise the right of first refusal;

(vi) How the State agency will assume area agency on aging responsibilities in the event there are no successful applicants in the State agency's application process; and

(vii) The appeals process for affected parties.

(2) Provisions for an area agency on aging that voluntarily relinquishes their area agency on aging designation, including that the State agency's written acceptance of the voluntary relinquishment of area agency on aging designation will be considered as the State agency's withdrawal of area agency on aging designation, and requirements under § 1321.21(b) will apply;

(3) Provisions for when the State agency takes action to withdraw an area agency on aging's designation, in accordance with § 1321.21;

(4) Provisions for when the State agency administers area agency on aging programs as provided for in section 306(f) (42 U.S.C. 3026(f)), where the Assistant Secretary for Aging may extend the 90-day period if the State agency requests an extension and demonstrates to the satisfaction of the Assistant Secretary for Aging a need for the extension; and

(5) If a State agency previously designated the entire State as a single planning and service area, provisions for when the State agency designates one or more additional planning and service areas.

(b) For any of the actions listed in paragraph (a) of this section, the State agency must submit a State plan amendment as set forth in § 1321.31(b) or State plan as set forth in § 1321.33;

(c) An area agency may be any of the following types of agencies:

(1) An established office on aging which is operating within a planning and service area;

(2) Any office or agency of a unit of general purpose local government, which is designated to function for the purpose of serving as an area agency on aging by the chief elected official of such unit;

(3) Any office or agency designated by the appropriate chief elected officials of any combination of units of general purpose local government to act on behalf of such combination for such purpose; or

(4) Any non-State, local public, or nonprofit private agency in a planning and service area, or any separate organizational unit within such agency, which is under the supervision or direction for this purpose of the designated State agency, and which demonstrates the ability and willingness to engage in the planning or provision of a broad range of services under the Act within such planning and service area.

(d) A State agency may not designate any regional or local office of the State as an area agency.

### **§ 1321.21 Withdrawal of area agency designation.**

(a) In carrying out section 305 of the Act (42 U.S.C. 3025), the State agency shall withdraw the area agency designation whenever it, after reasonable notice and opportunity for a hearing, finds that:

(1) An area agency does not meet the requirements of this part;

(2) An area plan or plan amendment is not approved;

(3) There is substantial failure in the provisions or administration of an approved area plan to comply with any provision of the Act, regulations and other guidance as set forth by the



Assistant Secretary for Aging, terms and conditions of Federal grant awards under the Act, or policies and procedures established and published by the State agency on aging;

(4) Activities of the area agency are inconsistent with the statutory mission prescribed in the Act;

(5) The State agency changes one or more planning and service area designations; or

(6) The area agency voluntarily requests the State agency withdraw its designation.

(b) If a State agency withdraws an area agency's designation under this section it shall:

(1) Provide a plan for the continuity of area agency functions and services in the affected planning and service area;

(2) Submit a State plan amendment as set forth in § 1321.31(b) or State plan as set forth in § 1321.33; and

(3) Designate a new area agency in the planning and service area in a timely manner.

(c) If necessary to ensure continuity of services in a planning and service area, the State agency may, for a period of up to 180 days after its final decision to withdraw designation of an area agency:

(1) Perform the responsibilities of the area agency; or

(2) Assign the responsibilities of the area agency to another agency in the planning and service area.

(d) The Assistant Secretary for Aging may extend the 180-day period if a State agency:

(1) Notifies the Assistant Secretary for Aging in writing of its action under this section;

(2) Requests an extension; and

(3) Demonstrates to the satisfaction of the Assistant Secretary for Aging a need for the extension. Need for the extension may include the State agency's reasonable but unsuccessful attempts to procure an applicant to serve as the area agency.

**§ 1321.23 Appeal to the Departmental Appeals Board on area agency on aging withdrawal of designation.**

(a) This section sets forth hearing procedures afforded to affected parties if the State agency initiates an action or proceeding to withdraw designation of an area agency on aging.

(b) Any area agency on aging that has appealed a State agency's decision to withdraw area agency on aging designation, and that has been provided a hearing and a written decision, may appeal the decision to the Departmental Appeals Board in writing following receipt of the State agency's written decision, in accordance with the procedures set forth in 45 CFR part 16. The applicant must, at the time of filing an appeal with the DAB, mail a copy of the appeal to the State agency and include a certificate of service with its initial filing. The DAB may refer an appeal to its Alternative Dispute Resolution Division for mediation prior to making a decision.

**§ 1321.25 Duration, format, and effective date of the State plan.**

(a) A State agency will follow the guidance issued by the Assistant Secretary for Aging regarding duration and formatting of the State plan. Unless otherwise indicated, a State agency may determine the format, how to collect information for the plan, and whether the plan will remain in effect for two, three, or four years.

(b) An approved State plan or amendment identified in § 1321.31(a) becomes effective on the date designated by the Assistant Secretary for Aging.

(c) A State agency may not make expenditures under a new plan or amendment requiring approval, as identified in § 1321.27 or § 1321.31(a), until it is approved.

**§ 1321.27 Content of State plan.**

To receive a grant under this part, a State agency shall have an approved State plan as prescribed in section 307 of the Act (42 U.S.C. 3027). In addition to meeting the requirements of section 307, a State plan shall include:

(a) Identification of the sole State agency that the State has designated to develop and administer the plan.

(b) Statewide program objectives to implement the requirements under Title III and Title VII of the Act and any objectives established by the Assistant Secretary for Aging.

(c) Evidence that the State plan is informed by and based on area plans, except for single planning and service area States.

(d) A description of how greatest economic need and greatest social need are determined and addressed by specifying:

(1) How the State agency defines greatest economic need and greatest social need, which shall include the populations as set forth in the § 1321.3 definitions of greatest economic need and greatest social need; and

(2) The methods the State agency will use to target services to the populations identified in paragraph (d)(1) of this section, including how funds under the Act may be distributed to serve prioritized populations in accordance with requirements as set forth in § 1321.49 or § 1321.51, as appropriate.

(e) An intrastate funding formula or funds distribution plan indicating the proposed use of all Title III funds administered by a State agency, and the distribution of Title III funds to each planning and service area, in accordance with § 1321.49 or § 1321.51, as appropriate.

(f) Identification of the geographic boundaries of each planning and service area and of area agencies on aging designated for each planning and service area, if applicable.

(g) Demonstration that the determination of greatest economic need and greatest social need specific to Native American persons is identified pursuant to communication among the State agency and Tribes, Tribal organizations, and Native communities, and that the services provided under this part will be coordinated, where applicable, with the services provided under Title VI of the Act and that the State agency shall require area agencies to provide outreach where there are older Native Americans in any planning and service area, including those living outside of reservations and other Tribal lands.

(h) Certification that any program development and coordination activities shall meet the following requirements:

(1) The State agency shall not fund program development and coordination activities as a

cost of supportive services under area plans until it has first spent 10 percent of the total of its combined allotments under Title III on the administration of area plans;

(2) Program development and coordination activities must only be expended as a cost of State plan administration, area plan administration, and/or Title III, part B supportive services;

(3) State agencies and area agencies on aging shall, consistent with the area plan and budgeting cycles, submit the details of proposals to pay for program development and coordination as a cost of Title III, part B supportive services to the general public for review and comment; and

(4) Expenditure by the State agency and area agency on program development and coordination activities are intended to have a direct and positive impact on the enhancement of services for older individuals and family caregivers in the planning and service area.

(i) Specification of the minimum proportion of funds that will be expended by each area agency on aging and the State agency to provide each of the following categories of services:

- (1) Access to services;
- (2) In-home supportive services; and
- (3) Legal assistance, as set forth in § 1321.93.

(j) If the State agency allows for Title III, part C-1 funds to be used as set forth in § 1321.87(a)(1)(i):

(1) Evidence, using participation projections based on existing data, that provision of such meals will enhance and not diminish the congregate meals program, and a commitment to monitor the impact on congregate meals program participation;

(2) Description of how provision of such meals will be targeted to reach those populations identified as in greatest economic need and greatest social need;

(3) Description of the eligibility criteria for service provision;

(4) Evidence of consultation with area agencies on aging, nutrition and other direct services providers, other interested parties, and the general public regarding the provision of such

meals; and

(5) Description of how provision of such meals will be coordinated with area agencies on aging, nutrition and other direct services providers, and other interested parties.

(k) How the State agency will use funds for prevention of elder abuse, neglect, and exploitation as set forth in 45 CFR part 1324, subpart B.

(l) How the State agency will meet responsibilities for the Legal Assistance Developer, as set forth in 45 CFR part 1324, subpart C.

(m) Description of how the State agency will conduct monitoring that the assurances to which they attest are being met.

### **§ 1321.29 Public participation.**

The State agency shall:

(a) Have mechanisms and varied methods to obtain the views of older individuals, family caregivers, service providers, and the public on a periodic basis, with a focus on those in greatest economic need and greatest social need;

(b) Consider those views in developing and administering the State plan and policies and procedures regarding services provided under the plan;

(c) Establish and comply with a reasonable minimum time period (at least 30 calendar days) for public review and comment on new State plans as set forth in § 1321.27 and State plan amendments requiring approval of the Assistant Secretary for Aging as set forth in § 1321.31(a). State agencies may request a waiver of the minimum time period from the Assistant Secretary for Aging during an emergency or when a time sensitive action is otherwise necessary;

(d) Ensure the documents noted in paragraph (c) of this section and final State plans and amendments are available to the public for review, as well as available in alternative formats and other languages if requested.

### **§ 1321.31 Amendments to the State plan.**

(a) Subject to prior approval by the Assistant Secretary for Aging, a State agency shall

amend the State plan whenever necessary to reflect:

(1) New or revised statutes or regulations as determined by the Assistant Secretary for Aging;

(2) An addition, deletion, or change to a State agency's goal, assurance, or information requirement statement;

(3) A change in the State agency's intrastate funding formula or funds distribution plan for Title III funds, as set forth in § 1321.49 or § 1321.51;

(4) A request to waive State plan requirements as set forth in section 316 of the Act (42 U.S.C. 3030c-3), or as required by guidance as set forth by the Assistant Secretary for Aging; or

(5) Other changes as required by guidance as set forth by the Assistant Secretary for Aging.

(b) A State agency shall amend the State plan and notify the Assistant Secretary for Aging of an amendment not requiring prior approval whenever necessary and within 30 days of the action(s) listed in paragraphs (b)(1) through (6) of this section:

(1) A significant change in a State law, organization, policy, or State agency operation;

(2) A change in the name or organizational placement of the State agency;

(3) Distribution of State plan administration funds for demonstration projects;

(4) A change in planning and service area designation, as set forth in § 1321.13;

(5) A change in area agency on aging designation, as set forth in § 1321.19; or

(6) Exercising of major disaster declaration flexibilities, as set forth in § 1321.101.

(c) Information required by this section shall be submitted according to guidelines prescribed by the Assistant Secretary for Aging.

**§ 1321.33 Submission of the State plan or plan amendment to the Assistant Secretary for Aging for approval.**

(a) Each State plan, or plan amendment which requires approval of the Assistant Secretary for Aging as set forth at § 1321.31(a), shall be signed by the Governor, or the

Governor's designee, and submitted to the Assistant Secretary for Aging to be considered for approval at least 90 calendar days before the proposed effective date of the plan or plan amendment according to guidance as set forth by the Assistant Secretary for Aging, except in the case of a waiver provided by the Assistant Secretary for Aging. Each State plan amendment which does not require the prior approval of the Assistant Secretary for Aging shall be submitted as set forth at § 1321.31(b).

(b) In advance of the submission to the Assistant Secretary for Aging to be considered for approval, the State agency shall submit a draft of the plan or amendment to the appropriate ACL Regional Office at least 120 calendar days before the proposed effective date of the plan or plan amendment, except in the case of a waiver request or as otherwise provided in guidance as set forth by the Assistant Secretary for Aging. The State agency shall work with the ACL Regional Office in reviewing the plan or plan amendment for compliance.

**§ 1321.35 Notification of State plan or State plan amendment approval or disapproval for changes requiring Assistant Secretary for Aging approval.**

(a) The Assistant Secretary for Aging shall approve a State plan or State plan amendment by notifying the Governor or the Governor's designee in writing.

(b) When the Assistant Secretary for Aging proposes to disapprove a State plan or amendment, the Assistant Secretary for Aging shall notify the Governor in writing, giving the reasons for the proposed disapproval, and inform the State agency that it may request a hearing on the proposed disapproval following the procedures described in guidance issued by the Assistant Secretary for Aging.

**§ 1321.37 Notification of State plan amendment receipt for changes not requiring Assistant Secretary for Aging approval.**

The State agency shall submit an amendment not requiring Assistant Secretary for Aging approval as set forth at § 1321.31(b) to the appropriate ACL Regional Office. The ACL Regional Office shall review the amendment to confirm the contents do not require approval of the

Assistant Secretary for Aging and will acknowledge receipt of the State plan amendment by notifying the head of the State agency in writing.

**§ 1321.39 Appeal to the Departmental Appeals Board regarding State plan on aging.**

If the Assistant Secretary for Aging intends to disapprove a State plan or State plan amendment, the Assistant Secretary for Aging shall first afford the State agency notice and an opportunity for a hearing. Administrative reviews of State plan disapprovals, as provided for in sections 307(c) and 307(d) of the Act (42 U.S.C. 3027(c)-(d)) are performed by the Department Appeals Board in accordance with the procedures set forth in 45 CFR part 16. The DAB may refer an appeal to its Alternative Dispute Resolution Division for mediation prior to making a decision.

**§ 1321.41 When a disapproval decision is effective.**

(a) The Assistant Secretary for Aging shall specify the effective date for reduction and withholding of the State agency's grant upon a disapproval decision from the Departmental Appeals Board. This effective date may not be earlier than the date of the Departmental Appeals Board's decision or later than the first day of the next calendar quarter.

(b) A disapproval decision issued by the DAB represents the final determination of the Assistant Secretary for Aging and shall remain in effect unless reversed or stayed on judicial appeal, or until the agency or the plan is changed to meet all Federal requirements, except that the Assistant Secretary for Aging may modify or set aside the decision before the record of the proceedings under this subpart is filed in court.

**§ 1321.43 How the State agency may appeal the Departmental Appeals Board's decision.**

A State agency may appeal the final decision of the Departmental Appeals Board disapproving the State plan or plan amendment, finding of noncompliance, or finding that a State agency does not meet the requirements of this part to the U.S. Court of Appeals for the circuit in which the State is located. The State agency shall file the appeal within 30 days of the Departmental Appeals Board's final decision.



**§ 1321.45 How the Assistant Secretary for Aging may reallocate the State agency's withheld payments.**

The Assistant Secretary for Aging may disburse funds withheld from the State agency directly to any public or nonprofit private organization or agency, or political subdivision of the State that has the authority and capacity to carry out the functions of the State agency and submits a State plan which meets the requirements of this part, and which contains an agreement to meet the non-Federal share requirements.

**§ 1321.47 Conflicts of interest policies and procedures for State agencies.**

(a) State agencies must have policies and procedures regarding conflicts of interest, in accordance with the Act and all other applicable Federal requirements. These policies and procedures must safeguard against conflicts of interest on the part of the State agency, employees, and agents of the State who have responsibilities relating to Title III programs, including area agencies on aging, governing boards, advisory councils, staff, and volunteers. Conflicts of interest policies and procedures must establish mechanisms to identify, avoid, remove, and remedy conflicts of interest in a Title III program at organizational and individual levels, including:

(1) Ensuring that State agency employees and agents administering Title III programs do not have a financial interest in a Title III program;

(2) Removing and remedying actual, perceived, or potential conflicts that arise due to an employee or agent's financial interest in a Title III program;

(3) Establishing robust monitoring and oversight, including periodic reviews, to identify conflicts of interest in a Title III program;

(4) Ensuring that no individual, or member of the immediate family of an individual, involved in administration or provision of a Title III program has a conflict of interest;

(5) Requiring that other agencies that operate a Title III program have policies in place to prohibit the employment or appointment of Title III program decision-makers, staff, or

volunteers with a conflict that cannot be adequately removed or remedied;

(6) Requiring that a Title III program takes reasonable steps to suspend or remove Title III program responsibilities of an individual who has a conflict of interest, or who has an immediate family member with a conflict of interest, which cannot be adequately removed or remedied;

(7) Ensuring that no organization which provides a Title III service is subject to a conflict of interest;

(8) Prohibiting the officers, employees, or agents of the Title III program from soliciting or accepting gratuities, favors, or anything of monetary value from grantees, contractors, and/or subrecipients, except where policies and procedures allow for situations where the financial interest is not substantial, or the gift is an unsolicited item of nominal value;

(9) Establishing the actions the State agency will require a Title III program to take in order to remedy or remove such conflicts, as well as disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the Title III program; and

(10) Documenting conflict of interest mitigation strategies, as necessary and appropriate, when a State agency or Title III program operates an Adult Protective Services or guardianship program.

(b) Individual conflicts include:

(1) An employee, or immediate member of an employee's family, maintaining ownership, employment, consultancy, or fiduciary interest in a Title III program organization or awardee when that employee or immediate family member is in a position to derive personal benefit from actions or decisions made in their official capacity;

(2) One or more conflicts between the private interests and the official responsibilities of a person in a position of trust;

(3) One or more conflicts between competing duties; and

(4) Other conflicts of interest identified in guidance issued by the Assistant Secretary for

Aging and/or by State agency policies.

(c) Organizational conflicts include:

(1) One or more conflicts between competing duties, programs, and/or services; and

(2) Other conflicts of interest identified in guidance issued by the Assistant Secretary for

Aging and/or by State agency policies.

**§ 1321.49 Intrastate funding formula.**

(a) The State agency of a State with multiple planning and service areas, as part of its State plan, in accordance with guidelines issued by the Assistant Secretary for Aging, using the best available data, and after consultation with all area agencies on aging in the State, shall develop and publish for review and comment by older individuals, family caregivers, other appropriate agencies and organizations, and the general public, an intrastate funding formula for the allocation of funds specific to each planning and service area to area agencies on aging under Title III for supportive, nutrition, evidence-based disease prevention and health promotion, and family caregiver services prior to taking the steps as set forth in § 1321.33. The intrastate funding formula shall be made available for public review and comment for a reasonable minimum time period (at least 30 calendar days, unless a waiver is provided by the Assistant Secretary for Aging during an emergency or when a time sensitive action is otherwise necessary). The formula shall reflect the proportion among the planning and service areas of persons age 60 and over in greatest economic need and greatest social need with particular attention to low-income minority older individuals. A separate formula may be provided for the evidence-based disease prevention and health promotion allocation to target areas that are medically underserved and in which there are large numbers of older individuals who have the greatest economic need and greatest social need for such services. The State agency shall review, update, and submit for approval to the Assistant Secretary for Aging its formula as needed.

(b) The publication for review and comment required by the preceding paragraph shall include:

(1) A descriptive statement of the formula's assumptions and goals, and the application of the definitions of greatest economic need and greatest social need, including addressing the populations identified pursuant to § 1321.27(d)(1), which includes the following components:

(i) A statement that discloses if and how, prior to distribution under the intrastate funding formula to the area agencies on aging, funds are deducted from Title III funds for State plan administration, disaster set-aside funds as set forth in § 1321.99, and/or Long-Term Care Ombudsman Program allocations;

(ii) A statement that describes if a separate formula will be used for evidence-based disease prevention and health promotion allocation; and

(iii) A statement of how the State agency's Nutrition Services Incentive Program award will be distributed.

(2) A numerical mathematical statement of the actual funding formula to be used for all supportive, nutrition, evidence-based disease prevention and health promotion, and family caregiver allocations of Title III funds, including the separate numerical mathematical statement that may be provided for the evidence-based disease prevention and health promotion allocation, which includes:

(i) A descriptive statement of each factor and the weight or percentage used for each factor; and

(ii) Definitions of the terms used in the numerical mathematical statement.

(3) A listing of the population, economic, and social data to be used for each planning and service area in the State;

(4) A demonstration of the allocation of funds, pursuant to the funding formula, to each planning and service area in the State by part of Title III; and

(5) The source of the best available data used to allocate funding through the intrastate funding formula, which may include:

(i) The most current U.S. Decennial Census results;

(ii) The most current and reliable American Community Survey results; and/or

(iii) Other high-quality data available to the State agency.

(c) In meeting the requirement in paragraph (a) of this section, the intrastate funding formula may not allow for:

(1) The State agency to hold funds at the State level except as outlined in paragraph (b)(1)(i) of this section;

(2) Exceeding the State plan and area plan administration caps set in the Act, as set forth at § 1321.9(c)(2)(iv);

(3) Use of Title III, part D funds for area plan administration;

(4) A State agency to directly provide Title III funds to any entity other than a designated area agency on aging, with the exception of State plan administration funds, Title III, part B Ombudsman program funds, and disaster set-aside funds as described in § 1321.99; or

(5) Any other use in conflict with the Act.

(d) In meeting the requirement in paragraph (b)(1)(iii) of this section, the following apply:

(1) Cash must be promptly and equitably disbursed to recipients of grants or contracts for nutrition projects under the Act;

(2) The statement of distribution of grant funds and procedures for determining any commodities election amount must be followed;

(3) State agencies have the option to receive grant as cash and/or agricultural commodities; and

(4) State agencies may consult with the area agencies on aging to determine the amount of the commodities election.

(e) In meeting the requirements in this section, the following apply:

(1) Title VII funds are not required to be subject to the intrastate funding formula;

(2) Any funds allocated for the Long-Term Care Ombudsman Program under Title III, part B are not required to be subject to the intrastate funding formula;

(3) The intrastate funding formula may provide for a separate allocation of funds received under Title III, part D for preventive health services. In the award of such funds to selected planning and service areas, the State agency shall give priority to areas of the State:

(i) Which are medically underserved; and

(ii) In which there are large numbers of individuals who have the greatest economic need and greatest social need for such services, including the populations the State agency identifies pursuant to § 1321.27(d)(1).

(4) The State agency may determine the amount of funds available for area plan administration prior to deducting Title III, part B Ombudsman program funds and disaster set-aside funds as described in § 1321.99;

(5) After deducting any State plan administration funds, Title III, part B Ombudsman program funds, and disaster set-aside funds as described in § 1321.99, the State agency must allocate all other Title III funding to area agencies on aging designated to serve each planning and service area;

(6) State agencies may reallocate funding within the State when an area agency on aging voluntarily or otherwise returns funds, subject to the State agency's policies and procedures which must include the following:

(i) If an area agency voluntarily returns funds, the area agency on aging must provide evidence that its governing board or chief elected official approves the return of funds;

(ii) Funds must be made available to all area agencies on aging who request funds available for reallocation;

(iii) The intrastate funding formula shall be proportionally adjusted based on area agencies on aging that request redistributed allocations; and

(iv) Title III funds subject to reallocation may only be reallocated to area agencies on aging via the proportionally adjusted intrastate funding formula described in paragraph (a) of this section.

(f) The State agency shall submit its proposed intrastate funding formula to the Assistant Secretary for Aging for prior approval as part of a State plan or State plan amendment as set forth in § 1321.33.

**§ 1321.51 Single planning and service area States.**

(a) Unless otherwise specified, the State agency in single planning and service area States must meet the requirements in the Act and subpart C of this part, including maintaining an advisory council as set forth in § 1321.63.

(b) As part of their State plan submission, single planning and service area States must provide a funds distribution plan which includes:

(1) A descriptive statement as to how the State agency determines the geographical distribution of the Title III and Nutrition Services Incentive Program funding;

(2) How the State agency targets the funding to reach individuals with greatest economic need and greatest social need, with particular attention to low-income minority older individuals;

(3) At the option of the State agency, a numerical/mathematical statement as a part of their funds distribution plan; and

(4) Justification if the State agency determines it meets requirements to provide services directly where:

(i) As set forth in section 307(a)(8)(A) of the Act (42 U.S.C. 3027(a)(8)(A)), no supportive services, except as set forth in paragraph (b)(4)(i)(B) of this section, nutrition services, disease prevention and health promotion, or family caregiver services will be directly provided by the State agency, unless, in the judgment of the State agency:

(A) Provision of such services by the State agency is necessary to assure an adequate supply of such services;

(B) Such services are directly related to such State agency's administrative functions; or

(C) Such services may be provided more economically, and with comparable quality, by such State agency.

(ii) The State agency may directly provide case management, information and assistance services, and outreach.

(iii) Approval of the State agency to provide direct services may only be granted for a maximum of the State plan period. For each time that approval is granted to a State agency to provide direct services, the State agency must demonstrate the State agency's efforts to identify service providers prior to being granted a subsequent approval.

(c) Single planning and service area States must adhere to use of the funds distribution plan for Title III and Nutrition Services Incentive Program funds within the State. If a single planning and service area State agency revises their Title III funds distribution plan, they may do so by:

(1) Following their policies and procedures to publish the updated funds distribution plan for public review and comment for a reasonable minimum time period (30 calendar days or greater, unless a waiver is provided by the Assistant Secretary for Aging during an emergency or when a time sensitive action is otherwise necessary); and

(2) Submitting the revised funds distribution plan for Assistant Secretary for Aging approval prior to implementing the changes as noted at § 1321.33.

**§ 1321.53 State agency Title III and Title VI coordination responsibilities.**

(a) For States where there are Title VI programs, the State agency's policies and procedures, developed in coordination with the relevant Title VI program director(s), as set forth in § 1322.13(a), must explain how the State's aging network, including area agencies and service providers, will coordinate with Title VI programs to ensure compliance with sections 306(a)(11)(B) and 307(a)(21)(A) of the Act (42 U.S.C. 3026(a)(11)(B) and 3027(a)(21)(A)). State agencies may meet these requirements through a Tribal consultation policy that includes Title VI programs.

(b) The policies and procedures set forth in paragraph (a) of this section must at a minimum address:



(1) How the State's aging network, including area agencies on aging and service providers, will provide outreach to Tribal elders and family caregivers regarding services for which they may be eligible under Title III and/or VII;

(2) The communication opportunities the State agency will make available to Title VI programs, to include Title III and other funding opportunities, technical assistance on how to apply for Title III and other funding opportunities, meetings, email distribution lists, presentations, and public hearings;

(3) The methods for collaboration on and sharing of program information and changes, including coordinating with area agencies and service providers where applicable;

(4) How Title VI programs may refer individuals who are eligible for Title III and/or VII services;

(5) How services will be provided in a culturally appropriate and trauma-informed manner; and

(6) Opportunities to serve on advisory councils, workgroups, and boards, including area agency advisory councils, as set forth in § 1321.63.

### **Subpart C – Area Agency Responsibilities**

#### **§ 1321.55 Mission of the area agency.**

(a) The Act intends that the area agency on aging shall be the lead on all aging issues on behalf of all older individuals and family caregivers in the planning and service area. The area agency shall proactively carry out, under the leadership and direction of the State agency, a wide range of functions including advocacy, planning, coordination, inter-agency collaboration, information sharing, monitoring, and evaluation. The area agency shall lead the development or enhancement of comprehensive and coordinated community-based systems in, or serving, each community in the planning and service area. These systems shall be designed to assist older individuals and family caregivers in leading independent, meaningful, healthy, and dignified lives in their own homes and communities.

(b) A comprehensive and coordinated community-based system described in of this section shall:

(1) Have a point of contact where anyone may go or contact for help, information, and/or referral on any aging issue;

(2) Provide information on a range of available public and private long-term care services and support options;

(3) Assure that these options are readily accessible to all older individuals and family caregivers, no matter what their income;

(4) Include a commitment of public, private, voluntary, and personal resources committed to supporting the system;

(5) Involve collaborative decision-making among public, private, voluntary, faith-based, civic, and fraternal organizations, including trusted leaders of communities in greatest economic need and greatest social need, and older individuals and family caregivers in the community;

(6) Offer special help or targeted resources for the most vulnerable older individuals, family caregivers, and those in danger of losing their independence;

(7) Provide effective referral from agency to agency to assure that information and/or assistance is provided, no matter how or where contact is made in the community;

(8) Evidence sufficient flexibility to respond with appropriate individualized assistance, especially for vulnerable older individuals or family caregivers;

(9) Be tailored to the specific nature of the community and the needs of older adults in the community; and

(10) Have a board of directors comprised of leaders in the community, including leaders from groups identified as in greatest economic need and greatest social need, who have the respect, capacity, and authority necessary to convene all interested persons, assess needs, design solutions, track overall success, stimulate change, and plan community responses for the present and for the future.

(c) The resources made available to the area agency on aging under the Act shall be used consistent with the definition of area plan administration as set forth in § 1321.3 to finance those activities necessary to achieve elements of a community-based system set forth in paragraph (b) of this section and consistent with the requirements for provision of direct services as set forth in §§ 1321.85 through 1321.93.

(d) The area agency may not engage in any activity which is inconsistent with its statutory mission prescribed in the Act or policies prescribed by the State agency under § 1321.9.

**§ 1321.57 Organization and staffing of the area agency.**

(a) An area agency may be either:

(1) An agency whose single purpose is to administer programs for older individuals and family caregivers; or

(2) A separate organizational unit within a multipurpose agency which functions as the area agency on aging. Where the State agency designates a separate organizational unit of a multipurpose agency that has previously been serving as an area agency, the State agency action shall not be subject to section 305(b)(5)(B) of the Act (42 U.S.C. 3025(b)(5)(B)).

(b) The area agency, once designated, is responsible for providing for adequate and qualified staff to facilitate the performance of the functions as set forth in this part. Such functions, except for provision of direct services, are considered to be area plan administration functions.

(c) The designated area agency shall continue to function in that capacity until either:

(1) The State agency withdraws the designation of the area agency as provided in § 1321.21(a)(1) through (5); or

(2) The area agency informs the State agency that it no longer wishes to carry out the responsibilities of an area agency as provided in § 1321.21(a)(6).

**§ 1321.59 Area agency policies and procedures.**

(a) The area agency on aging shall develop policies and procedures in compliance with

State agency policies and procedures, including those required under § 1321.9, governing all aspects of programs operated under this part, including those related to conflict of interest, and be in alignment with the Act and all other applicable Federal requirements. These policies and procedures shall be developed in consultation with other appropriate parties in the planning and service area.

(b) The policies and procedures developed by the area agency shall address the manner in which the area agency will monitor the programmatic and fiscal performance of all programs, direct service providers, and activities initiated under this part for quality and effectiveness. Quality monitoring and measurement results are encouraged to be publicly available in a format that may be understood by older individuals, family caregivers, and their families.

(c) The area agency is responsible for enforcement of these policies and procedures.

(d) The area agency may not delegate to another agency the authority to award or administer funds under this part.

#### **§ 1321.61 Advocacy responsibilities of the area agency.**

(a) The area agency shall serve as the public advocate for the development or enhancement of comprehensive and coordinated community-based systems of services in each community throughout and specific to each planning and service area.

(b) In carrying out this responsibility, the area agency shall:

(1) Monitor, evaluate, and comment on policies, programs, hearings, levies, and community actions which affect older individuals and family caregivers which the area agency considers to be aligned with the interests identified in the Act;

(2) Solicit comments from the public on the needs of older individuals and family caregivers;

(3) Represent the interests of older individuals and family caregivers to local level and executive branch officials, public and private agencies, or organizations;

(4) Consult with and support the State's Long-Term Care Ombudsman Program; and

(5) Coordinate with public and private organizations, including units of general purpose local government to promote new or expanded benefits and opportunities for older individuals and family caregivers.

(c) Each area agency on aging shall undertake a leadership role in assisting communities throughout the planning and service area to target resources from all appropriate sources to meet the needs of older individuals and family caregivers with greatest economic need and greatest social need, with particular attention to low-income minority individuals. Such activities may include location of services and specialization in the types of services most needed by these groups to meet this requirement. However, the area agency shall not permit a grantee or contractor under this part to employ a means test for services funded under this part.

(d) No requirement in this section shall be deemed to supersede a prohibition contained in the Federal appropriation on the use of Federal funds to lobby the Congress; or the lobbying provision applicable to private nonprofit agencies and organizations contained in OMB Circular A-122.

**§ 1321.63 Area agency advisory council.**

(a) *Functions of council.* The area agency shall establish an advisory council. The council shall carry out advisory functions which further the area agency's mission of developing and coordinating community-based systems of services for all older individuals and family and older relative caregivers specific to each planning and service area. The council shall advise the agency relative to:

- (1) Developing and administering the area plan;
- (2) Ensuring the plan is available to older individuals, family caregivers, service providers, and the general public;
- (3) Conducting public hearings;
- (4) Representing the interests of older individuals and family caregivers; and
- (5) Reviewing and commenting on community policies, programs and actions which

affect older individuals and family caregivers with the intent of assuring maximum coordination and responsiveness to older individuals and family caregivers.

(b) *Composition of council.* The council shall include individuals and representatives of community organizations from or serving the planning and service area who will help to enhance the leadership role of the area agency in developing community-based systems of services targeting those in greatest economic need and greatest social need. The advisory council shall be made up of:

(1) More than 50 percent older individuals, including minority individuals who are participants or who are eligible to participate in programs under this part, with efforts to include individuals identified as in greatest economic need and individuals identified as in greatest social need in § 1321.65(b)(2);

(2) Representatives of older individuals;

(3) Family caregivers, which may include older relative caregivers;

(4) Representatives of health care provider organizations, including providers of veterans' health care (if appropriate);

(5) Representatives of service providers, which may include legal assistance, nutrition, evidence-based disease prevention and health promotion, caregiver, long-term care ombudsman, and other service providers;

(6) Persons with leadership experience in the private and voluntary sectors;

(7) Local elected officials;

(8) The general public; and

(9) As available:

(i) Representatives from Indian Tribes, Pueblos, or Tribal aging programs; and

(ii) Older relative caregivers, including kin and grandparent caregivers of children or adults age 18 to 59 with a disability.

(c) *Review by advisory council.* The area agency shall submit the area plan and

amendments for review and comment to the advisory council before it is transmitted to the State agency for approval.

(d) *Conflicts of interest.* The advisory council shall not operate as a board of directors for the area agency. Individuals may not serve on both the advisory council and the board of directors for the same entity.

**§ 1321.65 Submission of an area plan and plan amendments to the State agency for approval.**

(a) The area agency shall submit the area plan on aging and amendments specific to each planning and service area to the State agency for approval following procedures specified by the State agency in the State agency policies prescribed by § 1321.9.

(b) State agency policies and procedures regarding area plan requirements will at a minimum address the following:

(1) Content, duration, and format;

(2) That the area agency shall identify populations within the planning and service area at greatest economic need and greatest social need, which shall include the populations as set forth in the § 1321.3 definitions of greatest economic need and greatest social need.

(3) Assessment and evaluation of unmet need, such that each area agency shall submit objectively collected, and where possible, statistically valid, data with evaluative conclusions concerning the unmet need for supportive services, nutrition services, evidence-based disease prevention and health promotion services, family caregiver support services, and multipurpose senior centers. The evaluations for each area agency shall consider all services in these categories regardless of the source of funding for the services;

(4) Public participation specifying mechanisms to obtain the periodic views of older individuals, family caregivers, service providers, and the public with a focus on those in greatest economic need and greatest social need, including:

(i) A reasonable minimum time period (at least 30 calendar days, unless a waiver is

provided by the State agency during an emergency or when a time sensitive action is otherwise necessary) for public review and comment on area plans and area plan amendments; and

(ii) Ensuring the documents noted in (b)(4)(i) of this section and final area plans and amendments are accessible in a public location, as well as available in print by request.

(5) The services, including a definition of each type of service; the number of individuals to be served; the type and number of units to be provided; and corresponding expenditures proposed to be provided with funds under the Act and related local public sources under the area plan;

(6) Plans for how direct services funds under the Act will be distributed within the planning and service area, in order to address populations identified as in greatest social need and greatest economic need, as identified in § 1321.27(d)(1);

(7) Process for determining whether the area agency meets requirements to provide services directly where:

(i) As set forth in section 307(a)(8)(A) of the Act (42 U.S.C. 3027(a)(8)(A)), no supportive services, nutrition services, evidence-based disease prevention and health promotion services, or family caregiver support services will be directly provided by an area agency on aging in the State, unless, in the judgment of the State agency:

(A) Provision of such services by the area agency on aging is necessary to assure an adequate supply of such services;

(B) Such services are directly related to such area agency on aging's administrative functions; or

(C) Such services may be provided more economically, and with comparable quality, by such area agency on aging.

(ii) At its discretion, the State agency may waive the conditions set forth in paragraph (b)(7)(i) of this section and allow area agencies on aging to directly provide the supportive services of case management, information and assistance services, and outreach without



additional restriction.

(iii) Approval of the area agency to provide direct services shall only be granted for a maximum of the area plan period. For each time approval is granted to an area agency to provide direct services, the area agency must demonstrate the area agency's efforts to identify service providers prior to being granted a subsequent approval.

(8) Minimum adequate proportion requirements, as identified in the approved State plan as set forth in § 1321.27;

(9) Requirements for program development and coordination activities as set forth in § 1321.27(h), if allowed by the State agency;

(10) If the area agency requests to allow Title III, part C-1 funds to be used as set forth in § 1321.87(a)(1)(i) through (iii), it must provide the following information to the State agency:

(i) Evidence, using participation projections based on existing data, that provision of such meals will enhance and not diminish the congregate meals program, and a commitment to monitor impact on congregate meals program participation;

(ii) Description of how provision of such meals will be targeted to reach those populations identified as in greatest economic need and greatest social need;

(iii) Description of the eligibility criteria for service provision;

(iv) Evidence of consultation with nutrition and other direct services providers, other interested parties, and the general public regarding the need for and provision of such meals; and

(v) Description of how provision of such meals will be coordinated with nutrition and other direct services providers and other interested parties.

(11) Initial submission and amendments;

(12) Approval by the State agency; and

(13) Appeals regarding area plans on aging.

(c) Area plans shall incorporate services which address the incidence of hunger, food insecurity and malnutrition; social isolation; and physical and mental health conditions.

(d) Pursuant to section 306(a)(16) of the Act (42 U.S.C. 3026(a)(16)), area plans shall provide, to the extent feasible, for the furnishing of services under this Act, through self-direction.

(e) Area plans on aging shall develop objectives that coordinate with and reflect the State plan goals for services under the Act.

**§ 1321.67 Conflicts of interest policies and procedures for area agencies on aging.**

(a) The area agency must have policies and procedures regarding conflicts of interest in accordance with the Act, guidance as set forth by the Assistant Secretary for Aging, and State agency policies and procedures as set forth at § 1321.47. These policies and procedures must safeguard against conflicts of interest on the part of the area agency, area agency employees, governing board and advisory council members, and awardees who have responsibilities relating to the area agency's grants and contracts. Conflicts of interest policies and procedures must establish mechanisms to avoid both actual and perceived conflicts of interest and to identify, remove, and remedy any existing or potential conflicts of interest at organizational and individual levels, including:

(1) Reviewing service utilization and financial incentives to ensure agency employees, governing board and advisory council members, grantees, contractors, and other awardees who serve multiple roles, such as assessment and service delivery, are appropriately stewarding Federal resources while fostering services to enhance access to community living;

(2) Ensuring that the area agency on aging employees and agents administering Title III programs do not have a financial interest in Title III programs;

(3) Complying with § 1324.21 of this chapter regarding the Ombudsman program, as appropriate;

(4) Removing and remedying any actual, perceived, or potential conflict between the area agency on aging and the area agency on aging employee or contractor's financial interest in a Title III program;

(5) Establishing robust monitoring and oversight, including periodic reviews, to identify conflicts of interest in the Title III program;

(6) Ensuring that no individual, or member of the immediate family of an individual, involved in Title III programs has a conflict of interest;

(7) Requiring that agencies to which the area agency provides Title III funds have policies in place to prohibit the employment or appointment of Title III program decision makers, staff, or volunteers with conflicts that cannot be adequately removed or remedied;

(8) Requiring that Title III programs take reasonable steps to refuse, suspend or remove Title III program responsibilities of an individual who has a conflict of interest, or who has a member of the immediate family with a conflict of interest, that cannot be adequately removed or remedied;

(9) Complying with the State agency's periodic review and identification of conflicts of the Title III program;

(10) Prohibiting the officers, employees, or agents of the Title III program from soliciting or accepting gratuities, favors, or anything of monetary value from grantees, contractors, and/or subrecipients, except where policies and procedures allow for situations where the financial interest is not substantial, or the gift is an unsolicited item of nominal value;

(11) Establishing the actions the area agency will require Title III programs to take in order to remedy or remove such conflicts, as well as disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the Title III program; and

(12) Documentation of conflict of interest mitigation strategies, as necessary and appropriate, when operating an Adult Protective Services or guardianship program.

(b) [Reserved]

**§ 1321.69 Area agency on aging Title III and Title VI coordination responsibilities.**

(a) For planning and service areas where there are Title VI programs, the area agency's policies and procedures, developed in coordination with the relevant Title VI program

director(s), as set forth in § 1322.13(a), must explain how the area agency's aging network, including service providers, will coordinate with Title VI programs to ensure compliance with section 306(a)(11)(B) of the Act (42 U.S.C. 3026(a)(11)(B)).

(b) The policies and procedures set forth in paragraph (a) of this section must at a minimum address:

(1) How the area agency's aging network, including service providers, will provide outreach to Tribal elders and family caregivers regarding services for which they may be eligible under Title III;

(2) The communication opportunities the area agency will make available to Title VI programs, to include Title III and other funding opportunities, technical assistance on how to apply for Title III and other funding opportunities, meetings, email distribution lists, presentations, and public hearings;

(3) The methods for collaboration on and sharing of program information and changes, including coordinating with service providers where applicable;

(4) How Title VI programs may refer individuals who are eligible for Title III services;

(5) How services will be provided in a culturally appropriate and trauma-informed manner; and

(6) Opportunities to serve on advisory councils, workgroups, and boards, including area agency advisory councils as set forth in § 1321.63.

#### **Subpart D – Service Requirements**

##### **§ 1321.71 Purpose of services allotments under Title III.**

(a) Title III of the Act authorizes the distribution of Federal funds to the State agency on aging for the following services:

(1) Supportive services;

(2) Nutrition services;

(3) Evidence-based disease prevention and health promotion services; and

(4) Family caregiver support services.

(b) Funds authorized are for the purpose of assisting the State agency and its area agencies to develop, provide, or enhance for older individuals and family caregivers comprehensive and coordinated community-based direct services and systems.

(c) Except for ombudsman services, State plan administration, disaster assistance as noted at §§ 1321.99 through 1321.101, or as otherwise allowed in the Act, State agencies in States with multiple planning and service areas will award the funds made available under this section to designated area agencies on aging according to the approved intrastate funding formula as set forth in § 1321.49.

(d) Except for ombudsman services, State plan administration, disaster assistance as noted at §§ 1321.99 through 1321.101, or as otherwise allowed in the Act, State agencies in States with single planning and service areas shall award funds by grant or contract to community services provider agencies and organizations for direct services to older individuals and family caregivers in, or serving, communities throughout the planning and service area, except as set forth in § 1321.51(b)(4).

(e) Except where the State agency approves the area agency to provide direct services, as set forth in § 1321.65(b)(7), after subtracting funds for area plan administration as set forth in § 1321.9(c)(2)(iv)(B) and program development and coordination activities, if allowed by the State agency, as set forth in § 1321.27(h), area agencies shall award these funds by grant or contract to community services provider agencies and organizations for direct services to older individuals and family caregivers in, or serving, communities throughout the planning and service area.

#### **§ 1321.73 Policies and procedures.**

(a) The area agency on aging and/or service provider shall ensure the development and implementation of policies and procedures in accordance with State agency policies and procedures, including those required as set forth in § 1321.9. The State agency may allow for policies and procedures to be developed by the subrecipient(s), except as set forth at §§ 1321.9(a)

and 1321.9(c)(2)(xi) and where otherwise specified.

(b) The area agency on aging and/or service provider will provide the State agency in a timely manner with statistical and other information which the State agency requires to meet its planning, coordination, evaluation, and reporting requirements established by the State agency under § 1321.9.

(c) The State agency and/or area agencies on aging must develop an independent qualitative and quantitative monitoring process ensuring the quality and effectiveness of services regarding meeting participant needs and preferences, the goals described within the State and/or area plan, and State and local requirements, as well as conflicts of interest policies and procedures. Quality monitoring and measurement results are encouraged to be made available to the public in plain language format designed to support and provide information and choice among persons and families receiving services.

#### **§ 1321.75 Confidentiality and disclosure of information.**

(a) State agencies and area agencies on aging shall have procedures to protect the confidentiality of information about older individuals and family caregivers collected in the conduct of their responsibilities. The procedures shall ensure that no information about an older person or family caregiver, or obtained from an older person or family caregiver by a service provider or the State or area agencies, is disclosed by the provider or agency in a form that identifies the person without the informed consent of the person or of their legal representative, unless the disclosure is required by law or court order, or for program monitoring and evaluation by authorized Federal, State, or local monitoring agencies.

(b) A State agency, area agency on aging or other contracting or granting or auditing agency may not require a provider of long-term care ombudsman services under this part to reveal any information that is protected by disclosure provisions in 45 CFR part 1324, subpart A. State agencies must comply with confidentiality and disclosure of information provisions as directed in 45 CFR part 1324, as appropriate.

(c) A State or area agency on aging shall not require a provider of legal assistance under this part to reveal any information that is protected by attorney client privilege.

(d) State agencies must have policies and procedures that ensure that entities providing services under this title promote the rights of each older individual who receives such services. Such rights include the right to confidentiality of records relating to such individual.

(e) State agencies' policies and procedures must explain that individual information and records may be shared with other State and local agencies, community-based organizations, and health care providers and payers in order to provide services.

(f) State agencies' policies and procedures must comply with all applicable Federal laws as well as guidance as the State determines, for the collection, use, and exchange of both Personal Identifiable Information (PII) and personal health information in the provision of Title III services under the Act. State agencies are encouraged to consult with Tribes regarding any Tribal data sovereignty expectations that may apply.

**§ 1321.77 Purpose of services – person- and family-centered, trauma-informed.**

(a) Services must be provided to older adults and family caregivers in a manner that is person-centered, trauma-informed, and culturally sensitive. Services should be responsive to their interests, physical and mental health, social and cultural needs, available supports, and desire to live where and with whom they choose. Person-centered services may include community-centered and family-centered approaches consistent with the traditions, practices, beliefs, and cultural norms and expectations of older adults and family caregivers.

(b) Services should, as appropriate, provide older adults and family caregivers with the opportunity to develop a person-centered plan that is led by the individual or, if applicable, by the individual and the individual's authorized representative. Services should be incorporated into existing person-centered plans, as appropriate.

(c) State and area agencies and service providers should provide training to staff and volunteers on person-centered and trauma-informed service provision.

### **§ 1321.79 Responsibilities of service providers under State and area plans.**

As a condition for receipt of funds under this part, each State agency and/or area agency on aging shall assure that service providers shall:

(a) Specify how the service provider intends to satisfy the service needs of those identified as in greatest economic need and greatest social need, with a focus on low-income minority individuals in the area served, including attempting to provide services to low-income minority individuals at least in proportion to the number of low-income minority older individuals and family caregivers in the population serviced by the provider;

(b) Provide recipients with an opportunity to contribute to the cost of the service as provided in § 1321.9(c)(2)(x) or (xi);

(c) Pursuant to section 306(a)(16) of the Act (42 U.S.C. 3026(a)(16)), provide, to the extent feasible, for the furnishing of services under this Act through self-direction;

(d) Bring conditions or circumstances which place an older person, or the household of an older person, in imminent danger to the attention of adult protective services or other appropriate officials for follow-up, provided that:

(1) The older person or their legal representative consents; or

(2) Such action is in accordance with local adult protective services requirements, except as set forth at § 1321.93 and part 1324, subpart A, of this chapter;

(e) Where feasible and appropriate, make arrangements for the availability of services to older individuals and family caregivers in weather-related and other emergencies;

(f) Assist participants in taking advantage of benefits under other programs; and

(g) Assure that all services funded under this part are coordinated with other appropriate services in the community, and that these services do not constitute an unnecessary duplication of services provided by other sources.

### **§ 1321.81 Client eligibility for participation.**

(a) An individual must be age 60 or older at the time of service to be eligible to



participate in services under the Act, unless the Act otherwise provides an explicit exception.

Exceptions are limited to the following specific services:

(1) Nutrition services:

(i) Services shall be available to spouses of any age of older individuals;

(ii) Services may be available to:

(A) A person with a disability who lives with an adult age 60 or older or who resides in a housing facility that is primarily occupied by older adults at which congregate meals are served;  
and

(B) A volunteer during meal hours.

(2) Family caregiver support services for:

(i) Adults caring for older adults and adults caring for individuals of any age with Alzheimer's or a related disorder;

(ii) Older relative caregivers who are caring for children and are not the biological or adoptive parent of the child, where older relative caregivers shall no longer be eligible for services under this part when the child reaches 18 years of age; or

(iii) Older relative caregivers who are caring for individuals age 18 to 59 with disabilities and who may be of any relationship, including the biological or adoptive parent.

(3) Services such as information and assistance and public education, where recipients of information may not be age 60 or older, but the information is targeted to those who are age 60 or older and/or benefits those who are age 60 or older.

(4) Ombudsman program services, as provided in 45 CFR part 1324.

(b) State agencies, area agencies on aging, and local service providers may develop further eligibility requirements for implementation of services for older adults and family caregivers, as long as they do not conflict with the Act, this part, or guidance as set forth by the Assistant Secretary for Aging. Such requirements may include:

(1) Assessment of greatest social need;

- (2) Assessment of greatest economic need;
- (3) Assessment of functional and support need;
- (4) Geographic boundaries;
- (5) Limitations on number of persons that may be served;
- (6) Limitations on number of units of service that may be provided;
- (7) Limitations due to availability of staff/volunteers;
- (8) Limitations to avoid duplication of services; and
- (9) Specification of settings where services shall or may be provided.

**§ 1321.83 Client and service priority.**

(a) The State agency and/or area agency shall ensure service to those identified as members of priority groups through assessment of local needs and resources.

(b) The State agency and/or area agency shall establish criteria to prioritize the delivery of services under Title III, parts B (except for Ombudsman program services which are subject to provisions in 45 CFR part 1324), C, and D, in accordance with the Act.

(c) The State agency and/or area agency shall establish criteria to prioritize the delivery of services under Title III, part E, in accordance with the Act, to include:

(1) Caregivers who are older individuals with greatest social need, and older individuals with greatest economic need (with particular attention to low-income older individuals);

(2) Caregivers who provide care for individuals with Alzheimer's disease and related disorders with neurological and organic brain dysfunction; and

(3) If serving older relative caregivers, older relative caregivers of children or adults with severe disabilities.

**§ 1321.85 Supportive services.**

(a) Supportive services are community-based interventions set forth in the Act under Title III, part B, section 321 (42 U.S.C. 3030d) which meet standards established by the Assistant Secretary for Aging. They include in-home supportive services, access services, which may

include multipurpose senior centers, and legal services.

(b) State agencies may allow use of Title III, part B funds for acquiring, altering or renovating, or constructing facilities to serve as multipurpose senior centers, in accordance with guidance as set forth by the Assistant Secretary for Aging.

(c) For those Title III, part B services intended to benefit family caregivers, such as those provided under sections 321(a)(6)(C), 321(a)(19), and 321(a)(21) of the Act (42 U.S.C. 3030d(a)(6)(C), 3030d(a)(19), and 3030d(a)(21)), State and area agencies shall ensure that there is coordination and no inappropriate duplication of such services available under Title III, part E.

(d) All funds provided under Title III, part B of the Act must be distributed within a State pursuant to § 1321.49 or § 1321.51.

#### **§ 1321.87 Nutrition services.**

(a) Nutrition services are community-based interventions as set forth in Title III, part C of the Act, and as further defined by the Assistant Secretary for Aging. Nutrition services include congregate meals, home-delivered meals, nutrition education, nutrition counseling, and other nutrition services.

(1) Congregate meals are meals meeting the Dietary Guidelines for Americans and Dietary Reference Intakes as set forth in section 339 of the Act (42 U.S.C. 3030g-21) provided under Title III, part C-1 by a qualified nutrition service provider to eligible individuals and consumed while congregating virtually or in-person, except where:

(i) If included as part of an approved State plan as set forth in § 1321.27 or State plan amendment as set forth in § 1321.31(a) and area plan or plan amendment as set forth in § 1321.65 and to complement the congregate meals program, shelf-stable, pick-up, carry-out, drive-through, or similar meals may be provided under Title III, part C-1;

(ii) Meals provided as set forth in paragraph (a)(1)(i) of this section shall:

(A) Not exceed 25 percent of the funds expended by the State agency under Title III, part C-1, to be calculated based on the amount of Title III, part C-1 funds available after all transfers as set

forth in § 1321.9(c)(2)(iii) are completed;

(B) Not exceed 25 percent of the funds expended by any area agency on aging under Title III, part C-1, to be calculated based on the amount of Title III, part C-1 funds available after all transfers as set forth in § 1321.9(c)(2)(iii) are completed.

(iii) Meals provided as set forth in paragraph (a)(1)(i) of this section may be provided to complement the congregate meal program:

(A) During disaster or emergency situations affecting the provision of nutrition services;

(B) To older individuals who have an occasional need for such meal; and/or

(C) To older individuals who have a regular need for such meal, based on an individualized assessment, when targeting services to those in greatest economic need and greatest social need.

(2) Home-delivered meals are meals meeting the Dietary Guidelines for Americans and Dietary Reference Intakes as set forth in section 339 of the Act (42 U.S.C. 3030g-21) provided under Title III, part C-2 by a qualified nutrition service provider to eligible individuals and consumed at their residence or otherwise outside of a congregate setting, as organized by a service provider under the Act. Meals may be provided via home delivery, pick-up, carry-out, drive-through, or similar meals.

(i) Eligibility criteria for home-delivered meals may include consideration of an individual's ability to leave home unassisted, ability to shop for and prepare nutritious meals, degree of disability, or other relevant factors pertaining to their need for the service, including social need and economic need.

(ii) Home-delivered meals service providers may encourage meal participants to attend congregate meal sites and other health and wellness activities, as feasible, based on a person-centered approach and local service availability.

(3) Nutrition education is information provided under Title III, parts C-1 or 2 which provides individuals with the knowledge and skills to make healthy food and beverage choices.

Congregate and home-delivered nutrition services shall provide nutrition education, as appropriate, based on the needs of meal participants.

(4) Nutrition counseling is a service provided under Title III, parts C-1 or 2 which must align with the Academy of Nutrition and Dietetics. Congregate and home-delivered nutrition services shall provide nutrition counseling, as appropriate, based on the needs of meal participants, the availability of resources, and the expertise of a Registered Dietitian Nutritionist.

(5) Other nutrition services include additional services provided under Title III, parts C-1 or 2 that may be provided to meet nutritional needs or preferences of eligible participants, such as weighted utensils, supplemental foods, oral nutrition supplements, or groceries.

(b) State agencies shall establish policies and procedures that define a nutrition project and include how a nutrition project will provide meals and nutrition services five or more days per week in accordance with the Act. The definition of nutrition project established by the State agency must consider the availability of resources and the community's need for nutrition services as described in the State and area plans.

(c) All funds provided under Title III, part C of the Act must be distributed within a State pursuant to § 1321.49 or § 1321.51.

(d) Nutrition Services Incentive Program allocations are available to States and Territories that provide nutrition services where:

(1) Nutrition Services Incentive Program allocation amounts are based on the number of meals reported by the State agency which meet the following requirements:

(i) The meal is served to an individual who is eligible to receive services under the Act;

(ii) The meal is served to an individual who has not been means-tested to receive the meal;

(iii) The meal is served to an individual who has been provided the opportunity to provide a voluntary contribution to the cost of service;

(iv) The meal meets the other requirements of the Act, including that the meal meets the

Dietary Guidelines for Americans and Dietary Reference Intakes as set forth in section 339 of the Act (42 U.S.C. 3030g-21); and

(v) The meal is served by an agency that has a grant or contract with a State agency or area agency.

(2) The State agency may choose to receive their Nutrition Services Incentive Program grant as cash, commodities, or a combination of cash and commodities.

(3) Nutrition Services Incentive Program funds may only be used to purchase domestically produced foods used in a meal as set forth under the Act.

(4) Nutrition Services Incentive Program funds are distributed within a State pursuant to § 1321.49(b)(1)(iii) and (d) or § 1321.51(b)(1).

**§ 1321.89 Evidence-based disease prevention and health promotion services.**

(a) Evidence-based disease prevention and health promotion services programs are community-based interventions as set forth in Title III, part D of the Act, that have been proven to improve health and well-being and/or reduce risk of injury, disease, or disability among older adults. All programs provided using these funds must be evidence-based and must meet the Act's requirements and guidance as set forth by the Assistant Secretary for Aging.

(b) All funds provided under Title III, part D of the Act must be distributed within a State pursuant to § 1321.49 or § 1321.51.

**§ 1321.91 Family caregiver support services.**

(a) Family caregiver support services are community-based interventions set forth in Title III, part E of the Act, which meet standards set forth by the Assistant Secretary for Aging and which may be informed through the use of an evidence-informed or evidence-based caregiver assessment, including:

(1) Information to family caregivers about available services via public education;

(2) Assistance to family caregivers in gaining access to the services through:

(i) Individual information and assistance; or

(ii) Case management or care coordination.

(3) Individual counseling, organization of support groups, and caregiver training to assist family caregivers in those areas in which they provide support, including health, nutrition, complex medical care, and financial literacy, and in making decisions and solving problems relating to their caregiving roles;

(4) Respite care to enable family caregivers to be temporarily relieved from their caregiving responsibilities; and

(5) Supplemental services, on a limited basis, to complement the care provided by family caregivers. State agencies and AAAs shall define “limited basis” for supplemental services and may consider limiting units, episodes or expenditure amounts when making this determination.

(b) State agencies shall ensure that there is a plan to provide each of the services authorized under this part in each planning and service area, or statewide in accordance with a funds distribution plan for single planning and service area States, subject to availability of funds under the Act.

(c) To provide services listed in paragraphs (a)(4) and (5) of this section to family caregivers of adults aged 60 and older or of individuals of any age with Alzheimer’s disease or a related disorder, the individual for whom they are caring must be determined to be functionally impaired because the individual:

(1) Is unable to perform at least two activities of daily living without substantial assistance, including verbal reminding, physical cueing, or supervision;

(2) At the option of the State agency, is unable to perform at least three such activities without such assistance; or

(3) Due to a cognitive or other mental impairment, requires substantial supervision because the individual poses a serious health or safety hazard to themselves or others.

(d) All funds provided under Title III, part E of the Act must be distributed within a State pursuant to § 1321.49 or § 1321.51.

**§ 1321.93 Legal assistance.**

(a) *General - definition.* (1) The provisions and restrictions in this section apply to legal assistance funded by and provided pursuant to the Act.

(2) Legal assistance means legal advice and/or representation provided by an attorney to older individuals with economic or social needs, per section 102(33) of the Act (42 U.S.C. 3002(33)). Legal assistance may include, to the extent feasible, counseling, or other appropriate assistance by a paralegal or law student under the direct supervision of an attorney, and counseling or representation by a non-lawyer as permitted by law.

(b) *State agency on aging requirements.* (1) Under section 307(a)(11) of the Act (42 U.S.C. 3027(a)(11)), the roles and responsibilities of the State agency shall include assurances for the provision of legal assistance in the State plan as follows:

(i) Legal assistance, to the extent practicable, supplements and does not duplicate or supplant legal services provided with funding from other sources, including grants made by the Legal Services Corporation;

(ii) Legal assistance supplements existing sources of legal services through focusing legal assistance delivery and provider capacity in the specific areas of law affecting older adults with greatest economic need or greatest social need;

(iii) Reasonable efforts will be made to maintain existing levels of legal assistance for older individuals;

(iv) Advice, training, and technical assistance support for the provision of legal assistance for older adults will be made available to legal assistance providers, as provided in § 1324.303 and section 420(a)(1) of the Act (42 U.S.C. 3032i(a)(1));

(v) The State agency in single planning and service area States or area agencies on aging in States with multiple planning and service areas shall award, through contract funds, only to legal assistance providers that meet the standards and requirements as set forth in this section and section (c); and



(vi) Attorneys and personnel under the supervision of attorneys providing legal assistance shall adhere to the applicable Rules of Professional Conduct including the obligation to preserve the attorney-client privilege.

(2) As set forth in section 307(a)(2)(C) of the Act (42 U.S.C. 3027(a)(2)(C)) and § 1321.27(i)(3), the State agency shall designate the minimum proportion of Title III, part B funds and require the expenditure of at least that sum for each planning and service area for the purpose of procuring contract(s) for legal assistance.

(3) The State agency in States with a single planning and service area shall meet the requirements for area agencies on aging as set forth in paragraph (c) of this section.

(c) *Area Agency on Aging requirements—(1) Adequate proportion funding.* The area agency on aging shall award at a minimum the required adequate proportion of Title III, part B funds designated by the State agency to procure legal assistance for older residents of the planning and service area as set forth in §§ 1321.27 and 1321.65.

(2) *Standards for selection of legal assistance providers.* Area agencies on aging shall adhere to the following standards in selecting legal assistance providers:

(i) The area agency on aging must select and procure through contract the legal assistance provider or providers best able to provide legal assistance as provided in this paragraph (c)(2) and paragraphs (d) through (f) of this section; and

(ii) The area agency on aging must select the legal assistance provider(s) that best demonstrate the capacity to conduct legal assistance, which means having the requisite expertise and staff to fulfill the requirements of the Act and all applicable Federal requirements for provision of legal assistance.

(d) *Standards for legal assistance provider selection.* Selected legal assistance providers shall exhibit the capacity to:

(1) Retain staff with expertise in specific areas of law affecting older individuals with economic or social need, including the priority areas identified in the Act;

(2) Demonstrate expertise in specific areas of law that are given priority in the Act, including income and public entitlement benefits, health care, long-term care, nutrition, consumer law, housing, utilities, protective services, abuse, neglect, age discrimination, and defense of guardianship, prioritizing focus from among the areas of law based on the needs of the community served;

(i) Defense of guardianship means advice to and representation of older individuals at risk of guardianship and older individuals subject to guardianship to divert them from guardianship to less restrictive, more person-directed forms of decisional support whenever possible, to oppose appointment of a guardian in favor of such less restrictive decisional supports, to seek limitation of guardianship and to seek revocation of guardianship;

(ii) Defense of guardianship includes:

(A) Representation to maintain the rights of individuals at risk of guardianship, and to advocate for limited guardianship if a court orders guardianship to be imposed; assistance removing or limiting an existing guardianship; or assistance to preserve or restore an individual's rights or autonomy;

(B) Representation to advocate for and assert use of least-restrictive alternatives to guardianship to preserve or restore an individual's rights and or autonomy to support decision-making, or to limit the scope of guardianship orders when such orders have or will be entered by a court; and

(C) A legal assistance provider shall not represent a petitioner for imposition of guardianship except in limited circumstances involving guardianship proceedings of older individuals who seek to become guardians only if other adequate representation is unavailable in the proceedings, and the provider has exhausted, and documents efforts made to explore less restrictive alternatives to guardianship.

(3) Provide effective administrative and judicial advocacy in the areas of law affecting older individuals with greatest economic need or greatest social need;

(4) Support other advocacy efforts, for example, the Long-Term Care Ombudsman Program, including requiring a memorandum of agreement between the State Long-Term Care Ombudsman and the legal assistance provider(s) as required by section 712(h)(8) of the Act (42 U.S.C. 3058g(h)(8)); and

(5) Effectively provide legal assistance to older individuals residing in congregate residential long-term settings as defined in the Act in section 102(35) (42 U.S.C. 3002(35)), or who are isolated as defined in the Act in section 102(24)(c) (42 U.S.C. 3002(24)(c)), or who are restricted to the home due to cognitive or physical limitations.

(e) *Standards for contracting between Area Agencies on Aging and legal assistance providers.* (1) The area agency shall enter into a contract(s) with the selected legal assistance provider(s) that demonstrate(s) the capacity to deliver legal assistance.

(2) The contract shall specify that legal assistance provider(s) shall demonstrate capacity to:

(i) Maintain expertise in specific areas of law that are to be given priority, as defined in paragraphs (d)(1) and (2) of this section.

(ii) Prioritize representation and advice that focus on the specific areas of law that give rise to problems that are disparately experienced by older adults with economic or social need.

(iii) Maintain staff with the expertise, knowledge, and skills to deliver legal assistance as described in this section.

(iv) Engage in reasonable efforts to involve the private bar in legal assistance activities authorized under the Act, including groups within the private bar furnishing services to older individuals on a pro bono and reduced fee basis.

(v) Ensure that attorneys and personnel under the supervision of attorneys providing legal assistance will adhere to the applicable Rules of Professional Conduct including, but not limited to, the obligation to preserve the attorney-client privilege.

(3) The contract shall include provisions:

(i) Describing the duty of the area agency to refer older adults to the legal assistance provider(s) with whom the area agency contracts. In fulfilling this duty, the area agency is precluded from requiring a pre-screening of older individuals seeking legal assistance or from acting as the sole and exclusive referral pathway to legal assistance.

(ii) Requiring the contracted legal assistance provider(s) to maintain capacity to provide legal assistance in the preferred language used by older individuals seeking and/or receiving legal assistance who are limited English proficient (LEP), including in oral and written communication, and to ensure effective communication for individuals with disabilities, including by providing appropriate auxiliary aids and services where necessary.

(A) This includes requiring legal assistance providers take reasonable steps to ensure meaningful access to legal assistance by older individuals with limited-English proficiency, including an individualized assessment of an individual's need to understand and participate in the legal process (as determined by each individual).

(B) This includes stating the responsibility of the legal assistance provider to provide access to interpretation and translation services to meet clients' needs.

(C) This includes taking appropriate steps to ensure communications with persons with disabilities are as effective as communication with others, including by providing appropriate auxiliary aids and services where necessary to afford qualified persons with disabilities an equal opportunity to participate in, and enjoy the benefits of, legal assistance.

(iii) Providing that the area agency will provide outreach activities that will include information about the availability of legal assistance to address problems experienced by older adults that may have legal solutions, such as those referenced in sections 306(a)(4)(B) and 306(a)(19) of the Act (42 U.S.C. 3026(a)(4)(B) and 3026(a)(19)). This includes outreach to:

(A) Older adults with greatest economic need due to low income and to those with greatest social need, including minority older individuals; and

(B) Older adults of underserved communities, including:

(1) Older adults with limited-English proficiency and/or whose primary language is not English;

(2) Older adults with severe disabilities;

(3) Older adults living in rural areas;

(4) Older adults at risk for institutional placement; and

(5) Older adults with Alzheimer's disease and related disorders with neurological and organic brain dysfunction and their caregivers.

(iv) Providing that legal assistance provider attorney staff and non-attorney personnel under the supervision of legal assistance attorneys must adhere to the applicable State Rules of Professional Conduct.

(v) Requiring that if the legal assistance provider(s) contracted by the area agency is located within a Legal Services Corporation grantee entity, that the legal assistance provider(s) shall adhere to the specific restrictions on activities and client representation in the Legal Services Corporation Act (42 U.S.C. 2996 et seq.). Exempted from this requirement are:

(A) Restrictions governing eligibility for legal assistance under such Act;

(B) Restrictions for membership of governing boards; and

(C) Any additional provisions as determined appropriate by the Assistant Secretary for Aging.

(f) *Legal assistance provider requirements.* (1) The provisions and restrictions in this section apply to legal assistance provider(s) when they are providing legal assistance under section 307(a)(11) of the Act (42 U.S.C. 3027(a)(11)).

(2) Legal assistance providers under contract with the State agency in States with single planning and service areas or area agency in States with multiple planning and service areas shall adhere to the following requirements:

(i) Provide legal assistance to meet complex and evolving legal needs that may arise involving a range of private, public, and governmental entities, programs, and activities that may

impact an older adult's independence, choice, or financial security; and

(ii) Maintain the capacity for and provision of effective administrative and judicial representation.

(A) *Effective administrative and judicial representation* means the expertise and ability to provide the range of services necessary to adequately address the needs of older adults through legal assistance in administrative and judicial forums, as required under the Act. This includes providing the full range of legal services, from brief service and advice through representation in administrative and judicial proceedings.

(B) [Reserved]

(iii) Conduct administrative and judicial advocacy as is necessary to meet the legal needs of older adults with economic or social need, focusing on such individuals with the greatest economic need or greatest social need:

(A) *Economic need* means the need for legal assistance resulting from income at or below the Federal poverty level, as defined in section 102(44) of the Act (42 U.S.C. 3002(44)), that is insufficient to meet the legal needs of an older individual or that causes barriers to attaining legal assistance to assert the rights of older individuals as articulated in the Act and in the laws, regulations, and Constitution.

(B) *Social need* means the need for legal assistance resulting from social factors, as defined by in section 102(24) of the Act (42 U.S.C. 3002(24)), that cause barriers to attaining legal assistance to assert the rights of older individuals.

(iv) Maintain the expertise required to capably handle matters related to the priority case type areas specified under the Act, including income and public entitlement benefits, health care, long-term care, nutrition, housing, utilities, protective services, abuse, neglect, age discrimination and defense of guardianship (as defined in paragraph (d)(2)(i) of this section).

(v) Maintain the expertise required to deliver any matters in addition to those specified in paragraph (f)(2)(iv) of this section that are related to preserving, maintaining, and restoring an

older adult's independence, choice, or financial security.

(vi) Maintain the expertise and capacity to deliver a full range of legal assistance, from brief service and advice through representation in hearings, trials, and other administrative and judicial proceedings in the areas of law affecting such older individuals with economic or social need.

(vii) Maintain the capacity to provide effective legal assistance and legal support to other advocacy efforts, including, but not limited to, the Long-Term Care Ombudsman Program serving the planning and service area, as required by section 712(h)(8) of the Act (42 U.S.C. 3058g(h)(8)), and maintain the capacity to form, develop and maintain partnerships that support older adults' independence, choice, or financial security.

(viii) Maintain and exercise the capacity to effectively provide legal assistance to older adults regardless of whether they reside in community or congregate settings, and to provide legal assistance to older individuals who are confined to their home, and older adults whose access to legal assistance may be limited by geography or isolation.

(ix) Maintain the capacity to provide legal assistance in the preferred language used by older individuals seeking and/or receiving legal assistance who are limited-English proficient (LEP), including in oral and written communication.

(A) Legal assistance provider(s) shall take reasonable steps to ensure meaningful access to legal assistance by older individuals with limited English-speaking proficiency and other communication needs;

(B) Such reasonable steps require an individualized assessment of the needs of individuals who are seeking legal assistance and legal assistance clients to understand and participate in the legal process (as determined by each individual); and

(C) Legal assistance provider(s) are responsible for providing access to interpretation, translation, and auxiliary aids and services to meet older individuals' legal assistance needs.

(x) Maintain staff with knowledge of the unique experiences of older adults with

economic or social need and expertise in areas of law affecting such older adults.

(xi) Meet the following legal assistance provider requirements:

(A) A legal assistance provider may not require an older person to disclose information about income or resources as a condition for providing legal assistance under this part.

(B) A legal assistance provider may ask about the person's financial circumstances as a part of the process of providing legal advice, counseling, and representation, or for the purpose of identifying additional resources and benefits for which an older person may be eligible.

(C) A legal assistance provider and its attorneys may engage in other legal activities to the extent that there is no conflict of interest nor other interference with their professional responsibilities under this Act.

(D) Legal assistance providers that are not housed within Legal Services Corporation grantee entities shall coordinate their services with existing Legal Services Corporation projects to concentrate funds under this Act in providing legal assistance to older adults with the greatest economic need or greatest social need.

(E) Nothing in this section is intended to prohibit any attorney from providing any form of legal assistance to an eligible client, or to interfere with the fulfillment of any attorney's professional responsibilities to a client.

(F) Legal assistance provider attorney staff and non-attorney personnel under the supervision of legal assistance attorneys must adhere to the applicable Rules of Professional Conduct.

(3) Restrictions on legal assistance.

(i) No legal assistance provider(s) shall use funds received under the Act to provide legal assistance in a fee generating case unless other adequate representation is unavailable or there is an emergency requiring immediate legal action. All providers shall establish procedures for the referral of fee generating cases.

(A) "Fee generating case" means any case or matter which, if undertaken on behalf of an



eligible client by an attorney in private practice, reasonably may be expected to result in a fee for legal services from an award to a client, from public funds, or from the opposing party.

(B) [Reserved]

(ii) Other adequate representation is deemed to be unavailable when:

(A) Recovery of damages is not the principal object of the client; or

(B) A court appoints a provider or an employee of a provider pursuant to a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction; or

(C) An eligible client is seeking benefits under Title II of the Social Security Act (42 U.S.C. 401 et seq.), Federal Old Age, Survivors, and Disability Insurance Benefits; or Title XVI of the Social Security Act (42 U.S.C. 1381 et seq.), Supplemental Security Income for Aged, Blind, and Disabled.

(iii) A provider may seek and accept a fee awarded or approved by a court or administrative body or included in a settlement.

(iv) When a case or matter accepted in accordance with this section results in a recovery of damages, other than statutory benefits, a provider may accept reimbursement for out-of-pocket costs and expenses incurred in connection with the case or matter.

(4) Legal assistance provider prohibited activities.

(i) A provider, employee of the provider, or staff attorney shall not engage in the following prohibited political activities:

(A) No provider or its employees shall contribute or make available funds, personnel, or equipment provided under the Act to any political party or association or to the campaign of any candidate for public or party office; or for use in advocating or opposing any ballot measure, initiative, or referendum;

(B) No provider or its employees shall intentionally identify the Title III program or provider with any partisan or nonpartisan political activity, or with the campaign of any candidate for public or party office; or

(C) While engaged in legal assistance activities supported under the Act, no attorney shall engage in any political activity.

(ii) No funds made available under the Act shall be used for lobbying activities including, but not limited to, any activities intended to influence any decision or activity by a nonjudicial Federal, State, or local individual or body.

(A) Nothing in this section is intended to prohibit an employee from:

(1) Communicating with a governmental agency for the purpose of obtaining information, clarification, or interpretation of the agency's rules, regulations, practices, or policies;

(2) Informing a client about a new or proposed statute, executive order, or administrative regulation relevant to the client's legal matter;

(3) Responding to an individual client's request for advice only with respect to the client's own communications to officials unless otherwise prohibited by the Act, Title III regulations or other applicable law. This provision does not authorize publication or training of clients on lobbying techniques or the composition of a communication for the client's use;

(4) Making direct contact with the area agency for any purpose; or

(5) Testifying before a government agency, legislative body, or committee at the request of the government agency, legislative body, or committee.

(B) [Reserved]

(iii) A provider may use funds provided by private sources to:

(A) Engage in lobbying activities if a government agency, elected official, legislative body, committee, or member thereof is considering a measure directly affecting activities of the provider under the Act;

(B) [Reserved]

(iv) While carrying out legal assistance activities and while using resources provided under the Act, by private entities or by a recipient, directly or through a subrecipient, no provider

or its employees shall:

(A) Participate in any public demonstration, picketing, boycott, or strike, whether in person or online, except as permitted by law in connection with the employee's own employment situation;

(B) Encourage, direct, or coerce others to engage in such activities; or

(C) At any time engage in or encourage others to engage in:

(1) Rioting or civil disturbance;

(2) Activity determined by a court to be in violation of an outstanding injunction of any court of competent jurisdiction;

(3) Any illegal activity;

(4) Any intentional identification of programs funded under the Act or recipient with any partisan or nonpartisan political activity, or with the campaign of any candidate for public or party office; or

(v) None of the funds made available under the Act may be used to pay dues exceeding a reasonable amount per legal assistance provider per annum to any organization (other than a bar association), a purpose or function of which is to engage in activities prohibited under these regulations. Such dues may not be used to engage in activities for which Older Americans Act funds cannot be directly used.

**§ 1321.95 Service provider Title III and Title VI coordination responsibilities.**

(a) For locations served by service providers under Title III of the Act where there are Title VI programs, the area agency on aging's and/or service provider's policies and procedures, developed in coordination with the relevant Title VI program director(s), as set forth in § 1322.13(a), must explain how the service provider will coordinate with Title VI programs.

(b) The policies and procedures set forth in paragraph (a) of this section must at a minimum address:

(1) How the service provider will provide outreach to Tribal elders and family caregivers

regarding services for which they may be eligible under Title III;

(2) The communication opportunities the service provider will make available to Title VI programs, to include meetings email distribution lists, and presentations;

(3) The methods for collaboration on and sharing of program information and changes;

(4) How Title VI programs may refer individuals who are eligible for Title III services;

(5) How services will be provided in a culturally appropriate and trauma-informed manner; and

(6) Opportunities to serve on advisory councils, workgroups, and boards.

### **Subpart E – Emergency and Disaster Requirements**

#### **§ 1321.97 Coordination with State, Tribal, and local emergency management.**

(a) *State agencies.* (1) State agencies shall establish emergency plans, as set forth in section 307(a)(28) of the Act (42 U.S.C. 3027(a)(28)). Such plans must include, at a minimum:

(i) The State agency's continuity of operations plan and an all-hazards emergency response plan based on completed risk assessments for all hazards and updated annually;

(ii) A plan to coordinate activities with area agencies on aging, service providers, local emergency response agencies, relief organizations, local governments, State agencies responsible for emergency and disaster preparedness, and any other institutions that have responsibility for disaster relief service delivery;

(iii) Processes for developing and updating long-range emergency and disaster preparedness plans; and

(iv) Other relevant information as determined by the State agency.

(2) The plan shall include information describing the involvement of the head of the State agency in the development, revision, and implementation of emergency and disaster preparedness plans, including the State Public Health Emergency Preparedness and Response Plan.

(3) The plan shall discuss coordination with area agencies on aging and service providers

and Tribal and local emergency management.

(b) *Area agencies on aging.* (1) Area agencies on aging shall establish emergency plans.

Such plans must include:

(i) The area agency's continuity of operations plan and an all-hazards emergency response plan based on completed risk assessments for all hazards and updated annually;

(ii) A description of coordination activities for both development and implementation of long-range emergency and disaster preparedness plans; and

(iii) Other information as deemed appropriate by the area agency on aging.

(2) The area agency on aging shall coordinate with Federal, local, and State emergency response agencies, service providers, relief organizations, local and State governments, and any other entities that have responsibility for disaster relief service delivery, as well as with Tribal emergency management, as appropriate.

#### **§ 1321.99 Setting aside funds to address disasters.**

(a) Section 310 of the Act (42 U.S.C. 3030) authorizes the use of funds during Presidentially declared major disaster declarations under the Stafford Act (42 U.S.C. 5121-5207) without regard to distribution through the State agency's intrastate funding formula or funds distribution plan when the following apply:

(1) Title III services are impacted; and

(2) Flexibility is needed as determined by the State agency.

(b) When implementing this authority, State agencies may set aside funds, up to five percent of their total Title III allocations, if specified as being allowed to be withheld for the purpose in their approved intrastate funding formula or funds distribution plan, or with prior approval from the Assistant Secretary for Aging. The following apply for use of set aside funds:

(1) Set aside funds that are awarded under this provision must comply with the requirements at § 1321.101; and

(2) The State agency must have policies and procedures in place to award funds set aside

through the intrastate funding formula, as set forth in § 1321.49, or funds distribution plan, as set forth in § 1321.51(b), if there are no funds awarded subject to this provision within 30 days of the end of the fiscal year in which the funds were received.

**§ 1321.101 Flexibilities under a major disaster declaration.**

(a) If a State or Indian Tribe requests and receives a major disaster declaration under the Stafford Act (42 U.S.C. 5121-5207), the State agency may use disaster relief flexibilities under Title III as set forth in this section to provide disaster relief services for areas of the State where the specific major disaster declaration is authorized and where older adults and family caregivers are affected.

(b) Flexibilities a State agency may exercise under a major disaster declaration include:

(1) Allowing use of any portion of the funds of any open grant awards under Title III of the Act for disaster relief services for older individuals and family caregivers.

(2) Awarding portions of State plan administration, up to a maximum of five percent of the Title III grant award or to a maximum of the amounts set forth at § 1321.9(c)(2)(iv), for use in a planning and service area covered in whole or part under a major disaster declaration without the requirement of allocation through the intrastate funding formula or funds distribution plan to be used for direct service provision.

(3) Awarding of funds set aside to address disasters, as set forth in § 1321.99, or as determined by the Assistant Secretary for Aging, in the following ways:

(i) to an area agency serving a planning and service area covered in whole or part under a major disaster declaration without the requirement of allocation through the intrastate funding formula;

(ii) for single planning and service area States, to a service provider without the requirement of allocation through a funds distribution plan; or

(iii) to be used for direct service provision, direct expenditures, and/or procurement of items on a statewide level, if the State agency adheres to the following:

(A) The State agency judges that provision of services or procurement of supplies by the State agency is necessary to ensure an adequate supply of such services and/or that such services can be provided/supplies procured more economically, and with comparable quality, by the State agency;

(B) The State agency consults with area agencies on aging prior to exercising the flexibility, and includes the Ombudsman as set forth in part 1324, subpart A if funding for the Ombudsman program is affected;

(C) The State agency uses such set aside funding, as provided at § 1321.99, for services provided through area agencies on aging and other aging network partners to the extent reasonably practicable, in the judgment of the State agency; and

(D) The State agency ensures reporting of any clients, units, and services provided through such expenditures.

(c) A State agency must submit a State plan amendment as set forth in § 1321.31(b) if the State agency exercises any of the flexibilities as set forth in paragraph (b) of this section. The State plan amendment must at a minimum include the specific entities receiving funds; the amount, source, and intended use for funds; and other such justification of the use of funds.

(d) Disaster relief services may include any allowable services under the Act to eligible older individuals or family caregivers during the period covered by the major disaster declaration.

(e) Expenditures of funds under disaster relief flexibilities must be reported separately from the grant where funding was expended. State agencies may expend funds from any source within open grant awards under Title III and Title VII of the Act but must track the source of all expenditures.

(f) State agencies must have policies and procedures outlining communication with area agencies on aging and/or local service providers regarding State agency expectations for eligibility, use, and reporting of services and funds provided under these flexibilities, and include

the Ombudsman as set forth in part 1324, subpart A if funding for the Ombudsman program is affected.

(g) A State agency may only make obligations exercising this flexibility during the major disaster declaration incident period or 90 days thereafter or with prior approval from the Assistant Secretary for Aging.

### **§ 1321.103 Title III and Title VI coordination for emergency and disaster preparedness.**

State agencies, area agencies, and Title VI programs should coordinate in emergency and disaster preparedness planning, response, and recovery. State agencies and area agencies that have Title VI programs in operation within their jurisdictions must have policies and procedures, developed in communication with the relevant Title VI program director(s) as set forth in § 1322.13(c), in place for how they will communicate and coordinate with Title VI programs regarding emergency and disaster preparedness planning, response, and recovery.

### **§ 1321.105 Modification during major disaster declaration or public health emergency.**

The Assistant Secretary for Aging retains the right to modify the requirements described in these regulations pursuant to a major disaster declaration or public health emergency.

2. Revise part 1322 to read as follows:

## **PART 1322—GRANTS TO INDIAN TRIBES AND NATIVE HAWAIIAN GRANTEEES FOR SUPPORTIVE, NUTRITION, AND CAREGIVER SERVICES**

Sec.

### **Subpart A – Introduction**

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1322.3 Definitions.

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### **Subpart D – Emergency and Disaster Requirements**

1322.33 Coordination with Tribal, State, and local emergency management.  
1322.35 Flexibilities under a major disaster declaration.  
1322.37 Title VI and Title III coordination for emergency and disaster preparedness.  
1322.39 Modification during major disaster declaration or public health emergency.

**Authority:** 42 U.S.C. 3001 et seq.

### **Subpart A – Introduction**

#### **§ 1322.1 Basis and purpose of this part.**

(a) This program is established to meet the unique needs and circumstances of American Indian and Alaskan Native elders and family caregivers and of older Native Hawaiians and family caregivers, on Indian reservations and/or in service areas as approved in § 1322.7. This program honors the sovereign government to government relationship with a Tribal organization serving elders and family caregivers through direct grants to serve the eligible participants and similar considerations, as appropriate, for Hawaiian Native grantees representing elders and family caregivers. This part implements Title VI (parts A, B, and C) of the Older Americans Act, as amended (the Act), by establishing the requirements that an Indian Tribal organization or Hawaiian Native grantee shall meet in order to receive a grant to promote the delivery of services for older Indians, Alaskan Native, Native Hawaiians, and Native American family caregivers that are comparable to services provided under Title III. This part also prescribes application and hearing requirements and procedures for these grants.

(b) Terms used, but not otherwise defined, in this part will have the meanings ascribed to

them in the Act.

### **§ 1322.3 Definitions.**

*Access to services or access services*, as used in this part, means services which may facilitate connection to or receipt of other direct services, including transportation, outreach, information and assistance, options counseling, and case management services.

*Acquiring*, as used in this part, means obtaining ownership of an existing facility.

*Act*, means the Older Americans Act of 1965 as amended.

*Altering or renovating*, as used in this part, means making modifications to or in connection with an existing facility which are necessary for its effective use. Such modifications may include alterations, improvements, replacements, rearrangements, installations, renovations, repairs, expansions, upgrades, or additions, which are not in excess of double the square footage of the original facility and all physical improvements.

*Area agency on aging*, as used in this part, means a single agency designated by the State agency to perform the functions specified in the Act for a planning and service area.

*Budgeting period*, as used in § 1322.19, means the intervals of time into which a period of assistance (project period) is divided for budgetary and funding purposes.

*Constructing*, as used in this part, means building a new facility, including the costs of land acquisition and architectural and engineering fees, or making modifications to or in connection with an existing facility which are in excess of double the square footage of the original facility and all physical improvements.

*Department*, means the U.S. Department of Health and Human Services.

*Domestically produced foods*, as used in this part, means agricultural foods, beverages and other food ingredients which are a product of the United States, its Territories or possessions, the Commonwealth of Puerto Rico, or the Trust Territories of the Pacific Islands (hereinafter referred to as “the United States”), except as may otherwise be required by law, and shall be considered to be such a product if it is grown, processed, and otherwise prepared for sale or

distribution exclusively in the United States except with respect to minor ingredients. Ingredients from nondomestic sources will be allowed to be utilized as a United States product if such ingredients are not otherwise:

(1) Produced in the United States; and

(2) Commercially available in the United States at fair and reasonable prices from domestic sources.

*Eligible organization*, means either a Tribal organization or a public or nonprofit private organization having the capacity to provide services under this part for older Hawaiian Natives.

*Family caregiver*, as used in this part, means an adult family member, or another individual, who is an informal provider of in-home and community care to an older Native American; an adult family member, or another individual, who is an informal provider of in-home and community care to an individual of any age with Alzheimer's disease or a related disorder with neurological and organic brain dysfunction; or an older relative caregiver. For purposes of this part, family caregiver does not include individuals whose primary relationship with the older adult is based on a financial or professional agreement.

*Hawaiian Native or Native Hawaiian*, as used in this part, means any individual any of whose ancestors were native of the area which consists of the Hawaiian Islands prior to 1778.

*Hawaiian Native grantee*, as used in this part, means an eligible organization that has received funds under Title VI of the Act to provide services to older Hawaiians.

*Indian reservation*, means the reservation of any Federally recognized Indian Tribe, including any band, nation, pueblo, or rancheria, any former reservation in Oklahoma, any community on non-trust land under the jurisdiction of an Indian Tribe, including a band, nation, pueblo, or rancheria, with allotted lands, or lands subject to a restriction against alienation imposed by the United States, and Alaska Native regions established, pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.).

*Indian Tribe*, means any Indian Tribe, band, nation, or organized group or community,

including any Alaska Native village, regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (25 U.S.C. 450b).

*In-home supportive services*, as used in this part, references those supportive services provided in the home as set forth in the Act, to include:

- (1) Homemaker, personal care, home care, home health, and other aides;
- (2) Visiting and telephone or virtual reassurance;
- (3) Chore maintenance;
- (4) Respite care for families, including adult day care as a respite service for families; and
- (5) Minor modification of homes that is necessary to facilitate the independence and health of older Native Americans and that is not readily available under another program.

*Major disaster declaration*, as used in this part and section 310 of the Act (42 U.S.C. 3030), means a Presidentially declared disaster under the Robert T. Stafford Relief and Emergency Assistance Act (42 U.S.C. 5121-5207).

*Means test*, as used in this part in the provision of services, means the use of the income, assets, or other resources of an older Native American, family caregiver, or the households thereof to deny or limit that person's eligibility to receive services under this part.

*Multipurpose senior center*, as used in the Act, means a community facility for the organization and provision of a broad spectrum of services, which shall include provision of health (including mental and behavioral health), social, nutritional, and educational services and the provision of facilities for recreational activities for older Native Americans, as practicable, including as provided via virtual facilities; as used in § 1322.25, facilitation of services in such a facility.

*Native American*, as used in the Act, means a person who is a member of any Indian Tribe, band, nation, or other organized group or community of Indians (including any Alaska

Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) who:

(1) Is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; or

(2) Is located on, or in proximity to, a Federal or State reservation or rancheria; or is a person who is a Native Hawaiian, who is any individual any of whose ancestors were natives of the area which consists of the Hawaiian Islands prior to 1778.

*Nutrition Services Incentive Program*, as used in the Act, means grant funding to State agencies, eligible Tribal organizations, and Native Hawaiian grantees to support congregate and home-delivered nutrition programs by providing an incentive to serve more meals.

*Older Indians*, means those individuals who have attained the minimum age determined by the Indian Tribe for services.

*Older Native Hawaiian*, means any individual, age 60 or over, who is a Hawaiian Native.

*Older relative caregiver*, as used in section 631 of the Act (42 U.S.C. 3057k-11), means a caregiver who is age 55 or older and lives with, is the informal provider of in-home and community care to, and is the primary caregiver for, a child or an individual with a disability;

(1) In the case of a caregiver for a child is:

(i) The grandparent, step-grandparent, or other relative (other than the parent) by blood, marriage, or adoption, of the child;

(ii) Is the primary caregiver of the child because the biological or adoptive parents are unable or unwilling to serve as the primary caregivers of the child; and

(iii) Has a legal relationship to the child, such as legal custody, adoption, or guardianship, or is raising the child informally; and

(2) In the case of a caregiver for an individual with a disability, is the parent, grandparent, step-grandparent, or other relative by blood, marriage, or adoption of the individual with a disability.

*Program income*, as defined in 2 CFR part 200.1 means gross income earned by the non-Federal entity that is directly generated by a supported activity or earned as a result of the Federal award during the period of performance except as provided in 2 CFR 200.307(f). Program income includes but is not limited to income from fees for services performed, the use or rental of real or personal property acquired under Federal awards, the sale of commodities or items fabricated under a Federal award, license fees and royalties on patents and copyrights, and principal and interest on loans made with Federal award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in Federal statutes, regulations, or the terms and conditions of the Federal award, program income does not include rebates, credits, discounts, and interest earned on any of them. See also 2 CFR 200.307, 200.407 and 35 U.S.C. 200-212 (which applies to inventions made under Federal awards).

*Project period*, as used in § 1322.19, means the total time for which a project is approved including any extensions.

*Reservation*, as used in section 305(b)(2) of the Act (42 U.S.C. 3025(b)(2)) with respect to the designation of planning and service areas, means any Federally or State recognized American Indian Tribe's reservation, pueblo, or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments.

*Service area*, as used in § 1322.5(b) and elsewhere in this part, means that geographic area approved by the Assistant Secretary for Aging in which the Tribal organization or Hawaiian Native grantee provides supportive, nutrition, and/or family caregiver support services to older Indians or Native Hawaiians residing there. Service areas are approved through the funding application process, which may include Bureau of Indian Affairs service area maps. A service area may include all or part of the reservation or any portion of a county or counties which has a common boundary with the reservation. A service area may also include a non-contiguous area if the designation of such an area will further the purpose of the Act and will provide for more

effective administration of the program by the Tribal organization.

*Service provider*, means an entity that is awarded funds, including via a grant, subgrant, contract, or subcontract, from a Tribal organization or Native Hawaiian grantee to provide direct services under this part.

*State agency*, as used in this part, means the designated State unit on aging for each of the 50 States, the District of Columbia, and the Territories of Guam, Puerto Rico, the United States Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands, unless otherwise specified.

*Title VI director*, as used in this part, means a single individual who is the key personnel responsible for day-to-day management of the Title VI program and who serves as a contact point for communications regarding the Title VI program.

*Tribal organization*, as used in this part, means the recognized governing body of any Indian Tribe, or any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities. Provided that in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian Tribe, the approval of each Indian Tribe shall be a prerequisite to the letting or making of the contract or grant (25 U.S.C. 450b).

*Voluntary contributions*, as used in section 315(b) of the Act (42 U.S.C. 3030c-2(b)), means donations of money or other personal resources given freely, without pressure or coercion, by individuals receiving services under the Act.

## **Subpart B – Application**

### **§ 1322.5 Application requirements.**

An eligible organization shall submit an application. The application shall be submitted as prescribed in section 614 of the Act (42 U.S.C. 3057e) and in accordance with the Assistant

Secretary for Aging's instructions for the specified project and budget periods. In addition to the requirements set out in section 614 of the Act (42 U.S.C. 3057e), the application shall provide for:

- (a) Program objectives, as set forth in section 614(a)(5) of the Act (42 U.S.C. 3057e(a)(5)), and any objectives established by the Assistant Secretary for Aging;
- (b) A map and/or description of the geographic boundaries of the service area proposed by the eligible organization, which may include Bureau of Indian Affairs service area maps;
- (c) Documentation of the ability of the eligible organization to deliver supportive and nutrition services to older Native Americans, or documentation that the eligible organization has effectively administered supportive and nutrition services within the last 3 years;
- (d) Assurances as prescribed by the Assistant Secretary for Aging that:
  - (1) The eligible organization represents at least 50 individuals who have attained 60 years of age or older and reside in the service area;
  - (2) The eligible organization shall comply with all applicable State and local license and safety requirements, if any, for the provision of those services;
  - (3) If a substantial number of the older Native Americans residing in the service area are limited English proficient, the Tribal organization shall utilize the services of workers who are fluent in the language used by a predominant number of older Native Americans;
  - (4) Procedures to ensure that all services under this part are provided without use of any means tests;
  - (5) The eligible organization shall comply with all requirements set forth in §§ 1322.7 through 1322.17;
  - (6) The services provided under this part shall be coordinated, where applicable, with services provided under Title III of the Act as set forth in 45 CFR part 1321 and Title VII of the Act as set forth in 45 CFR part 1324, and the eligible organization shall establish and follow policies and procedures as set forth in § 1322.13;



(7) The eligible organization shall have a completed needs assessment within the project period immediately prior to the application identifying the need for nutrition and supportive services for older Native Americans and, if applying for funds under Title VI part C, for family caregivers;

(8) The eligible organization shall ensure policies and procedures are aligned with periodic data collection and reporting requirements, including ensuring service and unit definitions are consistent with definitions set forth in these regulations, policy guidance, and other information developed by the Assistant Secretary for Aging; and

(9) The eligible organization shall complete a program evaluation using data as set forth by the Assistant Secretary for Aging and shall use findings of such program evaluation to establish and update program goals and objectives.

(e) A Tribal resolution(s) authorizing the Tribal organization to apply for a grant under this part; and

(f) Signature by the principal official of the Indian Tribe or eligible organization.

#### **§ 1322.7 Application approval.**

(a) Approval of any application under section 614(e) of the Act (42 U.S.C. 3057e(e)), shall not commit the Assistant Secretary for Aging in any way to make additional, supplemental, continuation, or other awards with respect to any approved application.

(b) The Assistant Secretary for Aging may give first priority in awarding grants to grantees that have effectively administered such grants in the prior year.

(c) Upon approval of an application and acceptance of the funding award, the Tribal organization or Hawaiian Native grantee is required to submit all performance and fiscal reporting as set forth by the Assistant Secretary for Aging on a no less than an annual basis.

(d) If the Assistant Secretary for Aging disapproves of an application, the Assistant Secretary for Aging must follow procedures outlined in section 614(d) of the Act (42 U.S.C. 3057e(d)).

## **§ 1322.9 Hearing procedures.**

In meeting the requirements of section 614(d)(3) of the Act (42 U.S.C. 3057e(d)(3)), if the Assistant Secretary for Aging disapproves an application from an eligible organization, the eligible organization may file a written request for a hearing with the Departmental Appeals Board (DAB) in accordance with 45 CFR part 16.

(a) The request shall be postmarked or delivered in person within 30 days of the date of the disapproval notice. If it requests a hearing, the eligible organization shall submit to the DAB, as part of the request, a full written response to each objection specified in the notice of disapproval, including the pertinent facts and reasons in support of its response, and all documentation to support its position as well as any documentation requested by the DAB.

(b) Upon receipt of appeal for reconsideration of a rejected application or activities proposed by an applicant, the DAB will notify the applicant by certified mail that the appeal has been received.

(c) The DAB may refer an appeal to its Alternative Dispute Resolution Division for mediation prior to making a decision. After consideration of the record, the DAB will issue a written decision, based on the record, that sets forth the reasons for the decision and the evidence on which it was based. A disapproval decision issued by the DAB represents the final determination of the Assistant Secretary for Aging and remains in effect unless reversed or stayed on judicial appeal, except that the Assistant Secretary for Aging may modify or set aside the decision before the record of the proceedings under this subpart is filed in court.

(d) Either the eligible organization or the staff of the Administration on Aging may request for good cause an extension of any of the time limits specified in this section.

## **Subpart C – Service Requirements**

### **§ 1322.11 Purpose of services allotments under Title VI.**

(a) Title VI of the Act authorizes the distribution of Federal funds to Tribal organizations and a Hawaiian Native grantee for the following categories of services:

- (1) Supportive services;
- (2) Nutrition services; and
- (3) Family caregiver support program services.

(b) Funds authorized under these categories are for the purpose of assisting a Tribal organization or Hawaiian Native grantee to develop or enhance comprehensive and coordinated community-based systems for older Native Americans and family caregivers.

### **§ 1322.13 Policies and procedures.**

The Tribal organization and Hawaiian Native grantee shall ensure the development and implementation of policies and procedures, including those required as set forth in this part.

(a) Upon approval of a program application and acceptance of funding, the Tribal organization or Hawaiian Native grantee must appoint a Title VI Director and provide appropriate contact information for the Title VI Director consistent with guidance from the Assistant Secretary for Aging.

(b) The Tribal organization or Hawaiian Native grantee shall provide the Assistant Secretary for Aging with statistical and other information in order to meet planning, coordination, evaluation and reporting requirements in a timely manner and shall ensure policies and procedures are aligned with periodic data collection and reporting requirements, including ensuring service and unit definitions are consistent with definitions set forth in these regulations, policy guidance, and other information developed by the Assistant Secretary for Aging.

(c) A Tribal organization or Hawaiian Native grantee must maintain program policies and procedures. Policies and procedures shall address:

- (1) Direct service provision, including:
  - (i) Requirements for client eligibility, periodic assessment, and person-centered planning, where appropriate;
  - (ii) Access to information and assistance to minimally address:
    - (A) Establishing or having a list of all services that are available to older Native

Americans in the service area;

(B) Maintaining a list of services needed or requested by older Native Americans;

(C) Providing assistance to older Native Americans to help them take advantage of available services;

(D) Working with agencies, such as area agencies on aging and other programs funded by Title III and Title VII as set forth in §§ 1321.53 and 1321.69 of this chapter, to facilitate participation of older Native Americans; and

(E) A listing and definitions of services that may be provided by the Tribal organization or Native Hawaiian grantee with funds received under the Act.

(iii) Limitations on the frequency, amount, or type of service provided; and

(iv) The grievance process for older individuals and family caregivers who are dissatisfied with or denied services under the Act.

(2) Fiscal requirements including:

(i) *Voluntary contributions*. Voluntary contributions, where:

(A) Each Tribal organization or Hawaiian Native grantee shall:

(1) Provide each older Native American with a voluntary opportunity to contribute to the cost of the service;

(2) Protect the privacy of each older Native American with respect to their contribution;

(3) Establish appropriate procedures to safeguard and account for all contributions;

(4) Use all voluntary contributions to expand comprehensive and coordinated services systems supported under this part, while using voluntary contributions provided for nutrition services only to expand nutrition services, consistent with § 1322.27.

(B) Each Tribal organization or Native Hawaiian grantee may develop a suggested contribution schedule for services provided under this part. In developing a contribution schedule, the Tribal organization or Native Hawaiian grantee shall consider the income ranges of older Native Americans in the service area and the Tribal organization's or Hawaiian Native

grantee's other sources of income. However, means tests may not be used.

(C) A Tribal organization or Hawaiian Native grantee that receives funds under this part may not deny any older Native American a service because the older Native American will not or cannot contribute to the cost of the service.

(ii) *Buildings and equipment.* Buildings and equipment, where costs incurred for altering or renovating, utilities, insurance, security, necessary maintenance, janitorial services, repair, and upkeep (including Federal property unless otherwise provided for) to keep buildings and equipment in an efficient operating condition, may be an allowable use of funds if:

(A) Costs are not payable by third parties through rental or other agreements;

(B) Costs support an allowed activity under Title VI part A, B, or C of the Act and are allocated proportionally to the benefiting grant program;

(C) Constructing and acquiring activities are only allowable for multipurpose senior centers;

(D) In addition to complying with 2 CFR part 200, the Tribal organization or Native Hawaiian grantee (and all other necessary parties) must file a Notice of Federal Interest in the appropriate official records of the jurisdiction where the property is located at the time of acquisition or prior to commencement of construction, as applicable. The Notice of Federal Interest must indicate that the acquisition or construction has been funded with an award under Title VI of the Act and that inquiries regarding the Federal Government's interest in the property should be directed in writing to the Assistant Secretary for Aging;

(E) Altering and renovating activities are allowable for facilities providing services with funds provided as set forth in this part and as subject to 2 CFR part 200.

(iii) *Supplement, not supplant.* Funds awarded under this part must be used to supplement, not supplant existing Federal, State, and local funds expended to support activities.

(d) The Tribal organization or Hawaiian Native grantee must develop a monitoring process ensuring the quality and effectiveness of services regarding meeting participant needs,

the goals outlined within the approved application, and Tribal organization requirements.

**§ 1322.15 Confidentiality and disclosure of information.**

A Tribal organization or Hawaiian Native grantee shall develop and maintain confidentiality and disclosure procedures as follows:

(a) A Tribal organization or Hawaiian Native grantee shall have procedures to ensure that no information about an older Native American or obtained from an older Native American by any provider of services is disclosed by the provider of such services in a form that identifies the person without the informed consent of the person or their legal representative, unless the disclosure is required by court order, or for program monitoring by authorized Federal or Tribal monitoring agencies.

(b) A Tribal organization or Hawaiian Native grantee is not required to disclose those types of information or documents that are exempt from disclosure by a Federal agency under the Federal Freedom of Information Act (5 U.S.C. 552).

(c) A Tribal organization or Hawaiian Native grantee shall not require a provider of legal assistance under this part to reveal any information that is protected by attorney client privilege.

(d) The Tribal organization or Hawaiian Native grantee must have policies and procedures that ensure that entities providing services under this title promote the rights of each older Native American who receives such services. Such rights include the right to confidentiality of records relating to such Native American.

(e) A Tribal organization's or Hawaiian Native grantee's policies and procedures may explain that individual information and records may be shared with other State and local agencies, community-based organizations, and health care providers and payers, as appropriate, in order to provide services.

(f) A Tribal organization's or Hawaiian Native grantee's policies and procedures must comply with all applicable Federal laws, codes, rules, and regulations, including the Health Insurance Portability and Accountability Act (HIPAA) (42 U.S.C. 1301 et seq.), as well as

guidance as the Tribal organization or Hawaiian Native grantee determines, for the collection, use, and exchange of both Personal Identifiable Information (PII) and personal health information in the provision of Title VI services under the Act.

**§ 1322.17 Purpose of services – person- and family-centered, trauma-informed.**

(a) Services must be provided to older Native Americans and family caregivers in a manner that is person-centered, trauma-informed, and culturally sensitive. Services should be consistent with culturally appropriate holistic traditional care and responsive to their interests, physical and mental health, social and cultural needs, available supports, and desire to live where and with whom they choose. Person-centered services may include community-centered and family-centered approaches consistent with the traditions, practices, beliefs, and cultural norms and expectations of the Tribal organization or Hawaiian Native grantee.

(b) Services should, as appropriate, be consistent with culturally appropriate holistic traditional care and provide older Native Americans and family caregivers with the opportunity to develop a person-centered plan that is led by the individual or, if applicable, by the individual and the individual's authorized representative. Services should be incorporated into existing person-centered plans, as appropriate.

(c) Tribal organizations and Hawaiian Native grantees should provide training to staff and volunteers on culturally appropriate holistic traditional care and person-centered and trauma-informed service provision.

**§ 1322.19 Responsibilities of service providers.**

As a condition for receipt of funds under this part, each Tribal organization and Hawaiian Native grantee shall assure that providers of services shall:

(a) Provide service participants with an opportunity to contribute to the cost of the service as provided in § 1322.13(c)(2)(i);

(b) Provide, to the extent feasible, for the furnishing of services under this Act, through self-direction;

(c) With the consent of the older Native American, or their legal representative if there is one, or in accordance with local adult protective services requirements, bring to the attention of adult protective services or other appropriate officials for follow-up, conditions or circumstances which place the older Native American, or the household of the older Native American, in imminent danger;

(d) Where feasible and appropriate, make arrangements for the availability of services to older Native Americans and family caregivers in weather-related and other emergencies;

(e) Assist participants in taking advantage of benefits under other programs;

(f) Assure that all services funded under this part are coordinated with other appropriate services in the community, and that these services do not constitute an unnecessary duplication of services provided by other sources; and

(g) Receive training to provide services in a culturally competent manner and consistent with §§ 1322.13 through 1322.17.

**§ 1322.21 Client eligibility for participation.**

(a) An individual must have attained the minimum age determined by the Tribal organization or Hawaiian Native grantee as specified in their approved application, to be eligible to participate in services under the Act, unless the Act otherwise provides an explicit exception.

Exceptions are limited to the following specific services:

(1) Nutrition services:

(i) Services shall be available to spouses of any age of older Native Americans;

(ii) Services may be available to:

(A) A person with a disability who lives with an adult, age 60 or older, or who resides in a housing facility that is primarily occupied by older adults at which congregate meals are served; and

(B) A volunteer during meal hours.

(2) Family caregiver support services for:



(i) Adults caring for older Native Americans or individuals of any age with Alzheimer's or related disorder;

(ii) Older relative caregivers who are caring for children and are not the biological or adoptive parent of the child, where older relative caregivers shall no longer be eligible for services under this part when the child reaches 18 years of age; or

(iii) Older relative caregivers who are caring for individuals age 18 to 59 with disabilities, and who may be of any relationship, including the biological or adoptive parent.

(3) Services such as information and assistance and public education, where recipients of information may not be older Native Americans, but the information is targeted to those who are older Native Americans and/or benefits those who are older Native Americans.

(b) A Tribal organization or Hawaiian Native grantee may develop further eligibility requirements for implementation of services for older Native Americans and family caregivers, consistent with the Act and all applicable Federal requirements. Such requirements may include:

(1) Assessment of functional and support needs;

(2) Geographic boundaries;

(3) Limitations on number of persons that may be served;

(4) Limitations on number of units of service that may be provided;

(5) Limitations due to availability of staff/volunteers;

(6) Limitations to avoid duplication of services;

(7) Specification of settings where services shall or may be provided;

(8) Whether to serve Native Americans who have Tribal or Native Hawaiian membership other than those who are specified in the Tribal organization's or Hawaiian Native grantee's approved application; and

(9) Whether to serve older individuals or family caregivers who are non-Native Americans but live within the approved service area and are considered members of the community by the Tribal organization.

### **§ 1322.23 Client and service priority.**

(a) The Tribal organization or Hawaiian Native grantee shall ensure service to those identified as members of priority groups through their assessment of local needs and resources.

(b) The Tribal organization or Hawaiian Native grantee shall identify criteria for being given priority in the delivery of services under Title VI, parts A or B, consistent with the Act and all applicable Federal requirements..

(c) The Tribal organization or Hawaiian Native grantee shall identify criteria for being given priority in the delivery of services under Title VI, part C, consistent with the Act and all applicable Federal requirements:

(1) Caregivers who are older Native Americans with greatest social need, and older Native Americans with greatest economic need (with particular attention to low-income older individuals);

(2) Caregivers who provide care for individuals with Alzheimer's disease and related disorders with neurological and organic brain dysfunction; and

(3) When serving older relative caregivers, older relative caregivers of children or adults with severe disabilities shall be given priority.

### **§ 1322.25 Supportive services.**

(a) Supportive services are community-based interventions as set forth in Title VI of the Act, are intended to be comparable to such services set forth under Title III, and meet standards established by the Assistant Secretary for Aging. They include in-home supportive services, access services, which may include multipurpose senior centers, and legal services.

(b) A Tribal organization or Hawaiian Native grantee may provide any of the supportive services mentioned under Title III of the Act, and any other supportive services that are necessary for the general welfare of older Native Americans and older Hawaiian Natives.

(c) A Tribal organization or Hawaiian Native grantee may allow use of Title VI, part A and B funds, respectively, for acquiring, altering or renovating, or constructing facilities to serve

as multipurpose senior centers, in accordance with guidance as set forth by the Assistant Secretary for Aging.

(d) For those Title VI, parts A and B services intended to benefit family caregivers, a Tribal organization or Hawaiian Native grantee, respectively, shall ensure that there is coordination and no duplication of such services available under Title VI, part C or Title III.

(e) If a Tribal organization or Hawaiian Native grantee elects to provide legal services, it shall comply with the requirements in § 1321.93 of this chapter and legal services providers shall comply fully with the requirements in § 1321.93(f) of this chapter.

### **§ 1322.27 Nutrition services.**

(a) Nutrition services are community-based interventions as set forth in Title VI, parts A and B of the Act, and as further defined by the Assistant Secretary for Aging. Nutrition services include congregate meals, home-delivered meals, nutrition education, nutrition counseling, and other nutrition services.

(1) Congregate meals are meals meeting the Dietary Guidelines for Americans and Dietary Reference Intakes as set forth in section 339 of the Act (42 U.S.C. 3030g-21) provided by a qualified nutrition service provider to eligible individuals and consumed while congregating virtually, in-person, or in community off-site.

(2) Home-delivered meals are meals meeting the Dietary Guidelines for Americans and Dietary Reference Intakes as set forth in section 339 of the Act (42 U.S.C. 3030g-21) provided by a qualified nutrition service provider to eligible individuals and consumed at their residence or otherwise outside of a congregate setting, as organized by a service provider under the Act. Meals may be provided via home delivery, pick-up, carry-out or drive-through, or through other service as determined by the Tribal organization or Hawaiian Native grantee.

(i) Eligibility criteria for home-delivered meals, as determined by the Tribal organization or Hawaiian Native grantee, may include consideration of an individual's ability to leave home unassisted, ability to shop for and prepare nutritious meals, degree of disability, or other relevant

factors pertaining to their need for the service.

(ii) Home-delivered meals providers may encourage meal participants to attend congregate meal sites and other health and wellness activities, as feasible, based on a person-centered approach and local service availability.

(3) Nutrition education is information provided which provides individuals with the knowledge and skills to make healthy food and beverage choices. Congregate and home-delivered nutrition services may provide nutrition education, as appropriate, based on the needs of meal participants.

(4) Nutrition counseling is a standardized service provided which must align with the Academy of Nutrition and Dietetics. Congregate and home-delivered nutrition services may provide nutrition counseling, as appropriate, based on the needs of meal participants.

(5) Other nutrition services include additional services that may be provided to meet nutritional needs or preferences, such as weighted utensils, supplemental foods, or food items, based on the needs of eligible participants.

(b) The Tribal organization or Hawaiian Native grantee shall provide congregate meals and home-delivered meals to eligible participants and may provide nutrition education, nutrition counseling, and other nutrition services, as available. As set forth in section 614(a)(8) of the Act (42 U.S.C. 3057e(a)(8)), if the need for nutrition services is met from other sources, the Tribal organization or Hawaiian Native grantee may use the available funding under the Act for supportive services.

(c) Nutrition Services Incentive Program allocations are available to a Tribal organization or Hawaiian Native grantee that provides nutrition services where:

(1) Nutrition Services Incentive Program allocation amounts are based on the number of meals reported by the Tribal organization or Hawaiian Native grantee which meet the following requirements:

(i) The meal is served to an individual who is eligible to receive services under the Act;

(ii) The meal is served to an individual who has not been means-tested to receive the meal;

(iii) The meal is served to an individual who has been provided the opportunity to provide a voluntary contribution to the cost of service;

(iv) The meal meets the other requirements of the Act, including that the meal meets the Dietary Guidelines for Americans and Dietary Reference Intakes as set forth in section 339 of the Act (42 U.S.C. 3030g-21); and

(v) The meal is served by an agency that is, or has a grant or contract with, a Tribal organization or Hawaiian Native grantee.

(2) The Tribal organization or Hawaiian Native grantee may choose to receive their Nutrition Services Incentive Program grant as cash, commodities, or a combination of cash and commodities.

(3) Nutrition Services Incentive Program funds may only be used to purchase domestically produced foods used in a meal as set forth under the Act.

(d) Where applicable, the Tribal organization or Hawaiian Native grantee shall work with agencies responsible for administering nutrition and other programs to facilitate participation of older Native Americans.

### **§ 1322.29 Family caregiver support services.**

(a) Family caregiver support services are community-based interventions set forth in Title VI, part C of the Act, which meet standards set forth by the Assistant Secretary for Aging and which may be informed through the use of an evidence-informed or evidence-based caregiver assessment, including:

(1) Information to caregivers about available services via public education;

(2) Assistance to caregivers in gaining access to the services through:

(i) Individual information and assistance; or

(ii) Case management or care coordination.

(3) Individual counseling, organization of support groups, and caregiver training to assist the caregivers in those areas in which they provide support, including health, nutrition, complex medical care, and financial literacy, and in making decisions and solving problems relating to their caregiving roles;

(4) Respite care to enable caregivers to be temporarily relieved from their caregiving responsibilities; and

(5) Supplemental services, on a limited basis, to complement the care provided by caregivers. A Tribal organization or Hawaiian Native grantee shall define “limited basis” for supplemental services and may consider limiting units, episodes or expenditure amounts when making this determination.

(b) The Title VI Native American Family Caregiver Support Program is intended to serve unpaid family caregivers and to provide services to caregivers, not to the people for whom they care. Its primary purpose is not to pay for care for an elder. However, respite care may be provided to an unpaid family caregiver.

(c) To provide services listed in paragraphs (a)(4) and (5) of this section to caregivers of older Native Americans or of individuals of any age with Alzheimer’s disease or a related disorder, the individual for whom they are caring must be determined to be functionally impaired because the individual:

(1) Is unable to perform at least two activities of daily living without substantial assistance, including verbal reminding, physical cueing, or supervision;

(2) At the option of the Tribal organization or Hawaiian Native grantee, is unable to perform at least three such activities without such assistance; or

(3) Due to a cognitive or other mental impairment, requires substantial supervision because the individual behaves in a manner that poses a serious health or safety hazard to the individual or to another individual.

**§ 1322.31 Title VI and Title III coordination.**

(a) A Tribal organization or Hawaiian Native grantee under Title VI of the Act must have policies and procedures, developed in coordination with the relevant State agency, area agency or agencies, and service provider(s) that explain how the Title VI program will coordinate with Title III and/or VII funded services within the Tribal organization's or Hawaiian Native grantee's approved service area for which older Native Americans and family caregivers are eligible to ensure compliance with sections 614(a)(11) and 624(a)(3) of the Act (42 U.S.C. 3057e(a)(11) and 3057j(a)(3)), respectively. A Tribal organization or Hawaiian Native grantee may meet these requirements by participating in Tribal consultation with the State agency regarding Title VI programs.

(b) The policies and procedures set forth in paragraph (a) of this section must at a minimum address:

(1) How the Tribal organization or Hawaiian Native grantee will provide outreach to Tribal elders and family caregivers regarding services for which they may be eligible under Title III and/or VII of the Act;

(2) The communication opportunities the Tribal organization or Hawaiian Native grantee will make available to Title III and VII programs, to include meetings, email distribution lists, and presentations;

(3) The methods for collaboration on and sharing of program information and changes;

(4) How Title VI programs may refer individuals who are eligible for Title III services;

(5) How services will be provided in a culturally appropriate and trauma-informed manner; and

(6) Processes the Title VI program will use for providing feedback on the State plan on aging and any area plans on aging relevant to the Tribal organization's or Hawaiian Native grantee's approved service area.

(c) The Title VI program director, as set forth in § 1322.13(a), shall participate in the development of policies and procedures as set forth in §§ 1321.53, 1321.69, and 1321.95 of this

chapter.

## **Subpart D – Emergency and Disaster Requirements**

### **§ 1322.33 Coordination with Tribal, State, and local emergency management.**

A Tribal organization or Hawaiian Native grantee shall establish emergency plans. Such plans must include, at a minimum:

(a) A continuity of operations plan and an all-hazards emergency response plan based on completed risk assessments for all hazards and updated annually;

(b) A plan to coordinate activities with the State agency, any area agencies on aging providing Title III and VII funded services within the Tribal organization's or Hawaiian Native grantee's approved service area, local emergency response and management agencies, relief organizations, local governments, other State agencies responsible for emergency and disaster preparedness, and any other institutions that have responsibility for disaster relief service delivery;

(c) Processes for developing and updating long-range emergency and disaster preparedness plans; and

(d) Other relevant information as determined by the Tribal organization or Hawaiian Native grantee.

### **§ 1322.35 Flexibilities under a major disaster declaration.**

(a) If a State or Indian Tribe requests and receives a major disaster declaration under the Stafford Act (42 U.S.C. 5121-5207), the Tribal organization or Hawaiian Native grantee may use disaster relief flexibilities as set forth in this section to provide disaster relief services within its approved service area for areas of the State or Indian Tribe where the specific major disaster declaration is authorized and where older Native Americans and family caregivers are affected.

(b) Flexibilities a Tribal organization or Hawaiian Native grantee may exercise under a major disaster declaration include allowing use of any portion of the funds of any open grant awards under Title VI of the Act for disaster relief services for older individuals and family



caregivers.

(c) Disaster relief services may include any allowable services under the Act to eligible older Native Americans or family caregivers during the period covered by the major disaster declaration.

(d) Expenditures of funds under disaster relief flexibilities must be reported separately from the grant where funding was expended. A Tribal organization or Hawaiian Native grantee may expend funds from any source within open grant awards under Title VI of the Act but must track the source of all expenditures.

(e) A Tribal organization or Hawaiian Native grantee must have policies and procedures outlining eligibility, use, and reporting of services and funds provided under these flexibilities.

(f) A Tribal organization or Hawaiian Native grantee may only make obligations exercising this flexibility during the major disaster declaration incident period or 90 days thereafter or with prior approval from the Assistant Secretary for Aging.

**§ 1322.37 Title VI and Title III coordination for emergency and disaster preparedness.**

A Tribal organization or Hawaiian Native grantee under Title VI of the Act and State and area agencies funded under Title III of the Act should coordinate in emergency and disaster preparedness planning, response, and recovery. A Tribal organization or Hawaiian Native grantee must have policies and procedures in place for how they will communicate and coordinate with State agencies and area agencies regarding emergency and disaster preparedness planning, response, and recovery.

**§ 1322.39 Modification during major disaster declaration or public health emergency.**

The Assistant Secretary for Aging retains the right to modify the requirements described in these regulations pursuant to a major disaster declaration or public health emergency.

**PART 1323—[REMOVED]**

3. Under the authority of 42 U.S.C. 3001 et seq., remove part 1323.
4. Revise part 1324 to read as follows:

## **PART 1324—ALLOTMENTS FOR VULNERABLE ELDER RIGHTS PROTECTION**

### **ACTIVITIES**

Sec.

#### **Subpart A – State Long-Term Care Ombudsman Program**

1324.1 Definitions.

1324.11 Establishment of the Office of the State Long-Term Care Ombudsman.

1324.13 Functions and responsibilities of the State Long-Term Care Ombudsman.

1324.15 State agency responsibilities related to the Ombudsman program.

1324.17 Responsibilities of agencies hosting local Ombudsman entities.

1324.19 Duties of the representatives of the Office.

1324.21 Conflicts of interest.

#### **Subpart B – Programs for Prevention of Elder Abuse, Neglect, and Exploitation**

1324.201 State agency responsibilities for the prevention of elder abuse, neglect, and exploitation.

#### **Subpart C – State Legal Assistance Development**

1324.301 Definitions.

1324.303 Legal Assistance Developer.

**Authority:** 42 U.S.C. 3001 et seq.

#### **Subpart A – State Long-Term Care Ombudsman Program**

##### **§ 1324.1 Definitions.**

The following definitions apply to this part:

*Immediate family*, pertaining to conflicts of interest as used in section 712 of the Older Americans Act (the Act) (42 U.S.C. 3058g), means a member of the household or a relative with whom there is a close personal or significant financial relationship.

*Office of the State Long-Term Care Ombudsman*, as used in sections 711 and 712 of the Act (42 U.S.C. 3058f and 3058g), means the organizational unit in a State or Territory which is headed by a State Long-Term Care Ombudsman.

*Official duties*, as used in section 712 of the Act (42 U.S.C. 3058g) with respect to representatives of the Long-Term Care Ombudsman Program, means work pursuant to the Long-Term Care Ombudsman Program authorized by the Act, subpart A of this part, and/or State law and carried out under the auspices and general direction of, or by direct delegation from, the

State Long-Term Care Ombudsman.

*Representatives of the Office of the State Long-Term Care Ombudsman*, as used in sections 711 and 712 of the Act (42 U.S.C. 3058f and 3058g), means the employees or volunteers designated by the Ombudsman to fulfill the duties set forth in § 1324.19(a), whether personnel supervision is provided by the Ombudsman or their designees or by an agency hosting a local Ombudsman entity designated by the Ombudsman pursuant to section 712(a)(5) of the Act (42 U.S.C. 3058g(a)(5)).

*Resident representative* means any of the following:

(1) An individual chosen by the resident to act on behalf of the resident in order to support the resident in decision-making; access the resident's medical, social, or other personal information; manage the resident's financial matters; or receive notifications pertaining to the resident;

(2) A person authorized by State or Federal law (including but not limited to agents under power of attorney, representative payees, and other fiduciaries) to act on behalf of the resident in order to support the resident in decision-making; access the resident's medical, social or other personal information; manage the resident's financial matters; or receive notifications pertaining to the resident;

(3) Legal representative, as used in section 712 of the Act (42 U.S.C. 3058g);

(4) The court-appointed guardian or conservator of a resident;

(5) Nothing in this rule is intended to expand the scope of authority of any resident representative beyond that authority specifically authorized by the resident, State or Federal law, or a court of competent jurisdiction.

*State Long-Term Care Ombudsman*, or *Ombudsman*, as used in sections 711 and 712 of the Act (42 U.S.C. 3058f and 3058g), means the individual who heads the Office and is responsible to personally, or through representatives of the Office, fulfill the functions, responsibilities and duties set forth in §§ 1324.13 and 1324.19.

*State Long-Term Care Ombudsman program, Ombudsman program, or program*, as used in sections 711 and 712 of the Act (42 U.S.C. 3058f and 3058g), means the program through which the functions and duties of the Office are carried out, consisting of the Ombudsman, the Office headed by the Ombudsman, and the representatives of the Office.

*Willful interference* means actions or inactions taken by an individual in an attempt to intentionally prevent, interfere with, or attempt to impede the Ombudsman from performing any of the functions or responsibilities set forth in § 1324.13, or the Ombudsman or a representative of the Office from performing any of the duties set forth in § 1324.19.

### **§ 1324.11 Establishment of the Office of the State Long-Term Care Ombudsman.**

(a) The Office of the State Long-Term Care Ombudsman shall be an entity headed by the State Long-Term Care Ombudsman, who shall carry out all of the functions and responsibilities set forth in § 1324.13 and, directly and/or through local Ombudsman entities, the duties set forth in § 1324.19.

(b) The State agency shall establish the Office and thereby carry out the Long-Term Care Ombudsman Program in either of the following ways:

(1) The Office is a distinct entity, separately identifiable, and located within or connected to the State agency; or

(2) The State agency enters into a contract or other arrangement with any public agency or nonprofit organization which shall establish a separately identifiable, distinct entity as the Office.

(c) The State agency shall require that the Ombudsman serve on a full-time basis. In providing leadership and management of the Office, the functions, responsibilities, and duties, as set forth in §§ 1324.13 and 1324.19 are to constitute the entirety of the Ombudsman's work. The State agency or other agency carrying out the Office shall not require or request the Ombudsman to be responsible for leading, managing or performing the work of non-ombudsman services or programs except on a time-limited, intermittent basis.

(1) This provision does not limit the authority of the Ombudsman program to provide ombudsman services to populations other than residents of long-term care facilities so long as the appropriations under the Act are utilized to serve residents of long-term care facilities, as authorized by the Act.

(2) [Reserved]

(d) The State agency, and other entity selecting the Ombudsman, if applicable, shall ensure that the Ombudsman meets minimum qualifications which shall include, but not be limited to, demonstrated expertise in:

(1) Long-term services and supports or other direct services for older individuals or individuals with disabilities;

(2) Consumer-oriented public policy advocacy;

(3) Leadership and program management skills; and

(4) Negotiation and problem resolution skills.

(e) Where the Ombudsman has the legal authority to do so, they shall establish policies and procedures, in consultation with the State agency, to carry out the Ombudsman program in accordance with the Act. Where State law does not provide the Ombudsman with legal authority to establish policies and procedures, the Ombudsman shall recommend policies and procedures to the State agency or other agency in which the Office is organizationally located, and such agency shall establish Ombudsman program policies and procedures as recommended by the Ombudsman. Where local Ombudsman entities are designated within area agencies on aging or other entities, the Ombudsman and/or appropriate agency shall develop such policies and procedures in consultation with the agencies hosting local Ombudsman entities, area agencies on aging, and representatives of the Office. The policies and procedures must address the following:

(1) *Program administration.* Policies and procedures regarding program administration must include, but not be limited to:

(i) A requirement that the agency in which the Office is organizationally located must not

have personnel policies or practices that prohibit the Ombudsman from performing the functions and responsibilities of the Ombudsman, as set forth in § 1324.13, or from adhering to the requirements of section 712 of the Act (42 U.S.C. 3058g). Nothing in this provision shall prohibit such agency from requiring that the Ombudsman, or other employees or volunteers of the Office, adhere to the personnel policies and procedures of the entity which are otherwise lawful.

(ii) A requirement that an agency hosting a local Ombudsman entity must not have personnel policies or practices which prohibit a representative of the Office from performing the duties of the Ombudsman program or from adhering to the requirements of section 712 of the Act (42 U.S.C. 3058g). Nothing in this provision shall prohibit such agency from requiring that representatives of the Office adhere to the personnel policies and procedures of the host agency which are otherwise lawful.

(iii) A requirement that the Ombudsman shall, on a regular basis, monitor the performance of local Ombudsman entities which the Ombudsman has designated to carry out the duties of the Office.

(iv) A description of the process by which the agencies hosting local Ombudsman entities will coordinate with the Ombudsman in the employment or appointment of representatives of the Office.

(v) Standards to ensure that the Office and/or local Ombudsman entities provide prompt response to complaints, with priority given to complaints regarding abuse, neglect, exploitation, and complaints that are time sensitive. At a minimum, the standards shall require consideration of the severity of the risk to the resident, the imminence of the threat of or potential harm to the resident, and the opportunity for mitigating harm to the resident through provision of Ombudsman program services.

(vi) Procedures that clarify appropriate fiscal responsibilities of the local Ombudsman entity, including but not limited to clarifications regarding access to programmatic fiscal

information by appropriate representatives of the Office.

(vii) Procedures that establish standard retention periods for files, records, and other information maintained by the Ombudsman program and allowable methods of storage and destruction.

(2) *Procedures for access.* Policies and procedures regarding timely access to facilities, residents, and appropriate records (regardless of format and including, upon request, copies of such records) by the Ombudsman and representatives of the Office must include, but not be limited to:

(i) Access to enter all long-term care facilities at any time during a facility's regular business hours or regular visiting hours, and at any other time when access may be required by the circumstances to be investigated;

(ii) Access to all residents to perform the functions and duties set forth in §§ 1324.13 and 1324.19;

(iii) Access to the name and contact information of the resident representative, if any, where needed to perform the functions and duties set forth in §§ 1324.13 and 1324.19;

(iv) Access to review the medical, social, and other records relating to a resident, if:

(A) The resident or resident representative communicates informed consent to the access and the consent is given in writing or through the use of auxiliary aids and services;

(B) The resident or resident representative communicates informed consent orally, visually, or through the use of auxiliary aids and services, and such consent is documented contemporaneously by a representative of the Office in accordance with such procedures;

(C) The resident is unable to communicate consent to the review and has no legal representative, and the representative of the Office obtains the approval of the Ombudsman; or

(D) Access is necessary in order to investigate a complaint, the resident representative refuses to consent to the access, a representative of the Office has reasonable cause to believe that the resident representative is not acting in the best interests of the resident, and the

representative of the Office obtains the approval of the Ombudsman.

(v) Access to the administrative records, policies, and documents, to which the residents have, or the general public has access, of long-term care facilities;

(vi) Access of the Ombudsman to, and, upon request, copies of all licensing and certification records maintained by the State with respect to long-term care facilities; and

(vii) Reaffirmation that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule (42 U.S.C. 1301 et seq.), 45 CFR part 160 and 45 CFR part 164, subparts A and E, does not preclude release by covered entities of resident private health information or other resident identifying information to the Ombudsman program, including but not limited to residents' medical, social, or other records, a list of resident names and room numbers, or information collected in the course of a State or Federal survey or inspection process.

(3) *Disclosure.* Policies and procedures regarding disclosure of files, records, and other information maintained by the Ombudsman program must include, but not be limited to:

(i) Provision that the files, records, and information maintained by the Ombudsman program may be disclosed only at the discretion of the Ombudsman or designee of the Ombudsman for such purpose and in accordance with the criteria developed by the Ombudsman, as required by § 1324.13(e);

(ii) Prohibition of the disclosure of identifying information of any resident with respect to whom the Ombudsman program maintains files, records, or information, except as otherwise provided by § 1324.19(b)(5) through (8), unless:

(A) The resident or the resident representative communicates informed consent to the disclosure and the consent is given in writing or through the use of auxiliary aids and services;

(B) The resident or resident representative communicates informed consent orally, visually, or through the use of auxiliary aids and services and such consent is documented contemporaneously by a representative of the Office in accordance with such procedures; or

(C) The disclosure is required by court order.



(iii) Prohibition of the disclosure of identifying information of any complainant with respect to whom the Ombudsman program maintains files, records, or information, unless:

(A) The complainant communicates informed consent to the disclosure and the consent is given in writing or through the use of auxiliary aids and services;

(B) The complainant communicates informed consent orally, visually, or through the use of auxiliary aids and services and such consent is documented contemporaneously by a representative of the Office in accordance with such procedures; or

(C) The disclosure is required by court order.

(iv) Standard criteria for making determinations about disclosure of resident information when the resident is unable to provide consent and there is no resident representative or the resident representative refuses consent as set forth in § 1324.19(b)(5) through (8);

(v) Prohibition on requirements for mandatory reporting abuse, neglect, or exploitation to adult protective services or any other entity, long-term care facility, or other concerned person, including when such reporting would disclose identifying information of a complainant or resident without appropriate consent or court order, except as otherwise provided in § 1324.19(b)(5) through (8); and

(vi) Adherence to the provisions of paragraph (e)(3) of this section, regardless of the source of the request for information or the source of funding for the services of the Ombudsman program, notwithstanding section 705(a)(6)(C) of the Act (42 U.S.C. 3058d(a)(6)(C)).

(4) *Conflicts of interest.* Policies and procedures regarding conflicts of interest must establish mechanisms to identify and remove or remedy conflicts of interest as provided in § 1324.21, including:

(i) Ensuring that no individual, or member of the immediate family of an individual, involved in the employment or appointment of the Ombudsman has or may have a conflict of interest;

(ii) Requiring that other agencies in which the Office or local Ombudsman entities are

organizationally located have policies in place to prohibit the employment or appointment of an Ombudsman or a representative of the Office who has or may have a conflict that cannot be adequately removed or remedied;

(iii) Requiring that the Ombudsman take reasonable steps to refuse, suspend, or remove designation of an individual who has a conflict of interest, or who has a member of the immediate family who has or may have a conflict of interest, which cannot be removed or remedied;

(iv) Establishing the methods by which the Office and/or State agency will periodically review and identify conflicts of the Ombudsman and representatives of the Office; and

(v) Establishing the actions the Office and/or State agency will require the Ombudsman or representatives of the Office to take in order to remedy or remove such conflicts.

(5) *Systems advocacy.* Policies and procedures related to systems advocacy must assure that the Office is required and has sufficient authority to carry out its responsibility to analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other government policies and actions that pertain to long-term care facilities and services and to the health, safety, welfare, and rights of residents, and to recommend any changes in such laws, regulations, and policies as the Office determines to be appropriate.

(i) Such procedures must exclude the Ombudsman and representatives of the Office from any State lobbying prohibitions to the extent that such requirements are inconsistent with section 712 of the Act (42 U.S.C. 3058g).

(ii) Nothing in this part shall prohibit the Ombudsman or the State agency or other agency in which the Office is organizationally located from establishing policies which promote consultation regarding the determinations of the Office related to recommended changes in laws, regulations, and policies. However, such a policy shall not require a right to review or pre-approve positions or communications of the Office.

(6) *Designation.* Policies and procedures related to designation must establish the criteria

and process by which the Ombudsman shall designate and/or refuse, suspend, or remove designation of local Ombudsman entities and representatives of the Office.

(i) Such criteria should include, but not be limited to, the authority to refuse, suspend, or remove designation of a local Ombudsman entity or representative of the Office in situations in which an identified conflict of interest cannot be removed or remedied as set forth in § 1324.21.

(ii) [Reserved]

(7) *Grievance process.* Policies and procedures related to grievances must establish a grievance process for the receipt and review of grievances regarding the determinations or actions of the Ombudsman and representatives of the Office.

(i) Such process shall include an opportunity for reconsideration of the Ombudsman decision to refuse, suspend, or remove designation of a local Ombudsman entity or representative of the Office. Notwithstanding the grievance process, the Ombudsman shall make the final determination to designate or to refuse, suspend, or remove designation of a local Ombudsman entity or representative of the Office.

(ii) [Reserved]

(8) *Determinations of the Office.* Policies and procedures related to the determinations of the Office must ensure that the Ombudsman, as head of the Office, shall be able to independently make determinations and establish positions of the Office, and carry out the functions and responsibilities authorized by § 1324.13 without interference and shall not be constrained by or necessarily represent the determinations or positions of the State agency or other agency in which the Office is organizationally located.

(9) *Emergency planning.* Policies and procedures related to emergency planning must include continuity of operations procedures using an all-hazards approach, and coordination with emergency management agencies.

### **§ 1324.13 Functions and responsibilities of the State Long-Term Care Ombudsman.**

The Ombudsman, as head of the Office, shall have responsibility and authority for the

leadership and management of the Office in coordination with the State agency, and, where applicable, any other agency carrying out the Ombudsman program, as follows.

(a) *Functions.* The Ombudsman shall, personally or through representatives of the Office:

(1) Identify, investigate, and resolve complaints that:

(i) Are made by, or on behalf of, residents; and

(ii) Relate to action, inaction, or decisions, that may adversely affect the health, safety, welfare, or rights of residents (including the welfare and rights of residents with respect to the appointment and activities of resident representatives) of:

(A) Providers, or representatives of providers, of long-term care;

(B) Public agencies; or

(C) Health and social service agencies.

(2) Provide services to protect the health, safety, welfare, and rights of the residents;

(3) Inform residents about means of obtaining services provided by the Ombudsman program;

(4) Ensure that residents have regular and timely access to the services provided through the Ombudsman program and that residents and complainants receive timely responses from representatives of the Office to requests for information and complaints;

(5) Represent the interests of residents before governmental agencies, assure that individual residents have access to, and pursue (as the Ombudsman determines as necessary and consistent with resident interests) administrative, legal, and other remedies to protect the health, safety, welfare, and rights of residents;

(6) Provide administrative and technical assistance to representatives of the Office and agencies hosting local Ombudsman entities;

(7)(i) Analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other governmental policies and actions, that pertain to the health, safety, welfare, and rights of the residents, with respect to the adequacy of

long-term care facilities and services in the State;

(ii) Recommend any changes in such laws, regulations, policies, and actions as the Office determines to be appropriate;

(iii) Facilitate public comment on the laws, regulations, policies, and actions;

(iv) Provide leadership to statewide systems advocacy efforts of the Office on behalf of long-term care facility residents, including coordination of systems advocacy efforts carried out by representatives of the Office;

(v) Provide information to public and private agencies, legislators, the media, and other persons, regarding the problems and concerns of residents and recommendations related to the problems and concerns;

(vi) Such determinations and positions shall be those of the Office and shall not necessarily represent the determinations or positions of the State agency or other agency in which the Office is organizationally located;

(vii) In carrying out systems advocacy efforts of the Office on behalf of long-term care facility residents and pursuant to the receipt of grant funds under the Act, the provision of information, recommendations of changes of laws to legislators, and recommendations of changes to government agency regulations and policies by the Ombudsman or representatives of the Office do not constitute lobbying activities as defined by 45 CFR part 93.

(8) Coordinate with and promote the development of citizen organizations consistent with the interests of residents; and

(9) Promote, provide technical support for the development of, and provide ongoing support as requested by resident and family councils to protect the well-being and rights of residents.

(b) *Responsibilities.* The Ombudsman shall be the head of a unified statewide Long-Term Care Ombudsman Program and shall:

(1) Establish or recommend policies, procedures, and standards for administration of the

Ombudsman program pursuant to § 1324.11(e);

(2) Require representatives of the Office to fulfill the duties set forth in § 1324.19 in accordance with Ombudsman program policies and procedures.

(c) *Designation.* The Ombudsman shall determine designation and refusal, suspension, or removal of designation, of local Ombudsman entities and representatives of the Office pursuant to section 712(a)(5) of the Act (42 U.S.C. 3058g(a)(5)) and the policies and procedures set forth in § 1324.11(e)(6).

(1) If an Ombudsman chooses to designate local Ombudsman entities, the Ombudsman shall:

(i) Designate local Ombudsman entities to be organizationally located within public or non-profit private entities;

(ii) Review and approve plans or contracts governing local Ombudsman entity operations, including, where applicable, through area agency on aging plans, in coordination with the State agency; and

(iii) Monitor, on a regular basis, the Ombudsman program performance of local Ombudsman entities.

(2) The Ombudsman shall establish procedures for training for certification and continuing education of the representatives of the Office, based on and consistent with standards established by the Director of the Office of Long-Term Care Ombudsman Programs as described in section 201(d) of the Act (42 U.S.C. 3011(d)) and set forth by the Assistant Secretary for Aging, in consultation with residents, resident representatives, citizen organizations, long-term care providers, and the State agency, that:

(i) Specify a minimum number of hours of initial training;

(ii) Specify the content of the training, including training relating to Federal, State, and local laws, regulations, and policies, with respect to long-term care facilities in the State; investigative and resolution techniques; and such other matters as the Office determines to be

appropriate;

(iii) Specify that all program staff or volunteers who have access to residents, files, records, and other information of the Ombudsman program subject to disclosure requirements shall undergo training and certification to be designated as representatives of the Office; and

(iv) Specify an annual number of hours of in-service training for all representatives of the Office.

(3) Prohibit any representative of the Office from carrying out the duties described in § 1324.19 unless the representative:

(i) Has received the training required under paragraph (c)(2) of this section or is performing such duties under supervision of the Ombudsman or a designated representative of the Office as part of certification training requirements; and

(ii) Has been approved by the Ombudsman as qualified to carry out the activity on behalf of the Office.

(4) The Ombudsman shall investigate allegations of misconduct by representatives of the Office in the performance of Ombudsman program duties and, as applicable, coordinate such investigations with the State agency in which the Office is organizationally located, agency hosting the local Ombudsman entity and/or the local Ombudsman entity.

(5) Policies, procedures, or practices which the Ombudsman determines to be in conflict with the laws, policies, or procedures governing the Ombudsman program shall be sufficient grounds for refusal, suspension, or removal of designation of the representative of the Office and/or the local Ombudsman entity.

(d) *Ombudsman program information.* The Ombudsman shall manage the files, records, and other information of the Ombudsman program, whether in physical, electronic, or other formats, including information maintained by representatives of the Office and local Ombudsman entities pertaining to the cases and activities of the Ombudsman program. Such files, records, and other information are the property of the Office. Nothing in this provision shall

prohibit a representative of the Office or a local Ombudsman entity from maintaining such information in accordance with Ombudsman program requirements. All program staff or volunteers who access the files, records, and other information of the Ombudsman program subject to disclosure requirements shall undergo training and certification to be designated as representatives of the Office.

(e) *Disclosure.* In making determinations regarding the disclosure of files, records, and other information maintained by the Ombudsman program, the Ombudsman shall:

(1) Have the sole authority to make or delegate determinations concerning the disclosure of the files, records, and other information maintained by the Ombudsman program. The Ombudsman shall comply with section 712(d) of the Act (42 U.S.C. 3058g(d)) in responding to requests for disclosure of files, records, and other information, regardless of the format of such file, record, or other information, the source of the request, and the sources of funding to the Ombudsman program;

(2) Develop and adhere to criteria to guide the Ombudsman's discretion in determining whether to disclose the files, records, or other information of the Office. Criteria for disclosure of records shall consider if the disclosure has the potential to:

- (i) Cause retaliation against residents, complainants, or witnesses;
- (ii) Undermine the working relationships between the Ombudsman program, facilities, and/or other agencies; or
- (iii) Undermine other official duties of the program.

(3) Develop and adhere to a process for the appropriate disclosure of information maintained by the Office, including:

- (i) Classification of at least the following types of files, records, and information: medical, social, and other records of residents; administrative records, policies, and documents of long-term care facilities; licensing and certification records maintained by the State with respect to long-term care facilities; and data collected in the Ombudsman program reporting system;



(ii) Identification of the appropriate individual designee or category of designee, if other than the Ombudsman, authorized to determine the disclosure of specific categories of information in accordance with the criteria described in this paragraph (e).

(f) *Fiscal management.* The Ombudsman shall determine the use of the fiscal resources appropriated or otherwise available for the operation of the Office. Where local Ombudsman entities are designated, the Ombudsman shall approve the allocations of Federal and State funds provided to such entities, subject to applicable Federal and State laws and policies. The Ombudsman shall determine that program budgets and expenditures of the Office and local Ombudsman entities are consistent with laws, policies, and procedures governing the Ombudsman program.

(g) *Annual report.* In addition to the annual submission of the National Ombudsman Reporting System report, the Ombudsman shall independently develop, provide final approval of, and disseminate an annual report as set forth in section 712(h)(1) of the Act (42 U.S.C. 3058g(h)(1)) and as otherwise required by the Assistant Secretary for Aging.

(1) Such report shall:

(i) Describe the activities carried out by the Office in the year for which the report is prepared;

(ii) Contain analysis of Ombudsman program data;

(iii) Describe evaluation of the problems experienced by, and the complaints made by or on behalf of, residents;

(iv) Contain policy, regulatory, and/or legislative recommendations for improving quality of the care and life of the residents; protecting the health, safety, welfare, and rights of the residents; and resolving resident complaints and identified problems or barriers;

(v) Contain analysis of the success of the Ombudsman program, including success in providing services to residents of assisted living, board and care facilities, and other similar adult care facilities; and

(vi) Describe barriers that prevent the optimal operation of the Ombudsman program.

(2) The Ombudsman shall make such report available to the public and submit it to the Assistant Secretary for Aging, the chief executive officer of the State, the State legislature, the State agency responsible for licensing or certifying long-term care facilities, and other appropriate governmental entities.

(h) *Memoranda of understanding.* Through adoption of memoranda of understanding or other means, the Ombudsman shall lead State-level coordination and support appropriate local Ombudsman entity coordination, between the Ombudsman program and other entities with responsibilities relevant to the health, safety, well-being, or rights of residents of long-term care facilities, including:

(1) The required adoption of memoranda of understanding between the Ombudsman program and:

(i) Legal assistance programs provided under section 306(a)(2)(C) of the Act (42 U.S.C. 3026(a)(2)(C)), addressing at a minimum referral processes and strategies to be used when the Ombudsman program and a legal assistance program are both providing program services to a resident;

(ii) Facility and long-term care provider licensure and certification programs, addressing at minimum communication protocols and procedures to share information including procedures for access to copies of licensing and certification records maintained by the State with respect to long-term care facilities.

(2) The recommended adoption of memoranda of understanding or other means between the Ombudsman program and:

(i) Area agency on aging programs;

(ii) Aging and disability resource centers;

(iii) Adult protective services programs;

(iv) Protection and advocacy systems, as designated by the State, and as established under

the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (42 U.S.C. 15001 et seq.);

(v) The State Medicaid fraud control unit, as defined in section 1903(q) of the Social Security Act (42 U.S.C. 1396b(q));

(vi) Victim assistance programs;

(vii) State and local law enforcement agencies;

(viii) Courts of competent jurisdiction;

(ix) The State Legal Assistance Developer as provided under section 731 of the Act (42 U.S.C. 3058j) and as set forth in subpart C to this part; and

(x) The State mental health authority.

(i) *Other activities.* The Ombudsman shall carry out such other activities as the Assistant Secretary for Aging determines to be appropriate and are consistent with the functions of the State Long-Term Care Ombudsman Program as authorized by the Older Americans Act.

#### **§ 1324.15 State agency responsibilities related to the Ombudsman program.**

(a) *Compliance.* In addition to the responsibilities set forth in part 1321 of this chapter, the State agency shall ensure that the Ombudsman complies with the relevant provisions of the Act and of this rule.

(b) *Authority and access.* The State agency shall ensure, through the development of policies, procedures, and other means, consistent with § 1324.11(e)(2), that the Ombudsman program has sufficient authority and access to facilities, residents, and information needed to fully perform all of the functions, responsibilities, and duties of the Office.

(c) *Training.* The State agency shall provide opportunities for training for the Ombudsman and representatives of the Office in order to maintain expertise to serve as effective advocates for residents. The State agency may utilize funds appropriated under Title III and/or Title VII of the Act designated for direct services in order to provide access to such training opportunities.

(d) *Personnel supervision and management.* The State agency shall provide personnel supervision and management for the Ombudsman and representatives of the Office who are employees of the State agency. Such management shall include an assessment of whether the Office is performing all of its functions under the Act.

(e) *State agency monitoring.* The State agency shall provide monitoring, as required by § 1321.9(b) of this chapter, including but not limited to fiscal monitoring, where the Office and/or local Ombudsman entity is organizationally located within an agency under contract or other arrangement with the State agency. Such monitoring shall include an assessment of whether the Ombudsman program is performing all of the functions, responsibilities and duties set forth in §§ 1324.13 and 1324.19. The State agency may make reasonable requests for reports, including aggregated data regarding Ombudsman program activities, to meet the requirements of this provision.

(f) *Disclosure limitations.* The State agency shall ensure that any review of files, records, or other information maintained by the Ombudsman program is consistent with the disclosure limitations set forth in §§ 1324.11(e)(3) and 1324.13(e).

(g) *State and area plans on aging.* The State agency shall integrate the goals and objectives of the Office into the State plan and coordinate the goals and objectives of the Office with those of other programs established under Title VII of the Act and other State elder rights, disability rights, and elder justice programs, including, but not limited to, legal assistance programs provided under section 306(a)(2)(C) of the Act (42 U.S.C. 3026(a)(2)(C)), to promote collaborative efforts and diminish duplicative efforts. Where applicable, the State agency shall require inclusion of goals and objectives of local Ombudsman entities into area plans on aging.

(h) *Elder rights leadership.* The State agency shall provide elder rights leadership. In so doing, it shall require the coordination of Ombudsman program services with the activities of other programs authorized by Title VII of the Act, as well as other State and local entities with responsibilities relevant to the health, safety, well-being, or rights of older adults, including

residents of long-term care facilities as set forth in § 1324.13(h).

(i) *Interference, retaliation, and reprisals.* The State agency shall:

(1) Ensure that it has mechanisms to prohibit and investigate allegations of interference, retaliation, and reprisals:

(i) By a long-term care facility, other entity, or individual with respect to any resident, employee, or other person for filing a complaint with, providing information to, or otherwise cooperating with any representative of the Office; or

(ii) By a long-term care facility, other entity or individual against the Ombudsman or representatives of the Office for fulfillment of the functions, responsibilities, or duties enumerated at §§ 1324.13 and 1324.19; and

(2) Provide for appropriate sanctions with respect to interference, retaliation, and reprisals.

(j) *Legal counsel.* (1) The State agency shall ensure that:

(i) Legal counsel for the Ombudsman program is adequate, available, is without conflict of interest (as defined by the State ethical standards governing the legal profession), and has competencies relevant to the legal needs of:

(A) The program, in order to provide consultation and/or representation as needed to assist the Ombudsman and representatives of the Office in the performance of their official functions, responsibilities, and duties, including complaint resolution and systems advocacy. Legal representation, arranged by or with the approval of the Ombudsman, is provided to the Ombudsman or any representative of the Office against whom suit or other legal action is brought or threatened to be brought in connection with the performance of official duties.

(B) Residents, in order to provide consultation and representation as needed for the Ombudsman program to protect the health, safety, welfare, and rights of residents.

(ii) The Ombudsman and representatives of the Office assist residents in seeking administrative, legal, and other appropriate remedies. In so doing, the Ombudsman shall

coordinate with the Legal Assistance Developer, legal services providers, and victim assistance services to promote the availability of legal counsel to residents.

(2) Such legal counsel may be provided by one or more entities, depending on the nature of the competencies and services needed and as necessary to avoid conflicts of interest (as defined by the State ethical standards governing the legal profession). At a minimum, the Office shall have access to an attorney knowledgeable about the Federal and State laws protecting the rights of residents and governing long-term care facilities.

(3) Legal representation of the Ombudsman program by the Ombudsman or representative of the Office who is a licensed attorney shall not by itself constitute sufficiently adequate legal counsel.

(4) The communications between the Ombudsman and their legal counsel are subject to attorney-client privilege.

(k) *Fiscal management.* The State agency shall ensure that:

(1) The Ombudsman receives notification of all sources of funds received by the State agency that are allocated or appropriated to the Ombudsman program and provides information on any requirements of the funds, and the Ombudsman is supported in their determination of the use of funds;

(2) The Ombudsman has full authority to determine the use of fiscal resources appropriated or otherwise available for the operation of the Office;

(3) Where local Ombudsman entities are designated, the Ombudsman approves the allocations of Federal and State funds to such entities, prior to any distribution of such funds, subject to applicable Federal and State laws and policies; and

(4) The Ombudsman determines that program budgets and expenditures of the Office and local Ombudsman entities are consistent with laws, policies, and procedures governing the Ombudsman program.

(l) *State agency requirements of the Office.* The State agency shall require the Office to:

(1) Develop and provide final approval of an annual report as set forth in section 712(h)(1) of the Act (42 U.S.C. 3058g(h)(1)) and § 1324.13(g) and as otherwise required by the Assistant Secretary for Aging;

(2) Analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other government policies and actions that pertain to long-term care facilities and services, and to the health, safety, welfare, and rights of residents, in the State, and recommend any changes in such laws, regulations, and policies as the Office determines to be appropriate;

(3) Provide such information as the Office determines to be necessary to public and private agencies, legislators, the media, and other persons, regarding the problems and concerns of individuals residing in long-term care facilities; and recommendations related to such problems and concerns;

(4) Establish procedures for the training of the representatives of the Office, as set forth in § 1324.13(c)(2); and

(5) Coordinate Ombudsman program services with entities with responsibilities relevant to the health, safety, welfare, and rights of residents of long-term care facilities, as set forth in § 1324.13(h).

**§ 1324.17 Responsibilities of agencies hosting local Ombudsman entities.**

(a) The agency in which a local Ombudsman entity is organizationally located shall be responsible for the personnel management, but not the programmatic oversight, of representatives, including employee and volunteer representatives, of the Office.

(b) The agency in which a local Ombudsman entity is organizationally located shall not have personnel policies or practices which prohibit the representatives of the Office from performing the duties, or from adhering to the access, confidentiality, and disclosure requirements of section 712 of the Act (42 U.S.C. 3058g), as implemented through this rule and the policies and procedures of the Office.

(1) Policies, procedures, and practices, including personnel management practices of the host agency, which the Ombudsman determines conflict with the laws or policies governing the Ombudsman program shall be sufficient grounds for the refusal, suspension, or removal of the designation of local Ombudsman entity by the Ombudsman.

(2) Nothing in this provision shall prohibit the host agency from requiring that the representatives of the Office adhere to the personnel policies and procedures of the agency which are otherwise lawful.

### **§ 1324.19 Duties of the representatives of the Office.**

In carrying out the duties of the Office, the Ombudsman may designate an entity as a local Ombudsman entity and may designate an employee or volunteer of the local Ombudsman entity as a representative of the Office. Representatives of the Office may also be designated employees or volunteers within the Office.

(a) *Duties.* An individual so designated as a representative of the Office shall, in accordance with the policies and procedures established by the Office and the State agency:

(1) Identify, investigate, and resolve complaints made by or on behalf of residents that relate to action, inaction, or decisions, that may adversely affect the health, safety, welfare, or rights of the residents;

(2) Provide services to protect the health, safety, welfare, and rights of residents;

(3) Ensure that residents in the service area of the local Ombudsman entity have regular and timely access to the services provided through the Ombudsman program and that residents and complainants receive timely responses to requests for information and complaints;

(4) Represent the interests of residents before government agencies and assure that individual residents have access to, and pursue (as the representative of the Office determines necessary and consistent with resident interest) administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents;

(5)(i) Review, and if necessary, comment on any existing and proposed laws, regulations,



and other government policies and actions, that pertain to the rights and well-being of residents;

(ii) Facilitate the ability of the public to comment on the laws, regulations, policies, and actions.

(6) Promote, provide technical support for the development of, and provide ongoing support as requested by resident and family councils; and

(7) Carry out other activities that the Ombudsman determines to be appropriate and are consistent with the functions of the State Long-Term Care Ombudsman Program as authorized by the Older Americans Act.

(b) *Complaint processing.* (1) With respect to identifying, investigating, and resolving complaints, and regardless of the source of the complaint (*i.e.*, complainant), the Ombudsman and the representatives of the Office serve the resident of a long-term care facility. The Ombudsman or representative of the Office shall investigate a complaint, including but not limited to a complaint related to abuse, neglect, or exploitation, for the purposes of resolving the complaint to the resident's satisfaction and of protecting the health, welfare, and rights of the resident. The Ombudsman or representative of the Office may identify, investigate, and resolve a complaint impacting multiple residents or all residents of a facility.

(2) Regardless of the source of the complaint (*i.e.*, the complainant), including when the source is the Ombudsman or representative of the Office, the Ombudsman or representative of the Office must support and maximize resident participation in the process of resolving the complaint as follows:

(i) The Ombudsman or representative of the Office shall offer privacy to the resident for the purpose of confidentially providing information and hearing, investigating, and resolving complaints.

(ii) The Ombudsman or representative of the Office shall discuss the complaint with the resident (and, if the resident is unable to communicate informed consent, the resident's representative) in order to:

(A) Determine the perspective of the resident (or resident representative, where applicable) of the complaint;

(B) Request the resident (or resident representative, where applicable) to communicate informed consent in order to investigate the complaint;

(C) Determine the wishes of the resident (or resident representative, where applicable) with respect to resolution of the complaint, including whether the allegations are to be reported and, if so, whether the Ombudsman or representative of the Office may disclose resident identifying information or other relevant information to the facility and/or appropriate agencies. Such report and disclosure shall be consistent with paragraph (b)(3) of this section;

(D) Advise the resident (and resident representative, where applicable) of the resident's rights;

(E) Work with the resident (or resident representative, where applicable) to develop a plan of action for resolution of the complaint;

(F) Investigate the complaint to determine whether the complaint can be verified; and

(G) Determine whether the complaint is resolved to the satisfaction of the resident (or resident representative, where applicable).

(iii) Where the resident is unable to communicate informed consent, and has no resident representative, the Ombudsman or representative of the Office shall:

(A) Take appropriate steps to investigate and work to resolve the complaint in order to protect the health, safety, welfare and rights of the resident; and

(B) Determine whether the complaint was resolved to the satisfaction of the complainant.

(iv) In determining whether to rely upon a resident representative to communicate or make determinations on behalf of the resident related to complaint processing, the Ombudsman or representative of the Office shall ascertain the extent of the authority that has been granted to the resident representative under court order (in the case of a guardian or conservator), by power of attorney or other document by which the resident has granted authority to the representative,

or under other applicable State or Federal law.

(3) The Ombudsman or representative of the Office may provide information regarding the complaint to another agency in order for such agency to substantiate the facts for regulatory, protective services, law enforcement, or other purposes so long as the Ombudsman or representative of the Office adheres to the disclosure requirements of section 712(d) of the Act (42 U.S.C. 3058g(d)) and the procedures set forth in § 1324.11(e)(3).

(i) Where the goals of a resident or resident representative are for regulatory, protective services or law enforcement action, and the Ombudsman or representative of the Office determines that the resident or resident representative has communicated informed consent to the Office, the Office must assist the resident or resident representative in contacting the appropriate agency and/or disclose the information for which the resident has provided consent to the appropriate agency for such purposes.

(ii) Where the goals of a resident or resident representative can be served by disclosing information to a facility representative and/or referrals to an entity other than those referenced in paragraph (b)(3)(i) of this section, and the Ombudsman or representative of the Office determines that the resident or resident representative has communicated informed consent to the Ombudsman program, the Ombudsman or representative of the Office may assist the resident or resident representative in contacting the appropriate facility representative or the entity, provide information on how a resident or representative may obtain contact information of such facility representatives or entities, and/or disclose the information for which the resident has provided consent to an appropriate facility representative or entity, consistent with Ombudsman program procedures.

(iii) In order to comply with the wishes of the resident, (or, in the case where the resident is unable to communicate informed consent, the wishes of the resident representative), the Ombudsman and representatives of the Office shall not report suspected abuse, neglect or exploitation of a resident when a resident or resident representative has not communicated

informed consent to such report except as set forth in paragraphs (b)(5) through (7) of this section, notwithstanding State laws to the contrary.

(4) For purposes of paragraphs (b)(1) through (3) of this section, communication of informed consent may be made in writing, including through the use of auxiliary aids and services. Alternatively, communication may be made orally or visually, including through the use of auxiliary aids and services, and such consent must be documented contemporaneously by the Ombudsman or a representative of the Office, in accordance with the procedures of the Office.

(5) For purposes of paragraphs (b)(1) through (3) of this section, if a resident is unable to communicate their informed consent, or perspective on the extent to which the matter has been satisfactorily resolved, the Ombudsman or representative of the Office may rely on the communication by a resident representative of informed consent and/or perspective regarding the resolution of the complaint if the Ombudsman or representative of the Office has no reasonable cause to believe that the resident representative is not acting in the best interests of the resident.

(6) For purposes of paragraphs (b)(1) through (3) of this section, the procedures for disclosure, as required by § 1324.11(e)(3), shall provide that the Ombudsman or representative of the Office may refer the matter and disclose resident-identifying information to the appropriate agency or agencies for regulatory oversight; protective services; access to administrative, legal, or other remedies; and/or law enforcement action in the following circumstances:

(i) The resident is unable to communicate informed consent to the Ombudsman or representative of the Office;

(ii) The resident has no resident representative;

(iii) The Ombudsman or representative of the Office has reasonable cause to believe that an action, inaction, or decision may adversely affect the health, safety, welfare, or rights of the resident;

(iv) The Ombudsman or representative of the Office has no evidence indicating that the

resident would not wish a referral to be made;

(v) The Ombudsman or representative of the Office has reasonable cause to believe that it is in the best interest of the resident to make a referral; and

(vi) The representative of the Office obtains the approval of the Ombudsman or otherwise follows the policies and procedures of the Office described in paragraph (b)(9) of this section.

(7) For purposes of paragraphs (b)(1) through (3) of this section, the procedures for disclosure, as required by § 1324.11(e)(3), shall provide that, the Ombudsman or representative of the Office may refer the matter and disclose resident-identifying information to the appropriate agency or agencies for regulatory oversight; protective services; access to administrative, legal, or other remedies; and/or law enforcement action in the following circumstances:

(i) The resident is unable to communicate informed consent to the Ombudsman or representative of the Office and the Ombudsman or representative of the Office has reasonable cause to believe that the resident representative has taken an action, inaction or decision that may adversely affect the health, safety, welfare, or rights of the resident;

(ii) The Ombudsman or representative of the Office has no evidence indicating that the resident would not wish a referral to be made;

(iii) The Ombudsman or representative of the Office has reasonable cause to believe that it is in the best interest of the resident to make a referral; and

(iv) The representative of the Office obtains the approval of the Ombudsman.

(8) The procedures for disclosure, as required by § 1324.11(e)(3), shall provide that, if the Ombudsman or representative of the Office personally witnesses suspected abuse, gross neglect, or exploitation of a resident, the Ombudsman or representative of the Office shall seek communication of informed consent from such resident to disclose resident-identifying information to appropriate agencies.

(i) Where such resident is able to communicate informed consent, or has a resident

representative available to provide informed consent, the Ombudsman or representative of the Office shall follow the direction of the resident or resident representative as set forth in paragraphs (b)(1) through (3) of this section; and

(ii) Where the resident is unable to communicate informed consent, and has no resident representative available to provide informed consent, the Ombudsman or representative of the Office shall open a case with the Ombudsman or representative of the Office as the complainant, follow the Ombudsman program's complaint resolution procedures, and shall refer the matter and disclose identifying information of the resident to the management of the facility in which the resident resides and/or to the appropriate agency or agencies for substantiation of abuse, gross neglect or exploitation in the following circumstances:

(A) The Ombudsman or representative of the Office has no evidence indicating that the resident would not wish a referral to be made;

(B) The Ombudsman or representative of the Office has reasonable cause to believe that disclosure would be in the best interest of the resident; and

(C) The representative of the Office obtains the approval of the Ombudsman or otherwise follows the policies and procedures of the Office described in paragraph (b)(9) of this section.

(iii) In addition, the Ombudsman or representative of the Office, following the policies and procedures of the Office described in paragraph (b)(9) of this section, may report the suspected abuse, gross neglect, or exploitation to other appropriate agencies for regulatory oversight; protective services; access to administrative, legal, or other remedies; and/or law enforcement action.

(9) Prior to disclosing resident-identifying information pursuant to paragraph (b)(6) or (8) of this section, a representative of the Office must obtain approval by the Ombudsman or, alternatively, follow policies and procedures of the Office which provide for such disclosure.

(i) Where the policies and procedures require Ombudsman approval, they shall include a time frame in which the Ombudsman is required to communicate approval or disapproval in

order to assure that the representative of the Office has the ability to promptly take actions to protect the health, safety, welfare or rights of residents.

(ii) Where the policies and procedures do not require Ombudsman approval prior to disclosure, they shall require that the representative of the Office promptly notify the Ombudsman of any disclosure of resident-identifying information under the circumstances set forth in paragraph (b)(6) or (8) of this section.

(iii) Disclosure of resident-identifying information under paragraph (b)(7) of this section shall require Ombudsman approval.

### **§ 1324.21 Conflicts of interest.**

The State agency and the Ombudsman shall consider both the organizational and individual conflicts of interest that may impact the effectiveness and credibility of the work of the Office. In so doing, both the State agency and the Ombudsman shall be responsible to identify actual and potential conflicts and, where a conflict has been identified, to remove or remedy such conflict as set forth in paragraphs (b) and (d) of this section.

(a) *Identification of organizational conflicts.* In identifying conflicts of interest pursuant to section 712(f) of the Act (42 U.S.C. 3058g(f)), the State agency and the Ombudsman shall consider the organizational conflicts that may impact the effectiveness and credibility of the work of the Office. Organizational conflicts of interest include, but are not limited to, placement of the Office, or requiring that an Ombudsman or representative of the Office perform conflicting activities, in an organization that:

(1) Is responsible for licensing, surveying, or certifying long-term care services, including facilities;

(2) Is an association (or an affiliate of such an association) of long-term care facilities, or of any other residential facilities for older individuals or individuals with disabilities;

(3) Has any ownership or investment interest (represented by equity, debt, or other financial relationship) in, or receives grants or donations from, a long-term care facility;

(4) Has governing board members with any ownership, investment, or employment interest in long-term care facilities;

(5) Provides long-term care to residents of long-term care facilities, including the provision of personnel for long-term care facilities or the operation of programs which control access to or services for long-term care facilities;

(6) Provides long-term care services, including programs carried out under a Medicaid waiver approved under section 1115 of the Social Security Act (42 U.S.C. 1315) or under subsection (b) or (c) of section 1915 of the Social Security Act (42 U.S.C. 1396n), or under a Medicaid State plan under section 1905(a) or subsection (i), (j), or (k) of section 1915 of the Social Security Act (42 U.S.C. 1396d(a); 42 U.S.C. 1396n(i)-(k));

(7) Provides long-term care coordination or case management, including for residents of long-term care facilities;

(8) Sets reimbursement rates for long-term care facilities;

(9) Sets reimbursement rates for long-term care services;

(10) Provides adult protective services;

(11) Is responsible for eligibility determinations for the Medicaid program carried out under title XIX of the Social Security Act (42 U.S.C. 1396-1396v);

(12) Is responsible for eligibility determinations regarding Medicaid or other public benefits for residents of long-term care facilities;

(13) Conducts preadmission screening for long-term care facility admission;

(14) Makes decisions regarding admission or discharge of individuals to or from long-term care facilities; or

(15) Provides guardianship, conservatorship or other fiduciary or surrogate decision-making services for residents of long-term care facilities.

(b) *Removing or remedying organizational conflicts.* The State agency and the Ombudsman shall identify and take steps to remove or remedy conflicts of interest between the



Office and the State agency or other agency carrying out the Ombudsman program.

(1) The Ombudsman shall identify organizational conflicts of interest in the Ombudsman program and describe steps taken to remove or remedy conflicts within the annual report submitted to the Assistant Secretary for Aging through the National Ombudsman Reporting System.

(2) Where the Office is located within or otherwise organizationally attached to the State agency, the State agency shall:

(i) Take reasonable steps to avoid internal conflicts of interest;

(ii) Establish a process for review and identification of internal conflicts;

(iii) Take steps to remove or remedy conflicts;

(iv) Ensure that no individual, or member of the immediate family of an individual, involved in designating, appointing, otherwise selecting, or terminating the Ombudsman is subject to a conflict of interest; and

(v) Assure that the Ombudsman has disclosed such conflicts and described steps taken to remove or remedy conflicts within the annual report submitted to the Assistant Secretary for Aging through the National Ombudsman Reporting System.

(3) Where a State agency is unable to adequately remove or remedy a conflict, it shall carry out the Ombudsman program by contract or other arrangement with a public agency or nonprofit private organization, pursuant to section 712(a)(4) of the Act (42 U.S.C. 3058g(a)(4)). The State agency may not enter into a contract or other arrangement to carry out the Ombudsman program if the other entity, and may not operate the Office directly if it:

(i) Is responsible for licensing, surveying, or certifying long-term care facilities;

(ii) Is an association (or an affiliate of such an association) of long-term care facilities, or of any other residential facilities for older individuals or individuals with disabilities; or

(iii) Has any ownership, operational, or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility.

(4) Where the State agency carries out the Ombudsman program by contract or other arrangement with a public agency or nonprofit private organization, pursuant to section 712(a)(4) of the Act (42 U.S.C. 3058g(a)(4)), the State agency shall:

(i) Prior to contracting or making another arrangement, take reasonable steps to avoid conflicts of interest in such agency or organization which is to carry out the Ombudsman program and to avoid conflicts of interest in the State agency's oversight of the contract or arrangement;

(ii) Establish a process for periodic review and identification of conflicts;

(iii) Establish criteria for approval of steps taken by the agency or organization to remedy or remove conflicts;

(iv) Require that such agency or organization have a process in place to:

(A) Take reasonable steps to avoid conflicts of interest; and

(B) Disclose identified conflicts and steps taken to remove or remedy conflicts to the State agency for review and approval.

(5) Where an agency or organization carrying out the Ombudsman program by contract or other arrangement develops a conflict and is unable to adequately remove or remedy a conflict, the State agency shall either operate the Ombudsman program directly or by contract or other arrangement with another public agency or nonprofit private organization.

(6) Where local Ombudsman entities provide ombudsman services, the Ombudsman shall:

(i) Prior to designating or renewing designation, take reasonable steps to avoid conflicts of interest in any agency which may host a local Ombudsman entity;

(ii) Establish a process for periodic review and identification of conflicts of interest with the local Ombudsman entity in any agencies hosting a local Ombudsman entity;

(iii) Require that such agencies disclose identified conflicts of interest with the local Ombudsman entity and steps taken to remove or remedy conflicts within such agency to the Ombudsman;

(iv) Establish criteria for approval of steps taken to remedy or remove conflicts in such agencies; and

(v) Establish a process for review of and criteria for approval of plans to remove or remedy conflicts with the local Ombudsman entity in such agencies.

(7) Failure of an agency hosting a local Ombudsman entity to disclose a conflict to the Office or inability to adequately remove or remedy a conflict shall constitute grounds for refusal, suspension, or removal of designation of the local Ombudsman entity by the Ombudsman.

(c) *Identifying individual conflicts of interest.* (1) In identifying conflicts of interest pursuant to section 712(f) of the Act (42 U.S.C. 3058g(f)), the State agency and the Ombudsman shall consider individual conflicts that may impact the effectiveness and credibility of the work of the Office.

(2) Individual conflicts of interest for an Ombudsman, representatives of the Office, and members of their immediate family include, but are not limited to:

(i) Direct involvement in the licensing or certification of a long-term care facility or of a provider of a long-term care service;

(ii) Ownership, operational, or investment interest (represented by equity, debt, or other financial relationship) in an existing or proposed long-term care facility or a long-term care service;

(iii) Employment of an individual by, or participation in the management of, a long-term care facility or a related organization, in the service area or by the owner or operator of any long-term care facility in the service area;

(iv) Receipt of, or right to receive, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility;

(v) Accepting gifts or gratuities of significant value from a long-term care facility or its management, a resident, or a resident representative of a long-term care facility in which the Ombudsman or representative of the Office provides services (except where there is a personal

relationship with a resident or resident representative which is separate from the individual's role as Ombudsman or representative of the Office);

(vi) Accepting money or any other consideration from anyone other than the Office, or an entity approved by the Ombudsman, for the performance of an act in the regular course of the duties of the Ombudsman or the representatives of the Office without Ombudsman approval;

(vii) Serving as guardian, conservator or in another fiduciary or surrogate decision-making capacity for a resident of a long-term care facility in which the Ombudsman or representative of the Office provides services;

(viii) Serving residents of a facility in which an immediate family member resides;

(ix) Management responsibility for, or operating under the supervision of, an individual with management responsibility for, adult protective services; and

(x) Serving as a guardian or in another fiduciary capacity for residents of long-term care facilities in an official capacity (as opposed to serving as a guardian or fiduciary for a family member, in a personal capacity).

(d) *Removing or remedying individual conflicts.* (1) The State agency or Ombudsman shall develop and implement policies and procedures, pursuant to § 1324.11(e)(4), to ensure that no Ombudsman or representatives of the Office are required or permitted to hold positions or perform duties that would constitute a conflict of interest as set forth in § 1324.21(c). This rule does not prohibit a State agency or Ombudsman from having policies or procedures that exceed these requirements.

(2) When considering the employment or appointment of an individual as the Ombudsman or as a representative of the Office, the State agency or other employing or appointing entity shall:

(i) Take reasonable steps to avoid employing or appointing an individual who has an unremedied conflict of interest or who has a member of the immediate family with an unremedied conflict of interest;

(ii) Take reasonable steps to avoid assigning an individual to perform duties which would constitute an unremedied conflict of interest;

(iii) Establish a process for periodic review and identification of conflicts of the Ombudsman and representatives of the Office; and

(iv) Take steps to remove or remedy conflicts.

(3) In no circumstance shall the entity, which appoints or employs the Ombudsman, appoint or employ an individual as the Ombudsman who:

(i) Has direct involvement in the licensing or certification of a long-term care facility;

(ii) Has an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility. Divestment within a reasonable period may be considered an adequate remedy to this conflict;

(iii) Has been employed by or participated in the management of a long-term care facility within the previous twelve months; and

(iv) Receives, or has the right to receive, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility.

(4) In no circumstance shall the State agency, other agency which carries out the Office, or an agency hosting a local Ombudsman entity appoint or employ an individual, nor shall the Ombudsman designate an individual, as a representative of the Office who:

(i) Has direct involvement in the licensing or certification of a long-term care facility;

(ii) Has an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility. Divestment within a reasonable period may be considered an adequate remedy to this conflict;

(iii) Receives, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility; or

(iv) Is employed by, or participating in the management of, a long-term care facility.

(A) An agency which appoints or employs representatives of the Office shall make

efforts to avoid appointing or employing an individual as a representative of the Office who has been employed by or participated in the management of a long-term care facility within the previous twelve months.

(B) Where such individual is appointed or employed, the agency shall take steps to remedy the conflict.

## **Subpart B – Programs for Prevention of Elder Abuse, Neglect, and Exploitation**

### **§ 1324.201 State agency responsibilities for the prevention of elder abuse, neglect, and exploitation.**

(a) In accordance with Title VII, chapter 3 of the Act, the distribution of Federal funds to the State agency on aging by formula is authorized to carry out activities to develop, strengthen, and carry out programs for the prevention, detection, assessment, and treatment of, intervention in, investigation of, and response to elder abuse, neglect, and exploitation.

(b) All programs using these funds must meet requirements as set forth in the Act, including those of section 721(c), (d), (e) (42 U.S.C. 3058i(c)-(e)) and guidance as set forth by the Assistant Secretary for Aging.

## **Subpart C – State Legal Assistance Development**

### **§ 1324.301 Definitions.**

(a) Definitions as set forth in § 1321.3 of this chapter apply to this part.

(b) Terms used, but not otherwise defined in this part will have the meanings ascribed to them in the Act.

### **§ 1324.303 Legal Assistance Developer.**

(a) *State Legal Assistance Developer.* In accordance with section 731 of the Act (42 U.S.C. 3058j), the State agency shall designate an individual who shall be known as a State Legal Assistance Developer, and other personnel, sufficient to ensure:

- (1) State leadership in securing and maintaining the legal rights of older individuals;
- (2) State capacity for coordinating the provision of legal assistance, in accordance with

section 102(23) and (24) and consistent with section 102(33) of the Act (42 U.S.C. 3002(23), (24), (33)), to include prioritizing such services provided to individuals with greatest economic need, or greatest social need;

(3) State capacity to provide technical assistance, training, and other supportive functions to area agencies on aging, legal assistance providers, Long-Term Care Ombudsman programs, adult protective services, and other service providers under the Act;

(i) The Legal Assistance Developer shall utilize the trainings, case consultations, and technical assistance provided by the support and technical assistance entity established pursuant to section 420(c) of the Act (42 U.S.C. 3032i(c)).

(ii) [Reserved]

(4) State capacity to promote financial management services to older individuals at risk of guardianship, conservatorship, or other fiduciary proceedings;

(i) In so doing, the Legal Assistance Developer shall take into consideration promotion of activities to increase awareness of and access to self-directed financial management services and legal assistance and;

(ii) The Legal Assistance Developer shall also take into consideration promotion of activities that proactively enable older adults and those they designate as decisional supporters through powers of attorney, health care proxies, supported decision making and similar instruments or approaches to be connected to resources and education to manage their finances and the decisions they make about their lives so as to limit their risk for guardianship, conservatorship, or more restrictive fiduciary proceedings.

(5) State capacity to assist older individuals in understanding their rights, exercising choices, benefiting from services and opportunities authorized by law, and maintaining the rights of older individuals at risk of guardianship, conservatorship, or other fiduciary proceedings;

(i) In so doing, the Legal Assistance Developer shall take into consideration engaging in activities aimed at preserving an individual's rights or autonomy, including, but not limited to,

increasing awareness of and access to least-restrictive alternatives to guardianship, conservatorship, or more restrictive fiduciary proceedings, such as supported decision making, and legal assistance;

(ii) In so doing, the Legal Assistance Developer shall adhere to the restrictions contained in section 321(a)(6)(B)(i) of the Act (42 U.S.C. 3030d(a)(6)(B)(i)) regarding the involvement of legal assistance providers in guardianship proceedings, and shall apply these restrictions to conservatorship and other fiduciary proceedings;

(iii) In undertaking this activity, the Legal Assistance Developer shall take into consideration coordination of efforts with legal assistance providers funded under the Act contracted by area agencies on aging, any Bar Association Elder Law section, and other elder rights or entities active in the State.

(6) State capacity to improve the quality and quantity of legal services provided to older individuals.

(b) *State plan.* The activities designated by the State agency for the Legal Assistance Developer, in accordance with paragraphs (a)(1) through (6) of this section, shall be contained in the State plan, per section 307 of the Act (42 U.S.C. 3027) and as set forth in § 1321.27 of this chapter.

(c) *Knowledge, resources, and capacity.* The State agency shall ensure that the Legal Assistance Developer has the knowledge, resources, and capacity to conduct the activities outlined in paragraph (a) of this section.

(d) *Conflicts of interest.* (1) In designating a Legal Assistance Developer, the State agency shall consider any potential conflicts of interest posed by any candidate for the role, and take steps to prevent, remedy, or remove such conflicts of interest.

(2) In designating a Legal Assistance Developer, the State agency shall consider both organizational and individual interests that may impact the effectiveness and credibility of the work of the Legal Assistance Developer to coordinate legal assistance and work to secure,



protect, and promote the legal rights of older adults in the State.

(i) This includes holding a position or performing duties that could lead to decisions that are or have the appearance of being contrary to the Legal Assistance Developer's duties as defined in this section and contained in the State plan as set forth in § 1321.27 of this chapter.

(ii) [Reserved]

(3) The State agency shall not designate as Legal Assistance Developer any individual who is:

(i) Serving as a director of adult protective services, or as legal counsel to adult protective services;

(ii) Serving as a State Long-Term Care Ombudsman, or as legal counsel to a State Long-Term Care Ombudsman Program;

(iii) Serving as a hearing officer, administrative law judge, trier of fact or counsel to these positions in an administrative proceeding related to the legal rights of older adults, such as one in which a legal assistance provider might appear;

(iv) Serving as legal counsel or a party to an administrative proceeding related to long-term care settings, including residential settings;

(v) Conducting surveys of and licensure certifications for long-term care settings, including residential settings, or serving as counsel or advisor to such positions;

(vi) Serving as a public or private guardian, conservator, or fiduciary or operating such a program, or serving as counsel to these positions or programs.

(4) The State agency and the Legal Assistance Developer shall be responsible for identifying any other actual and potential conflicts of interest and circumstances that may lead to the appearance of a conflict of interest; identifying processes for preventing conflicts of interest and, where a conflict of interest has been identified, for removing or remedying the conflict.

(5) The State agency shall develop and implement policies and procedures to ensure that the Legal Assistance Developer is not required or permitted to hold positions or perform duties

that would constitute a conflict of interest.

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**Xavier Becerra,**

*Secretary,  
Department of Health and Human Services.*

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