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 for Support and Nutrition 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).

ACTION: Notice of proposed rulemaking.

SUMMARY: The Administration for Community Living (ACL) within The Department of Health and Human Services (''the Department'' or HHS) is issuing this notice of proposed rulemaking (NPRM) to modernize the implementing regulations of the Older Americans Act of 1965 (''the Act'' or OAA), which have not been substantially altered since their promulgation in 1988. These changes advance the policy goals of the Older Americans Act as articulated by Congress, including equity in service delivery, accountability for funds expended, and clarity of administration for the Administration for Community Living and its grantees. Our proposals will ultimately facilitate improved service delivery and enhanced benefits for OAA participants, particularly those in greatest economic need and greatest social need consistent with the statute.

DATES: To be assured consideration, comments must be received at the address provided below, no later than August 15, 2023.

ADDRESSES: You may submit comments, including mass comment submissions, to this proposed rule, identified by RIN Number 0985–AA17, by any of the following methods:

1. Electronically. You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the ''Submit a comment'' instructions.

2. Regular, Express, or Overnight Mail: You may mail written comments to the following address ONLY:

Administration on Aging, Administration for Community Living, Department of Health and Human Services, Attention: ACL–AA17–P, 330 C Street SW, Washington, DC 20201.

Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted without change to content to *https://www.regulations.gov* and can be retrieved by most internet search engines. No deletions, modifications, or redactions will be made to comments received.

We will consider all comments received or officially postmarked by the methods and due date specified above, but because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to provide individual acknowledgements of receipt. Please allow sufficient time for mailed comments to be timely received in the event of delivery or security delays. Electronic comments with attachments should be in Microsoft Word or Portable Document Format (PDF).

Please note that comments submitted by fax or email, and those submitted or postmarked after the comment period, will not be accepted.

Inspection of Public Comments: All comments received before the close of the comment period will be available for viewing by the public, including personally identifiable or confidential business information that is included in a comment. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make. HHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *https://www.regulations.gov.* Follow the search instructions on that website to view the public comments.

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-rodriguez@acl.hhs.gov,* Telephone: (312) 938–9858. 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 proposed 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.*

SUPPLEMENTARY INFORMATION:

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I. Background

Congress passed the Older Americans Act (''the Act'' or OAA) in 1965 to expand and enhance community social services for older persons.[1] The original legislation established authority for grants to States 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 (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), as the principal agency designated to carry out the provisions of the OAA and serve as Federal focal point on matters concerning older persons.[2] It designated a Commissioner on Aging, now Assistant Secretary for Aging, to lead the activities of AoA and administer the OAA.[3] Since 2012, AoA has been housed in the Administration for Community Living (ACL) within HHS.[4]

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) to serve as advocates on behalf of older persons and create comprehensive and coordinated community-based continuums of services and supports.[5] In 2022, the national aging network was comprised of 56 State agencies (including the District of Columbia and five territories), over 600 AAAs, and over 20,000 local service providers, in addition to one Native Hawaiian organization and 281 Tribal

[1] Public Law 89–73, 42 U.S.C. 3001 et. seq.

[2] Title II. of the OAA.

[3] Sec. 201 of the OAA; Title V of the Act added in the 1978 reauthorization of the OAA is administered by the Dep't of Labor.

[4] 80 FR. 31389 (June 2, 2015).

[5] Title II and Title III of the OAA.

organizations, representing 400 Indian Tribes.[6]

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 prevention and health promotion, caregiver, legal, and other services.[7] Title III programs served 10.9 million older persons in 2019 (the most recent year for which data is available).[8] Title III spending accounted for nearly three quarters of the $2.177 billion OAA FY 2022 budget [9] and funding for these programs is based on a statutory formula that determines yearly allocations to individual territories and States.[10]

Title III services are available to persons aged 60 and older; however, they are prioritized to those with the greatest economic need and greatest social need, particularly low-income and minority individuals, older persons with limited English proficiency (LEP), older persons residing in rural areas, and older persons with disabilities.[11]

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 Tribal organizations, including Native Alaskan organizations, and a not-for-profit group representing Native Hawaiians. To be eligible for funding, a Tribal organization must represent at least 50 Native Americans aged 60 and older. In FY2021, grants were awarded to 282 Tribal organizations representing over 400 Indian Tribes and villages, and one organization serving Native Hawaiian elders.[12]

Title VII authorizes the Ombudsman program, programs for Elder Abuse, Neglect, and Exploitation Prevention, and a requirement for States to provide a State Legal Assistance Developer.[13] 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. 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. In FY 2021, the program handled more than 164,000 complaints and provided more than 624,000 instances of information and assistance to individuals and long-term care facilities.[14] Title VII also authorizes grants to State agencies for program activities aimed at preventing and remedying elder abuse, neglect, and exploitation.

II. Statutory and Regulatory History

This proposed regulation is published under the authority granted to the Assistant Secretary for Aging by the Older Americans Act of 1965, Public Law 89–73, 79 Stat. 218 (1965), as amended through Supporting Older Americans Act of 2020, Public Law 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 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 regulation, 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. Current regulations for programs authorized under the Act date from 1988.[15] 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.[16]

There have been substantial statutory changes since 1988, as detailed by the Congressional Research Service in several summary publications.[17] *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).[18] It 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 program; 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 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 States to impose cost-sharing, subject to limitations, for some Title III services certain older persons receive while retaining authority for voluntary contributions towards the costs of services.[19] The 2006 amendments (Pub. L. 109–365) authorized the Assistant Secretary for Aging to designate an individual within AoA to be responsible

[6] The Congressional Research Service, Older Americans Act: Overview and Funding (June 23, 2022) R43414 (*congress.gov*) (last visited Jan. 18, 2023).

[7] Title III of the OAA.

[8] *Supra* at 6.

[9] *Supra* at 6.

[10] ACL, FY 2022 OAA Title III Annual Grant Awards (without transfers) (last visited Jan. 18, 2023).

[11] Title III of the OAA.

[12] Fiscal Year 2023 Justification of Estimates for Appropriations Committees.

[13] Title VII of the OAA.

[14] *Supra* at 6; ACL, AGing Integrated Database (AGID), National Ombudsman Reporting System (NORS), Data at a Glance, (last visited Jan. 18, 2023); ACL, Fiscal Year 2023 Justification of Estimates for Appropriations Committees, p. 132.

[15] 53 FR 33758 (Aug. 31, 1988).

[16] 80 FR 7704 (Feb. 11, 2015).

[17] Congressional Research Service, Older Americans Act: A 2020 Reauthorization (July 1, 2020) (last visited Jan. 18, 2023); *Supra* at Note 6.

[18] 42 U.S.C. 3058g.

[19] OAA Sec. 316, 42 U.S.C. 3030p, 3030q, 3030r; OAA Sec. 631, 42 U.S.C. 3057k–11.

for prevention of elder abuse, neglect, and exploitation and to coordinate Federal elder justice activities.[20] 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 States 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.[21]

The 2016 amendments (Pub. L. 114–144) provided additional flexibility to States, AAAs, and social services providers in addressing the modernization of senior centers,[22] falls prevention,[23] and behavioral health screening,[24] and codified existing practices, such as requiring ''evidence-based'' [25] disease prevention and health promotion services. For the Ombudsman program, they clarified conflicts of interest provisions,[26] strengthened confidentiality and Ombudsman training requirements,[27] and improved resident access to representatives of the Office.[28] They addressed coordination among ADRCs [29] and other home and community-based service (HCBS) [30] 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*.[31] 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,[32] as well as addressing the negative effects of social isolation among older individuals.[33] Congress focused on other reauthorization issues as well, including changes to nutrition services programs and to programs that provide support to family caregivers.

[20] OAA Sec. 201, 42 U.S.C. 3012.

[21] 42 U.S.C. 3002, 3012, 3025, 3032k.

[22] 42 U.S.C. 3012

[23] 42 U.S.C. 3030d.

[24] Ibid.

[25] 42 U.S.C. 3030m; 3030s.

[26] 42 U.S.C. 3058g.

[27] 42 U.S.C. 3012.

[28] 42 U.S.C. 3058g.

[29] 42 U.S.C. 3012.

[30] 42 U.S.C. 3012, 3025, 3026.

[31] Sec. 102, 42 U.S.C. 3002.

[32] Sec. 303, 42 U.S.C. 3032.

[33] Sec 110, 42 U.S.C. 3002; Sec. 115 42 U.S.C. 3012(a); Sec. 126; Sec. 213, 42 U.S.C. 3030d; Sec. 304, 42 U.S.C. 3032(a).

III. Reasons for the Proposed Rulemaking

The OAA has been amended seven times since 1988 and twice since 2015. Other than 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 which were promulgated in 2015, these OAA regulations have not been amended since 1988. As a result, the OAA statute and regulations are no longer in alignment. The entire National Family Caregiver Support Program has been created by OAA reauthorizing legislation for which there is no conforming rule. Similarly, portions of the Act have been significantly altered since 1988, with no analogous updates to regulation. This discordance creates confusion for grantees, sub-grantees, and service providers, inhibiting their ability to most effectively serve OAA participants. In addition to areas where we propose to better align statute with regulation, we are proposing modifications to regulatory text that will modernize our rules to reflect ongoing stakeholder feedback and responses to our Request for Information in areas where our current regulations do not address the evolving needs of Title III, VI, and VII grantees and the older adults and family caregivers they serve.

The National Caregiver Support Act, passed as a part of the 2000 Amendments, created Title III part E and Title VI part C of the OAA.[34] The programs had a combined budget of nearly $200 million in FY 2022; in FY 2021, the most recent year for which data is available, nearly 800,000 caregivers received services.[35] However, there are currently no regulations implementing this far-reaching program. Consequently, we have proposed regulatory text at Subpart D § 1321.91 (Title III part E) and Subpart C§ 1322.29 (Title VI part C) to implement statutory mandates and clarify areas related to required family caregiver support services, allowable use of funds, and the method of funds distribution. These additions provide necessary direction to grantees in meeting their fiscal and programmatic responsibilities under the Act, and alleviating inefficiencies and uncertainties caused by reliance on sub-regulatory guidance rather than on regulations.

Additionally, newly proposed section 1321, subpart E, and section 1322, subpart D provide direction on emergency and disaster requirements under the Act. There is very limited guidance in § 1321.65 of the current regulations, which only address weather-related emergencies, and no mention of emergency or disaster requirements in current section 1322 or 1323. Our proposals take into account lessons from the COVID–19 public health emergency (PHE), which demonstrated that emergencies beyond those discussed in the current regulations could have a devastating effect on older adults, Native American elders, and family caregivers. In developing the proposed rule, we considered the evolution of what may constitute an ''emergency'' or ''disaster;'' how emergencies and disasters may uniquely affect older adults, Native American elders, and family caregivers; and how best to meet the needs of OAA grantees and participants. The proposed provisions allow Title VI grantees, States, AAAs, and service providers to have the flexibility in funding requirements to adequately plan for emergency situations, as contemplated by the Act.

We are likewise proposing to modernize our nutrition rules to better support grantees' efforts to meet the needs of older adults. Our previous sub-regulatory guidance required that meals must either be consumed on-site at a congregate meal setting or delivered to a participant's residence. This 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 pandemic. Again, the COVID–19 pandemic brought to light limitations in our current nutrition regulations, which we have sought to address in proposed § 1321.87 to allow for ''grab and go'' meals as part of a congregate site where participants can collect their meal and return to the community off-site to enjoy it. Our proposal is a direct response to stakeholder feedback, including as gathered from the RFI, and appropriately reflects the evolving needs of both grantees and OAA participants.

Finally, in response to robust comment, we also propose to include greater detail on the programmatic fiscal policies and procedures State agencies must develop and implement under the Act, including in areas of sub-awardee monitoring, data collection and

[34] 42 U.S.C. 3030s (Title III part E); 42 U.S.C. 3057k–11 (Title VI part C).

[35] The Dept. of Health and Human Serv. *Fiscal Year 2024 Admin. for Community Living Justification of Estimates for Appropriations Committee.*

reporting, direct service provision, matching, contribution requirements, transfer allowances between and among Title III part B, C–1 and/or C–2 funds, allowable administration funding, voluntary contributions/cost sharing, and required annual certification, among others. The lack of detailed instruction in this area to date has created administrative confusion and programmatic inefficiencies for both States and ACL.

Specific to services for Native American elders and caregivers, we propose a number of changes to improve coordination and clarify requirements. Title VI of the Act is titled ''Grants for Native Americans,'' and states a purpose of providing supportive services, including nutrition services, to American Indians, Alaskan Natives, and Native Hawaiians that are comparable to the services provided under Title III. Current section 1323 applies to one Native Hawaiian grantee who receives funds under Title VI part B of the Act. To more clearly and consistently specify requirements, we propose to combine sections 1322 and 1323 and incorporate requirements specific to Title VI, part B in the proposed § 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.

The Act sets forth expectations that States, area agencies on aging, Tribal organizations, and a Native Hawaiian grantee will coordinate regarding provision of services. We propose to include requirements for coordination between Title III and Title VI in each applicable Subpart of sections 1321 and 1322.

To further improve service provision to Native American elders and family caregivers, we propose to specify service requirements, where appropriate, similar to those for services funded under Title III of the Act. Our approach is to identify issues relating to service provision about which the grantee under Title VI of the Act must have policies and procedures, while affirming tribal sovereignty regarding the responsibility for decision-making, development, and implementation of such policies and procedures.

We propose updates to regulatory guidance for Ombudsman programs that receive funding under Title VII of the Act. There has been significant variation in the interpretation and implementation of the provisions of the Act and our 2015 implementing regulations. For example, some State agencies have incorrectly interpreted the 2015 regulations to mean they may still access the files and records of the Ombudsman program that are subject to strict disclosure requirements for monitoring purposes. This has resulted in inconsistent protection of resident identities and Ombudsman records based on residents' State of residence.

We issued a Request for Information [36] 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.[37] We received over 900 individual comments, most of which focused on a few topic areas including: 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. We have sought to address these areas of focus in our proposed rulemaking.

IV. Grants to State and Community Programs on Aging

A. Provisions Revised To Reflect Statutory Changes or Provide Clarity

For the following provisions, we propose revisions that reflect statutory changes (*e.g.,* changing ''Commissioner'' to ''Assistant Secretary'' throughout) and provide direction in response to grantee and other stakeholder requests for technical assistance, RFI responses, listening sessions, and Tribal consultation. We also propose redesignating provisions, reorganizing the placement of provisions, updating statutory references, and other technical revisions. We welcome comment on these proposed changes.

Subpart A—Introduction

§ 1321.1 Basis and Purpose of This Part

Proposed section 1321.1 sets forth the requirements of Title III of the Act to provide grants to State and community programs on aging. We propose revisions to ensure consistency with statutory terminology and requirements, such as references 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.

§ 1321.3 Definitions

We propose to update 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 stakeholders.

We propose to 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 propose to 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,'' and ''Service provider.'' We propose to retain with no revisions the terms: ''Act'' and ''Fiscal year,'' and we propose to delete the terms: ''Frail,'' ''Human services,'' and ''Severe disability.''

New definitions of note are discussed below.

''Conflicts of Interest''

Recognizing the importance of ensuring the integrity of, and trust in, activities carried out under the Act, section 307(a)(7) [38] of the Act requires State agencies to have mechanisms in place to identify and remove conflicts of interest. We propose several provisions related to conflicts of interest (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

[36] 87 FR 27160 (May 6, 2022).

[37] Sec. 2013A of the OAA, 42 U.S.C. 3013a.

[38] 42 U.S.C. 3027(a)(7).

provisions reflect the expanded potential for conflicts of interest 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 propose to clarify the definition of cost sharing to implement the intent of § 315 of the Act.[39] 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, as set forth in the OAA, this term is used differently than how it is used in other settings. There are many restrictions on how cost sharing may be implemented, 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,[40] but many other requirements apply to State agencies who wish to allow the practice of cost sharing that are later described in proposed § 1321.9(c)(2)(x)(I).

''Family Caregiver''

We propose to define ''family caregiver'' to include the following subsets: adults who are caring for older individual, adults 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. We later propose to define ''older relative caregiver.'' 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–E of the Act. For example, this includes unmarried partners, friends, or neighbors caring for an older adult.

''Greatest Economic Need''

Focusing OAA services towards individuals who have the greatest economic need is one of the basic tenets of the Act. 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.'' [41] Through its policies, the State agency may permit AAAs to even further refine specific target populations of greatest economic need within their planning and service area. 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.

''Greatest Social Need''

Focusing OAA services towards individuals who have the greatest social need is one of the basic tenets of the Act. ''Greatest social need'' is defined 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.[42] 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 minority 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 professional and aging services providers.[43] Demographics indicate that the population of HIV-positive older adults are likely to grow significantly for the next two decades, and such older adults may experience isolation due to stigma or lack of knowledge on aging issues for people who are HIV-positive. Other chronic conditions may also result in isolation or stigma, as may housing instability, food insecurity, lack of transportation, utility assistance needs, or interpersonal safety concerns, including abuse, neglect, and exploitation.

We received many comments through the RFI urging ACL to set clear and consistent expectations regarding such populations to be included, and our intent is to do so in this proposed 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.'' [44] Through its policies, the State agency may permit AAAs to even further refine specific target populations of greatest social need within their planning and service area. 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.

''Program Development and Coordination Activities''

We propose to add the term ''*program development and coordination activities*'' to the definitions to explain 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 the new definition, we propose to

[39] 42 U.S.C. 3030c–2.

[40] 42 U.S.C. 3030c–2(a)(2) prohibits a State 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 Federal poverty level. States 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.

[41] *See,* 42 U.S.C. 3026(a)(4)(A)(i)(I)(aa); 42. U.S.C. 3025(a)(1).

[42] 42 U.S.C. 3002(24).

[43] National Resource Center 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.*

[44] *See,* 42 U.S.C. 3026(a)(4)(A)(i)(I)(aa); 42. U.S.C. 3025(a)(1).

include language in § 1321.27 to clarify requirements for these activities.

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. Proposed § 1321.5 sets forth the State agency's mission, role, and functions as the lead on all aging issues in the State under the Act, and it specifies that the State agency will designate AAAs in States with multiple planning and service areas to assist in carrying out the mission. We propose minor revisions to align with reauthorizations of the statute, such as adding family caregivers as a service population per the 2000 reauthorization. We also propose to update regulatory references and revise language for clarity.

§ 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 propose several changes to the provision on organization and staffing for consistency and for clarification. Proposed minor changes at § 1321.7(a), (c), and (d) reflect consistent wording with the State agency's obligations under 45 CFR 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 1324. Proposed § 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)[45] and § 731[46] of the Act require the State agency to ensure that there are 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 propose to add a new paragraph (e) to this provision that sets forth these requirements to assist States 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.

§ 1321.9 State Agency Policies and Procedures. [Updated Title and Revised]

We propose to 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 propose to 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 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.''[47] Consistent with that obligation, we propose to require State agencies to promulgate policies and procedures related to a range of topics that fall within the State agency's authority to oversee under the State plan in § 1321.9(c)(1) (policies and procedures related to direct service provision) and § 1321.9(c)(2) (policies and procedures related to fiscal requirements).[48] The policy development process includes the establishment of procedures, which set forth the steps to follow to implement policies. Accordingly, we propose minor revisions to clarify that the policy development and implementation process includes the establishment of procedures, as well as policies.

Changes have been proposed to the language at § 1321.9(a) in order to (1) reflect statutory updates (*i.e.,* the LTCOP regulation (45 CFR 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 propose to combine the areas for which State agencies must have established policies and procedures in this provision. We invite comment as to whether this approach to streamlining State policies and procedures is appropriate. The first area relates to data collection and reporting. Section 307[49] of the Act requires the collection of data and periodic submission of reports to ACL regarding State agency and AAA activities. ACL has implemented a national reporting system and reporting requirements that must be used by all State agencies to ensure timely and consistent reporting. Proposed § 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.

Proposed § 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 equitably and in a consistent manner throughout the State, as appropriate.[50] In response to the RFI, this proposed section addresses comments that requested State agencies provide transparency and clarity on the policies and procedures that AAAs and service providers 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 proposed 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.

[45] 42 U.S.C. 3027(a)(13).

[46] 42 U.S.C. 3058j.

[47] 42 U.S.C. 3025(a).

[48] *Ibid.*

[49] 42 U.S.C. 3027.

[50] 42 U.S.C. 3025(a)(2); 42 U.S.C. 3012(a)(9).

To provide context for our proposals, as set forth in section 306(a)(4)(A)(i)(I)(aa),[51] AAAs are responsible for setting specific objectives, consistent with State policy, for provision of services to older individuals with greatest economic need and greatest social need. Identifying such populations at the State level facilitates consistent messaging and outreach, collaboration with other State level organizations and stakeholders, 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 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 proposed in § 1321.65. For example, a State 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), and another State may include older adults experiencing housing instability in their definition of greatest economic need. A State might also choose to define those at greatest social need to include people with low literacy, while another State may include grandparents raising grandchildren due to substance use disorder or loss of parents to COVID 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)[52] that services will not be directly provided by a State or area agency without the approval of the State agency, subject to certain conditions; we propose here that the State agency communicate how the area agencies may request approval to directly provide services. This proposed section also incorporates the requirement under section 307(a)(5)(B)[53] 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.

[51] 42 U.S.C. 3026(a)(4)(A)(i)(I)(aa).

[52] 42 U.S.C. 3027(a)(8).

[53] *Ibid.* at (a)(5)(B).

Proposed § 1321.9(c)(2) requires states to establish policies and procedures related to the fiscal requirements associated with being awarded funding for the Nutrition Services Incentive Program,[54] Title III,[55] and Title VII[56] under the Act. Over the years, we have found that some State agencies may be unaware of certain requirements or may not understand their obligations under these requirements. Section 1321.9(c)(2) will provide guidance on the following fiscal requirements: distribution of Title III[57] and Nutrition Services Incentive Program[58] funds; non-Federal share (match) requirements;[59] permitted transfers of service allotments;[60] maximum allocation amounts for State, territory, and area plan administration;[61] minimum funding expenditures for access to services, in-home supportive services, and legal assistance;[62] State agency maintenance of effort obligations;[63] requirements related to Ombudsman program expenditures and fiscal management;[64] minimum expenditures for services for older adults who live in rural areas;[65] reallotment of funds;[66] voluntary contributions, including cost-sharing at the election of the State agency;[67] use of program income;[68] private pay programs;[69] commercial relationships;[70] buildings, alterations or renovations, maintenance, and equipment;[71] prohibition against supplantation;[72] monitoring of State and area plan assurances;[73] and advance funding.[74] We provide further context for these fiscal requirements proposals in the following paragraphs.

§ 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).[75] The Act requires distribution to occur via an intrastate funding formula (IFF) (further defined in proposed § 1321.49) or funds distribution plan (further defined in proposed § 1321.51). The IFF is required for States with multiple planning and service areas, and a funds distribution plan is required for single planning and service area states. Through this provision, we also propose to require that funds be promptly disbursed using the IFF or funds distribution plan and to provide prior approval for fixed amount subawards up to the simplified acquisition threshold, as set forth in 2 CFR 200.353.

§ 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 matching funds from State or local sources, as set forth in sections 301(d)(1), 304(c), 304(d)(1)(A), 304(d)(1)(D), 304(d)(2), 309(b), 316(b)(5), and 373(h)(2). We propose to 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 the non-Federal share (match). We propose to clarify that State or local public resources used to fund a program which uses a means test shall not be used to meet the non-Federal share matching requirements. We also propose to clarify that a State agency or AAA may determine a non-Federal share in excess of required amounts, and we clarify the non-Federal share matching requirements that apply to service and administration costs for each type of grant award under Title III of the Act. We also propose to provide prior written approval for unrecovered indirect costs to be used as match and invite comment regarding this approach.

§ 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 States by part of the Act (for example, the

[54] 42 U.S.C. 3030a(e).

[55] 42 U.S.C. 3023.

[56] 42 U.S.C. 3058a.

[57] 42 U.S.C. 3025(a)(2)(C).

[58] 42 U.S.C. 3030a(d).

[59] 42 U.S.C. 3024(d), 3028(a)(1), 3029(b), 3030s–1(h)(2).

[60] 42 U.S.C. 3028(a)(4), (5).

[61] 42 U.S.C. 3024(d)(1), 3028(a), (b)(1)–(2).

[62] 42 U.S.C. 3026(a)(2).

[63] 42 U.S.C. 3029(c).

[64] 42 U.S.C. 3027(a)(9)(A).

[65] 42 U.S.C. 3027(a)(3)(B)(i).

[66] 42 U.S.C. 3024(b), 3058b(b).

[67] 42 U.S.C. 3030c–2.

[68] 42 U.S.C. 3030c–2(a)(5)(c).

[69] 42 U.S.C. 3020c, 3026(g).

[70] 42 U.S.C. 3026(a)(13)–(14).

[71] 45 CFR 75; 42 U.S.C. 3030b, 3030d(b).

[72] 42 U.S.C. 3026(a)(9)(B), 3030c–2(b)(4)(E), 3030d(d), 3030s–2, 3058d(a)(4).

[73] 42 U.S.C. 3025(a)(1)(A)–(C).

[74] 45 CFR 75.305.

[75] 42 U.S.C. 3025(a)(2)(C–D).

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 propose to list the requirements and considerations that apply if a State 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. For example, a State may find that older individuals have a need for transportation to congregate meal sites. A State 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.

§ 1321.9(c)(2)(iv). State, Territory, and Area Plan Administration

Section 308 of the Act sets forth limits on the amount of Title III funds which may be used for State, Territory, and area plan administration. We propose to 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 use of funds; the proposed specification of requirements is intended to provide clarity to States. For example, States 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, including 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 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 planning and service areas, we propose to clarify section 304(d)(1)(A) of the Act and better streamline implementation of maximum allocation amounts. We propose to specify that the State agency will determine the maximum amount available for area plan administration by deducting the amount of funding to be applied to State plan administration and calculating ten percent of this amount. The ten percent of funding remaining must be made available to AAAs in accordance with the IFF for the purpose of area plan administration, which we further address in proposed § 1321.57(b).

§ 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. We propose to require the State agency to have policies and procedures to implement these requirements.

§ 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. We propose to require State agencies to develop fiscal policies and procedures related to requirements under the Act, corresponding to sections 309(c)[76] and 374.[77] These requirements include expending specific minimum maintenance of effort amounts, which are calculated in a specific manner as required in the Act. In response to technical assistance requests received, we also propose to clarify that excess amounts reported in other reports, such as the Federal financial report (submitted via 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.

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

We propose to require State agencies to develop fiscal policies and procedures related to requirements under the Act, corresponding to section 307(a)(9).[78] These requirements include that the State agency will expend not less than the amount expended by the State agency under Title III and Title VII of the Act for the Ombudsman program in fiscal year 2019, in accordance with the level set in the Act as amended in 2020. We also propose to 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 are in compliance with the requirements set forth in § 1324.13(f).

§ 1321.9(c)(2)(viii). Rural Minimum Expenditures

We propose to require State agencies to develop fiscal policies and procedures related to requirements under the Act, corresponding to section 307(a)(3)(B).[79] These requirements include that the State agency must expend not less than the amount expended in fiscal year 2000, 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 propose that the State agency establish a process and control for determining how rural areas within the State shall be defined.

§ 1321.9(c)(2)(ix). Reallotment

We propose to require State agencies to develop fiscal policies and procedures related to a State's voluntary release of funds (reallotment), corresponding with sections 304(b)[80] and 703(b)[81] of the Act. These policies and procedures include that the State agency must communicate if the State agency has funding that will not be expended in the grant period to be 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 include 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 propose to 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) and § 1321.9(c)(2)(xi), Voluntary Contributions and 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 propose to add § 1321.9(c)(2)(xi) (cost sharing) to delineate between the two

[76] 42 U.S.C. 3029.

[77] 42 U.S.C. 3030s–2.

[78] 42 U.S.C. 3027(a)(9).

[79] *Ibid.* at (a)(3)(B).

[80] 42 U.S.C. 3024(b).

[81] 42 U.S.C. 3058b(b).

types of consumer contributions. Section 315 of the Act allows for consumer contributions which may take the form of (1) an individual voluntarily contributing towards the cost of a service (a voluntary contribution) [82] and (2) the State establishing a cost sharing policy, creating a structured system for collecting sliding scale payments from some service participants for some services (cost sharing).[83] For many decades, State and area agencies and service providers have collected voluntary contributions from participants receiving services under the Act. Such voluntary contributions 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, the majority of which we estimate was in the form of voluntary contributions.

Cost sharing provisions were added in the 2000 amendments to the OAA. 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 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 States 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, States have a long history of requesting voluntary contributions and are less likely to pursue cost sharing arrangements.

We propose to 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. In contrast, we also propose to 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.

In § 1321.9(c)(2)(xi) we propose to 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 proposed § 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 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 cost sharing and consumer contribution policies must be voluntary for OAA program participants, and States must ensure that program participants are aware that they are not required to contribute. We also propose to 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) [84] and (b)(3) [85] and to 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 Federal poverty line, 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 Federal poverty line 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 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).[86]

State agencies, AAAs, and others have expressed confusion about the differences between cost sharing and voluntary contributions. We seek comment on whether the proposed rule sufficiently clarifies the statutory requirements for and differences between cost sharing and voluntary contributions.

§ 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)(xi) and revised. We propose to clarify the fiscal requirements that apply to program income, which includes voluntary contributions and cost sharing payments. For example, we propose to clarify that States are required to report contributions as program income, and that contributions must be used to expand the service category by part of Title III of the Act for which the income was originally collected. Thus, a contribution for the supportive service of transportation must be reported as income to the supportive services program and used to expand supportive services, such as transportation, multipurpose senior centers and/or transportation. Similarly, if someone pays a portion of the cost of a transportation service under a cost-sharing arrangement, that portion must be reported as income to the supportive services program. A contribution for the nutrition service of home-delivered meals must be reported as income to the nutrition program and used to expand nutrition services, such as home-delivered meals, congregate meals, and/or nutrition education.

§ 1321.9(c)(2)(xiii). Private Pay Programs

We propose to clarify that 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. However, funds provided under the Act for direct services may not be used to support private pay programs (or any other services) where a fee is required. We propose to add Paragraph 1321.9(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

[82] 42 U.S.C. 3030c-2(b).

[83] 42 U.S.C. 3030c-2(a).

[84] 42 U.S.C. 3030c–2(a)(5)(E).

[85] *Ibid.* at (b)(3).

[86] *Id.* at (a)(6).

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. We seek comments on whether the proposed rule clarifies the allowability of private pay programs.

§ 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 relationships with various commercial entities to accomplish the delivery of comprehensive services, as authorized in section 212 and 306(a)(13) and (14) of the Act.[87] In response to numerous questions about the appropriate roles, responsibilities, and oversight of such activities, feedback received in response to the RFI, and based on our observations of program activities, we propose to clarify the policies and procedures that State agencies must establish related to all contracts and commercial relationships in subsection 1321.9(c)(2)(xiv). As a component of these policies and procedures, and consistent with their authority under sections 305(a)(1)(C), 306(a), 306(b), and 212(b)(1), State agencies must establish processes for AAAs to receive approval for contracts and commercial relationships. We expect such processes to be flexible and streamlined, reflecting the needs of the older individuals served and the abilities of AAAs and service providers to engage in contracts and commercial relationships. This provision will help ensure 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. We propose to set forth these provisions to promote and expand the ability of the aging network to engage in business activities.

For example, a State agency could establish policies and procedures that outline a tiered approach for approving contracts and commercial relationships, whereby some specific activities with certain entities receive prior approval (for example, as required under section 212), other activities and general categories of activities require a simple notice of intent to receive approval from the State agency, and, because of significant risk or conflict of interest complexities, still other specific activities or types of activities require a more thorough review process by the State agency in determining whether to provide approval. A State agency may include various factors in their decision-making process, such as whether the AAA/service provider is under a corrective action plan or demonstrates concerns in current OAA program operations, the role of the AAA/service provider in the State's long-term services and supports system, and the level of risk the AAA/service provider may assume in the contract or commercial relationship, in setting the tiers of its prior approval process.

Another State agency could have policies and procedures that require the AAA to request approval via the area plan process for the types of contracts or commercial relationships the AAA intends to undertake and/or allow the AAA's service providers to undertake. The State agency could then provide approval to the AAA or request further detail in determining whether to provide approval.

We expect that States might distinguish between contracts and commercial relationships where the AAA, for example, is paying for services or goods; and contracts and commercials relationships where the AAA is receiving payment to provide services or goods. For example, a state might establish de facto approval policies for contracts and commercial relationships related to AAAs paying for Title III services, but establish a more rigorous review process if the AAA is entertaining a contract or commercial relationship to receive payment to provide services to individuals or entities not otherwise receiving services under the Act.

Our proposal responds to numerous concerns from AAAs regarding inconsistent approaches taken by States, as well as concerns from State agencies about the level of oversight and approval that should be exercised. We are trying to take a balanced approach that is consistent with statutory requirements found in section 212 and throughout Title III—one that is not onerous, can be implemented easily, and does not cause undue delays. This approach outlined in the regulation will be supplemented by the provision of technical assistance to States and AAAs. We request comment on whether our proposed approach appropriately balances the need for clear policies and procedures with the need to have a workable approval process.

We propose to specify in the definition of *Area plan administration* at section 1321.3 that use of area plan administration funds for development of contracts or commercial relationships is allowable. We request comments on best practices and examples of existing processes.

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 and 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 most recent reauthorization of the OAA. ACL is committed to promoting this flexibility while providing good stewardship of and accountability for public funds. Therefore, we propose in § 1321.9(c)(2)(xiv) to delineate that State agencies, AAAs, and service providers may enter into a variety of contracts and commercial relationships. We further propose that entities establishing contracts and commercial relationships must develop policies and procedures to promote fairness, inclusion, and adherence to the requirements of the Act, including meeting conflict of interest requirements, continuing their role as advocates for older people in accordance with the Act, and meeting financial accountability requirements, as set forth in sections 306(a)(6)(B), (13), (14), and (15) and 307(a)(7).[88] They must also align with any guidance issued by the Assistant Secretary.

For example, AAAs and service providers may use funds for direct services under Title III to support provision of service via contracts and commercial relationships in two ways. The first is by maintaining all requirements for direct service provision using Title III funds. This would mean that Title III direct services funds would not be used for contracts or commercial relationships that required an older individual to make a payment or copayment (see § 1321.9(c)(x). *Voluntary contributions*), used means testing (see 1321.61(c). *Advocacy responsibilities of the area agency*), or served those ineligible for services under the Act (see 1321.81. *Client eligibility for participation*). Second, funds could be used to provide

[87] 42 U.S.C. 3020c; 42 U.S.C. 3026

[88] 42 U.S.C. 3026; 42 U.S.C. 3027.

direct services consistent with the requirements under section 212 of the Act, which among other requirements requires reimbursement of funds initially used to pay part or all of the cost of developing and carrying out the contract or commercial relationship.

We request comments regarding best practices in promoting contracting and commercial relationship activities of the aging network while maintaining fairness and adherence to the requirements of the Act. Many states, whether through formal policies and procedures or otherwise, have been facilitating a range of contracting and commercial relationship activities for years. For example, the area planning process is one example of a policy and procedure that all states use to approve certain contracts and commercial relationships. We do not intend to disrupt the normal course of business where it is currently functioning consistent with the requirements of the Act. We believe that standardizing policies and procedures will streamline these activities nationwide and ensure consistency with the requirements of the Act.

§ 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 proposed use of funding. We propose to 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. To ensure that third parties will be on notice of this requirement, we propose to 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. We welcome comment on this proposed section, including on the sufficiency of guidance provided to date and potential alternative approaches to achieve the goal of providing services to older adults.

§ 1321.9(c)(2)(xvi). Supplement, Not Supplant

The Act sets forth requirements in sections 306(a)(9)(B),[89] 315(b)(4)(E),[90] 321(d),[91] 374,[92] and 705(a)(4)[93] that OAA funds must supplement, and not supplant existing funds. We 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–E funding. The result is 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. This proposed provision will require a State agency policy and procedure on supplementing, not supplanting existing funds for the programs where specified in the Act.

§ 1321.9(c)(2)(xvii). Monitoring of State and Area Plan Assurances

The Act sets forth many assurances to which States must attest as a part of their State plans and to which AAAs must attest as a part of their area plans. We propose to specify that the State agency must have policies and procedures to monitor compliance regarding the assurances to which the State and area agencies attest.

§ 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 proposes to specify that State agencies may advance funding to meet immediate cash needs of AAAs and service providers, and if a State chooses to do so, the State agency must have policies and procedures that comply with Federal requirements and guidance as set forth by the Assistant Secretary for Aging.

§ 1321.9(c)(3). State Plan Process; § 1321.9(c)(4). Area Plan Process

We propose to add paragraphs 1321.9(c)(3) and (4) to ensure the integrity and transparency of the State plan process and, in States with multiple planning and service areas, of the area plan process. We propose to require the State agency to have policies and procedures that align with State and area plan requirements, including establishing and complying with a minimum time period for public review and comment for State and area plans, that are proposed at §§ 1321.29 and 1321.65.

§ 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 proposed, these include advocacy, technical assistance, and training activities. We propose additional minor revisions to these provisions to include activities related to the National Family Caregiver Support Program (NFCSP), which was added to the Act in 2000. Section 305(a)[94] of the Act provides that the State agency should serve as ''an effective and visible advocate'' for older individuals and family caregivers. Accordingly, we propose to 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.

§ 1321.13 Designation of and Designation Changes to Planning and Service Areas. [Updated Title and Revised]

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 proposed provision.

Section 305[95] of the Act requires the State agency to divide the State into distinct planning and service areas and subsequently designate an AAA to serve each planning and service area. The Act allows for exceptions for some States to designate the entire State as a single planning and service area. Single planning and service area 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 planning and service areas allows for a local approach to the planning, coordination, advocacy, and administration responsibilities as required under the Act. We propose to revise this section to affirm the State agencies' obligations to have policies and procedures in place to ensure that

[89] 42 U.S.C. 3026(a)(9)(B).
[90] 42 U.S.C. 3030c–2(b)(4)(E).
[91] 42 U.S.C. 3030d(d).
[92] 42 U.S.C. 3030s–2.
[93] 42 U.S.C. 3058d(a)(4).
[94] 42 U.S.C. 3025(a).
[95] 42 U.S.C. 3025.

the State agency process of designating and changing planning and service areas will be transparent, will hold the State agency accountable for its decisions, and will afford due process to affected parties. We also propose factors that a State agency should take into account when it considers changing a planning and service area 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 or greatest social need, the distribution of older individuals who are Native Americans, the distribution of 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 planning and service areas, we propose to provide greater detail on the requirements for changing planning and service areas, 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 proposal to require State agencies to consider listed factors will resolve confusion over how State agencies should make decisions about whether and how to change planning and service area designations. We also solicit feedback regarding any other relevant factors that should be specified in making decisions on planning and service area designation.

§ 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 proposed to this provision to clarify the nature of an interstate planning and service area (per section 305(b) [96] of the Act), as well as the process for requesting the Assistant Secretary to designate an interstate planning and service area. 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.

§ 1321.17 Appeal to the Departmental Appeals Board on Planning and Service Area Designation. [Updated Title and Revised]

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) [97] of the Act provides State agencies authority to divide the State into distinct planning and service areas 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) [98] to the Assistant Secretary for Aging who must then afford the entity an opportunity for a hearing pursuant to section 305(b)(4) [99] of the Act. There have historically been very few appeals under section 305(a)(1)(E).[100]

We are proposing appeals of State agency decisions for designation of planning and service areas be 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 proposed change aligns with our proposals in §§ 1321.23 and 1321.39. We believe it continues to fulfill the Act's mandate to provide 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, AAAs and is aligned with the intent of the Act.

§ 1321.19 Designation of and Designation Changes to Area Agencies. [Updated Title and Revised]

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 proposed provision. section 305(b) [101] of the Act requires State agencies not located in single planning and service area states to designate an AAA to serve each planning and service area. We propose to specify that only one AAA shall be designated to serve each planning and service area and that an organization may be designated as an AAA for more than one planning and service area. 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 planning and service area. 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 propose to 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 an AAA (withdrawal of AAA designation), will be transparent, will hold the State agency accountable for its decisions, and will afford due process to affected parties. We propose to provide greater clarity to assist States in understanding the designation process pursuant to section 305 [102] of the Act and the types of agencies permitted by the Act to serve as AAAs. Consistent with the Act's requirements, we retain the existing restriction against a regional or local State office serving as an AAA, and the provision continues to reference the State agency's obligations under section 305 [103] 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. We request comment on the specifications proposed, especially from State agencies and AAAs who have recent experience with AAA designation processes.

§ 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 propose changes to paragraph (a) to clarify the circumstances under which a State agency may withdraw designation to include failure to comply with regulations and guidance as set forth by the Assistant Secretary for Aging, if the State agency changes one or more planning and service area designations, and if the AAA voluntarily requests withdrawal of their designation. In paragraph (b) we propose a clarification that changes to the designation of an

[96] 42 U.S.C. 3025(b).

[97] 42 U.S.C. 3025(a)(1)(E).

[98] 42 U.S.C. 3025(a)(1)(E).

[99] 42 U.S.C. 3025(b)(4).

[100] 42 U.S.C. 3025(a)(1)(E).

[101] 42 U.S.C. 3025(a).

[102] 42 U.S.C. 3025.

[103] 42 U.S.C. 3025.

AAA must be included in the State plan on aging, with appropriate cross-references. In paragraph (d) we propose that a State agency may request an extension of time to perform the responsibilities of an 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.

§ 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 States regarding the formulation, duration, and formatting of State plans.

§ 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, their families, and caregivers, and serves as a blueprint for achieving the goals and objectives during the plan period. Section 307 [104] of the Act sets forth requirements that State plans must meet and content that must be included. As Stated above, section 307 [105] of the Act authorizes the Assistant Secretary to prescribe criteria for State plan development and content.

In response to the RFI and other requests for clarification, we propose 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; explain how individuals with greatest economic need and greatest social need are determined and served; include the State agency's intrastate funding formula 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–C–1 funds to be used as set forth in proposed § 1321.87(a)(1)(A); 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 proposed provision also clarifies the Assistant Secretary's authority to establish objectives for State plans, including objectives related to Title VII of the Act.

In response to significant feedback from stakeholders over the years and numerous responses to the RFI, ACL proposes to specify that the State plan must define greatest economic need and greatest social need, including for the following populations: Native American persons; persons who experience cultural, social, or geographical isolation caused by racial or ethnic status; members of religious minorities; lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI+) persons; persons living with HIV or AIDS; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality as the State defines it. 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.* We propose to establish standard expectations for whom States must include in their definitions of greatest economic need and greatest social need, while still allowing for States to flexibly include other populations that are specific to their circumstances. For example, one State may 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 may include persons experiencing housing instability. Another State may not specify any additional populations to be included in their definitions of greatest economic need or greatest social need at the State plan level, but encourage such additions at the area plan level (for which we further propose requirements in § 1321.65). We welcome comment as to whether this approach sufficiently identifies populations that all States must include as part of their definition of greatest economic need and greatest social need and offers flexibility to States to include additional populations.

We also propose to specify that upon identifying the populations of greatest economic need and greatest social need, the State plan must include how the State will target services to these populations, including how funds under the Act may be distributed in accordance with proposed intrastate funding formula or funds distribution plan requirements at §§ 1321.49 or 1321.51, respectively. For example, a State may specify that it will use one factor based on the low-income and rural population of individuals age 60 and older in its intrastate funding formula to meet populations identified as in greatest economic need and greatest social need. Another State may use two separate factors, one for low-income individuals age 60 and older and another for rural individuals age 60 and older.

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 also are 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 efforts 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. We propose for States 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 propose to 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–B supportive services, under limited circumstances.

We propose to require States 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),[106] and include cross reference to the legal assistance section at § 1321.93.

The provision also includes a new requirement for States to provide certain information regarding any permitted use of Title III C–1 funds (funds for meals served in a congregate setting) for shelf-

[104] 42 U.S.C. 3027.

[105] 42 U.S.C. 3027.

[106] 42 U.S.C. 3027.

stable, pick-up, carry-out, drive-through, or similar meals, as permitted by new proposed § 1321.87(a)(1)(A). The congregate meal program is a core Title III program; in addition to a healthy meal, the program provides opportunities for social interaction and health promotion and wellness activities. In response to the COVID–19 pandemic, ACL provided guidance on innovative, permissible service delivery options that grantees could provide meals to older individuals and other eligible recipients of home-delivered meals with Title III C–2 funds. In response to grantee and stakeholder comments on the RFI, ACL proposes in new § 1321.87 to allow these meal delivery methods with respect to Title III C–1 congregate meal funds, subject to certain terms and conditions. As this represents a proposed expansion of the permitted use of congregate meals funds, State agencies must provide information about this use of Title III 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 and so that ACL will be aware of the extent to which State agencies plan to implement this new allowable use of Title III C–1 funds.

We propose to remove redundant provisions in § 1321.27 that are addressed in other more appropriate sections of the proposed revised regulation (such as requirements related to State agency policies, voluntary contributions, and means testing, which are addressed in § 1321.9). Also, minor revisions have been made to the provision to delete references to statutory provisions that have been removed from the Act or to delete language that does not align with current ACL policy (such as the requirement in the existing provision that AAAs compile available information on post-secondary education available to older adults with little or no tuition).

With the increased expectations for information, assistance and referral (I&A/R) systems to offer direct consumer support to a growing population and the need to be responsive to emerging technology solutions that streamline access to services and supports, ACL solicits input on ways ACL and State agencies can support improvements in I&A/R systems, including training of professionals and modernization of information technology systems that are interoperable and streamline access to services through electronic, closed loop referrals.

§ 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. Sections 1321.29(a) and (b) set forth obligations for public input, including that opportunities for public participation should occur periodically 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, we propose that the public be given a reasonable period of time 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.

§ 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 propose 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 and which only need to be submitted for purposes of notification. Amendments requiring prior approval are those necessary to reflect new or revised statues or regulations as determined by the Assistant Secretary for Aging; an addition, deletion, or change to a State's goal, assurance, or information requirement Statement; a change in the State's intrastate funding formula or funds distribution plan for Title III funds; a request to waive State plan requirements; or other changes as required by guidance as set forth by the Assistant Secretary for Aging. 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; a request to distribute State plan administration funds for demonstration projects; a change in a planning and service area designation; a change in AAA designation; a request to use funds set aside to address disasters as we propose to further set forth in § 1321.99; or a request to exercise major disaster declaration flexibilities, as we propose to further set forth in § 1321.101. We also propose minor revisions to reflect statutory updates.

§ 1321.33 Submission of the State Plan or Plan Amendment to the Assistant Secretary for Aging for Approval. [Updated Title and Revised]

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 terminology 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. Currently, the regulations require States to submit for approval a plan or amendment, signed by the Governor or the Governor's designee, 45 days prior to its proposed effective date. This 45-day period does not provide adequate time for proper Regional Office review and provision to the State by the Regional Office of appropriate technical assistance, for the State then to make any changes that are required, and for the State 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, such as a lapse in funding under the Act. In addition, if a State 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'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 propose 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 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. We welcome comments suggesting ways to improve the State plan and amendment approval process.

§ 1321.35 Notification of State Plan or State Plan Amendment Approval or Disapproval for Changes Requiring Assistant Secretary for Aging Approval. [Updated Title and Revised]

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

§ 1321.39 Appeals to the Departmental Appeals Board Regarding State Plan on Aging. [Updated Title and Revised]

Section 1321.77 of the existing regulation (*Scope*) is redesignated here at § 1321.39, retitled, and modified. Section 305 [107] and 307 [108] 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) [109] the Assistant Secretary shall not make a final determination disapproving any State plan, or any modification thereof, or make a final determination that a State is ineligible under section 305,[110] without first affording the State reasonable notice and opportunity for a hearing.

In the past the Assistant Secretary for Aging would have facilitated the appeals process. We propose, in line with our proposals at revised § 1321.17 and new § 1321.23, that appeals be delegated to the Departmental Appeals Board (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 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.

[107] 42 U.S.C. 3025.

[108] 42 U.S.C. 3027.

[109] *Id.* at (c)(1).

[110] 42 U.S.C. 3025.

§ 1321.41 When a Disapproval Decision Is Effective. [Updated Title and Revised]

In this section, redesignated from existing § 1321.79, retitled, and modified, we propose to delete reference to the ''Assistant Secretary for Aging'' and replace it with ''the Departmental Appeals Board'' to align with changes proposed at § 1321.39.

§ 1321.43 How the State May Appeal the Departmental Appeals Board's Decision. [Updated Title and Revised]

In this section, redesignated from § 1321.81 and retitled, we propose to delete reference to the ''Assistant Secretary for Aging'' and replace it with ''the Departmental Appeals Board'' to align with changes proposed at § 1321.39.

§ 1321.45 How the Assistant Secretary for Aging May Reallot the State's Withheld Payments. [Updated Title and Revised]

The provision contained in § 1321.83 of the existing regulation (*How the Commissioner may reallot the State's withheld payments*) is redesignated here as § 1321.45. The provision has been retitled, and minor, non-substantive changes are proposed to the provision to reflect statutory terminology 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. States with multiple planning and service areas provide funding to AAAs through the IFF. Section 305 [111] of the Act sets forth requirements for the IFF while, at the same time, affording States some flexibilities in its development and implementation. The proposed changes to this provision are designed to assist State agencies develop 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 propose to specify that the State agency must include the IFF in the State plan, in accordance with guidelines issued by the Assistant Secretary 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 provided in section 362 [112] of the Act.

[111] 42 U.S.C. 3025.

[112] 42 U.S.C. 3030n.

In paragraph (b) we propose to clarify the elements of the IFF. The elements include a descriptive Statement and application of the State's definitions of greatest economic need and greatest social need; a Statement that discloses any funds deducted for allowable purposes of State plan administration, Ombudsman program, or disaster set aside funds, as proposed in § 1321.99; whether a separate formula for evidence-based disease prevention and health promotion is used; how the Nutrition Services Incentive Program 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 for the data to be used for each planning and service area in the State; a Statement of the allocation of funds to each planning and service area in the State; and the source of the best available data used to allocate the funding.

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

In paragraph (d) we propose to specify other requirements that apply to distribution of Nutrition Services Incentive Program 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 propose that Title VII funds or Title III–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–B Ombudsman program and disaster set-aside funds. We propose 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.

Proposed revisions to paragraph (f) reflect statutory updates and to cross

reference to other provisions within the regulation.

§ 1321.51 Single Planning and Service Area States. [Updated Title and Revised]

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 planning and service area, to continue as a single planning and service area if the State agency met certain requirements. Only State agencies currently designated as a single planning and service area state may have such status; accordingly, we propose to delete this language and clarify the specific requirements that apply to operating as a single planning and service area state. Single planning and service area states are addressed elsewhere in our proposed regulations including proposed definitions in § 1321.3 and regarding designation of and changes to planning and service areas in § 1321.13.

Based on questions we have received from such states, we propose clarifications that single planning and service area states must meet requirements for AAAs, unless otherwise specified. In paragraph (b), we propose to clarify that single planning and service area states, as part of their State plan, must include a funds distribution plan that mirrors many of the requirements of the intrastate funding formula for states with multiple planning and service areas, minus distribution to AAAs. The State 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). We propose this change to promote transparency and good stewardship of public funds. In paragraph (c) we propose that single planning and service area states may revise their funds distribution plans, subject to their policies and procedures and prior approval of the Assistant Secretary. Revisions also have been 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 planning and service area under the Act.

The social services systems in which AAAs and their community partners operate today 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 an 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)[113] of the Act. Focal points in current § 1321.53(c) are focused on the need for bricks-and-mortar facilities such as multipurpose senior centers. In light of the social service systems climate in which AAAs operate today, the existing language confining these focal points to facilities may impede an AAA's ability to develop and enhance a comprehensive and coordinated community-based systems in, or serving, its planning and service area, as contemplated by the Act. Accordingly, we propose to delete the language from this paragraph related to an AAA's obligations with respect to focal points.

We also propose 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 reauthorization) and to emphasize the Act's aim that priority be given to serving older adults with greatest economic need and greatest social need.

§ 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 multi-purpose agency which functions as the AAA from having any purpose other than serving as an AAA. The Act promotes AAAs as innovative, collaborative organizations which adapt to ever-evolving social service, health and economic climates. We propose to 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 regulations (such as requirements with respect of conflicts of interest) to render this restriction unnecessary.

We also propose a minor revision to paragraph (a)(1) to take into account the addition of family caregivers as a service population pursuant to the 2000 reauthorization of the Act. We also propose minor revisions to this provision to update cross-references to other sections of the regulation.

§ 1321.61 Advocacy Responsibilities of the Area Agency

We propose 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 reauthorization of the Act.

§ 1321.63 Area Agency Advisory Council

The provision contained in § 1321.57 of the existing regulation (A*rea agency advisory council*) is redesignated here as § 1321.63. Section 306[114] of the Act requires AAAs to seek public input with respect to the area plan; accordingly, we propose new language in this section clarifying the AAA's advisory council duties with regards to soliciting and incorporating public input. Minor changes are proposed 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 planning and service area, including those identified as in greatest economic need or 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 Indian Tribes and older relative caregivers, should be represented in the council.

We also propose minor revisions to this provision to take into account the addition of family caregivers as a service population pursuant to the 2000 reauthorization of the Act.

§ 1321.65 Submission of an Area Plan and Plan Amendments to the State 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

[113] 42 U.S.C. 3026(a).

[114] 42 U.S.C. 3026.

responsible for ensuring that area plans comply with the requirements of section 306 [115] of the Act. We propose revisions to this provision to clarify for State agencies the area plan requirements that should be addressed by State policies and procedures. These include identification of populations in the planning and service area 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) [116] of the Act; minimum adequate proportion requirements per section 306(a)(2) [117] of the Act; and requirements for program development and coordination activities as proposed to be set forth in § 1321.27(h). States may include other requirements that meet State-specific needs.

We also propose to make an addition to area plan requirements to reflect changes in the nutrition program. The congregate meal program is a core Title III nutrition program, with designated funding and requirements as set forth under Title III C–1 of the Act. In addition to a healthy meal, the program provides opportunities for social interaction and health promotion and wellness activities. In response to the COVID–19 pandemic, ACL provided guidance on innovative service delivery options that grantees could take advantage of to provide meals to older individuals and other eligible recipients of home-delivered meals with Title III C–2 funds.[118] These options included shelf-stable, pick-up, carry-out, drive-through, or similar meals. In response to input received from grantees and stakeholders pursuant to the RFI, ACL proposes in new § 1321.87 to also allow these meal delivery methods with respect to Title III C–1 congregate meal funds, subject to certain terms and conditions. This proposal marks an expansion of the permitted use of congregate meals funds. Therefore, if State agency policies and procedures allow for this service option, 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 C–1 funds for new service delivery methods.

In paragraphs (c) and (d) we propose 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 propose to clarify in paragraph (e) that area plans must be coordinated with and reflect State plan goals. This provision parallels proposed § 1321.27(c), which requires the State plan to provide evidence the plan is informed by and based on area plans. State and area plans may have cycles that align or vary, based on multiple considerations. With this provision, we wish to clarify that State and area plans processes should be iterative, where each informs the other. We welcome comments regarding this proposed clarification.

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 propose 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 proposed updates to the regulation. For example, we propose 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 reauthorization of the Act. Additional minor revisions are proposed for clarity, such as distinctions in the manner in which Title III funds are awarded between single planning and service area states and states with AAAs, with cross references to proposed language on intrastate funding formulas, funds distribution plans, and provision of direct services by State agencies and AAAs.

§ 1321.73 Policies and Procedures. [Updated Title and Revised]

The provisions contained in § 1321.65 of the existing regulation (*Responsibilities of service providers under area plans*) are redesignated and proposed to be revised in part here as § 1321.73 and § 1321.79. Proposed § 1321.73 sets forth requirements to ensure AAAs and local service providers develop and implement policies and procedures to meet requirements as set forth by State agency policies and procedures, in accordance with proposed § 1321.9. Accordingly, we propose to move the requirements currently set forth in (b)–(g) to other sections. We also propose to specify that the State agency and AAAs must develop monitoring processes, which are encouraged to be made available to the public to ensure accountability and stewardship of public funds, as required by the Act.

§ 1321.75 Confidentiality and Disclosure of Information

Proposed § 1321.75 reorganizes and redesignates existing § 1321.51. The revised section proposes 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 proposed revisions will enhance the protections afforded OAA participants. Revised § 1321.75 also adds ''family caregivers''' as a service population under the Act to reflect the 2000 reauthorization of the Act.

We propose to 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 program services to reveal any information protected under the provisions in § 1324 Subpart A, State Long-Term Care Ombudsman Program. Similarly, State agencies, AAAs, and others subject to this provision may 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.[119]

The policies and procedures required under this section must ensure that service providers promote the rights of each older individual who receives such services, including the right to confidentiality of their records. We further propose that the policies and procedures must comply with all applicable Federal laws, codes, rules and regulations, including the Health Insurance and Portability and Accountability Act (HIPAA). The State

[115] *Ibid.*

[116] 42 U.S.C. 3027(a)(8).

[117] 42 U.S.C. 3026(a)(2).

[118] ACL, Frequently Asked Questions—Nutrition Services and Emergency Management (March 12, 2020) *https://acl.gov/sites/default/files/COVID19/C19FAQ-NutritionEM_2020-03-12.pdf* (last visited Jan. 18, 2023).

[119] The American Bar Assn., Model Rules of Professional Conduct: Rule 1.6 Confidentiality of Information (last visited Jan. 18, 2023).

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 (PHI).

Proposed § 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. We also propose to allow disclosure for program monitoring and evaluation by authorized Federal, State, or local monitoring agencies. Under the proposed 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. We further seek comment to ensure we sufficiently set forth this exception to the confidentiality requirement.

§ 1321.79 Responsibilities of Service Providers Under State and Area Plans. [Updated Title and Revised]

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 proposed 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 propose to encourage providers to offer self-directed services to the extent feasible and acknowledge service provider responsibility to comply with local adult protective services requirements, as appropriate. We propose that this provision apply 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 planning and service area 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.

§ 1321.83 Client and Service Priority. [Updated Title and Revised]

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 public health emergency. 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.

Proposed § 1321.101 clarifies that entities may prioritize services and that they have flexibility to set their own policies in this regard. It also clarifies that States are permitted to set service priorities, but they may delegate that responsibility to the AAA, and the AAA may, in turn, delegate the responsibility to local service providers. We also propose revisions to this provision to take into account 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 reauthorization of the Act.

§ 1321.93 Legal Assistance

The provision contained in § 1321.71 of the existing regulation (*Legal assistance*) is redesignated here as § 1321.93. We are proposing modifications to § 1321.93 Legal Assistance, to better reflect the purpose of the Act, and especially the application of section 101 [120] 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),[121] 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.'' Legal assistance programs funded under Title III–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) [122] by serving the needs of those with greatest economic need or greatest social need, including, historically underrepresented, and underserved populations, such as people of color, 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.

ACL intends to offer technical assistance, pursuant to section 202(a)(6) [123] of the Act, to States, 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.

We propose to combine 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 propose a technical correction to change the reference to statutory language in section (a) of the regulation from § 307(a)(15) [124] to § 307(a)(11),[125] which sets forth State plan requirements to legal assistance. Section 307(a)(15) sets forth requirements for serving older people with LEP.

Proposed § 1321.93(a) provides a general definition of legal assistance based on the definition in section 102(33) [126] of the Act. Proposed § 1321.93(b) sets forth the requirements for the State Agency on Aging to add clarity about its responsibilities. The State Agency on Aging 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 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. The State is also obligated to provide advice, training, and technical assistance support for the provision of legal assistance as provided in proposed § 1321.93 and section 420(a)(1) [127] of the Act. As part of its oversight role, the State Agency on Aging must ensure that

[120] 42 U.S.C. 3001.

[121] *Ibid.* at (10).

[122] 42 U.S.C. 3002(23) and (24).

[123] 42 U.S.C. 3012(a)(6).

[124] 42 U.S.C. 3027(a)(15).

[125] *Ibid.* at (a)(11).

[126] 42 U.S.C. 3002(33).

[127] 42 U.S.C. 3032i(a)(1).

the statutorily required contractual awards by AAAs to legal assistance providers meet the requirements of § 1321.93(c).

Proposed § 1321.93(c) sets forth the requirements for the AAA with regard to legal assistance. Similar to the State agency requirement to designate a minimum percentage of Title III–B funds to be directed towards 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 proposed 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 discrimination, and defense against guardianship. Section 1321.93(c) 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 proposed areas of law given priority in the Act, section 307(a)(11)(E).[128] 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 home and community-based services (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. With regard to expertise around 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 proposed area of focus is guardianship and alternatives to guardianship. Section 307(a)(11)(E) [129] of the Act also States: ''area agencies on aging will give priority to legal assistance related to . . . defense of guardianship.'' We interpret this provision to include advice to and representation of proposed protected persons to oppose appointment of a guardian and representation to seek revocation of or limitations of 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) [130] also states Title III–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.'' The language in section 321(a)(6)(B)(ii) [131] and the language in section 307(a)(11)(E) [132] 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.

Guardianship is a legal determination that infringes upon the rights and self-determination of individuals who are purported to lack capacity for decision-making. Guardianship disproportionately impacts older adults and adults with disabilities. We seek comments on how to reconcile the language in § 321(a)(6)(B)(ii) [133] with the general intent of the Act, as set forth in § 101(10),[134] to provide older people with freedom, independence, and the free exercise of individual initiative in planning and managing their own lives.

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. We also want to preclude conflicts of interest or the appearance of conflicts of interest that may arise if a legal assistance program represents petitioners to take away decisional rights of older persons and proposed protected persons or protected persons seeking to oppose or revoke appointment of a guardian. 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 at grave risk of being deprived of the basic human right to make their own decisions. ACL believes that legal assistance should not be used to represent a petitioner for guardianship of an older person except in the rarest of circumstances and seeks comment, as described above.

If we were to include the statutory exception in the regulations, we expect that it would 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

[128] 42 U.S.C. 3027(a)(11)(E).

[129] *Ibid.*

[130] 42 U.S.C. 3030d(a)(6)(B)(ii).

[131] *Id.*

[132] 42 U.S.C. 3027(a)(11)(E).

[133] 42 U.S.C. 3030d(a)(6)(B)(ii).

[134] 42 U.S.C. 3001(10).

many States have established, through bar associations and other pro bono services, or through hospitals, nursing homes, adult protective services, 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 adult protective services would not satisfy our interpretation of the limited applicability of the exception. These parties have access to counsel for representation in petitioning for guardianship.

We request comments on whether the proposed regulatory language is consistent with ACL's goal of promoting self-determination and the rights of older people. We also are interested in comments that describe the extent to which legal assistance programs represent an older person who seeks to become a guardian, the circumstances that precipitate the guardianship proceeding, whether alternatives to guardianship have been considered, and the availability of bar association and other pro bono options for representation of the petitioner.

Proposed § 1321.93(d) sets forth the requirements for 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 proposed 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. An AAA that contracted with such a provider would also not meet their obligations under proposed § 1321.93(b) and under the Act.

We propose 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. Legal assistance programs are required to collaborate with other programs that address and protect elder rights. We encourage coordination and collaboration with Adult Protective Services programs, State Health Insurance Assistance Programs, Protection and Advocacy systems, AAA and Aging and Disabilities Resource Center 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 Legal Services Corporation grantee entities to coordinate their services with existing Legal Services Corporation 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 of these required practices.

As indicated in proposed § 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 requiring contributions from legal assistance clients before or during the course of representation. Only after the conclusion of representation may a request for a contribution be made. If a client chooses to voluntarily make a contribution, the proceeds must be applied to expanding the service category.

The proposed 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 proposed 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 proposed 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 proposed 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.

B. New Provisions Added To Clarify Responsibilities and Requirements Under Grants to State and Community Programs on Aging

We propose the following new provisions to provide direction in response to inquiries and feedback received from grantees and other stakeholders and changes in the provision of services, and to clarify requirements under the Act. We welcome comment on these proposed changes.

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) [135] of the Act empowers State agencies to designate eligible entities as AAAs. Sec. 305(b)(5)(C)(i) [136] of the Act affords an AAA the right to appeal a State's decision to revoke its designation including up to the Assistant Secretary. Per section 305(b)(5)(C)(iv) [137] the Assistant Secretary may affirm or set aside the State agency's decision. Historically, appeals of AAA designation to the Assistant Secretary have been extremely rare.

Under proposed § 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 functions and provide robust due process protections to AAAs. This aligns with our proposed § 1321.17 and § 1321.39. The HHS DAB provides impartial, independent review of disputed decisions under more than 60 statutory provisions. We believe this proposal 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, proposed to be 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 of notification of receipt for those State plan amendments that are required to be submitted, but not approved by the Assistant Secretary for Aging. We propose this new section to provide for notification of receipt of State plan amendments that do not require Assistant Secretary approval.

§ 1321.47 Conflicts of Interest Policies and Procedures for State Agencies

Section 307(a)(7)(B) [138] of the Act directs State agencies to include assurances against COI in their State plans. The general definition of COI, included in the proposed definition section at 45 CFR 1321.3, describes 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. For example, a State agency may have specific COI requirements for providing case management or information and assistance/referral services under the Act. In other instances, a State agency which also oversees Medicaid managed care programs may choose to extend their COI policies in response to relevant Medicaid COI regulations in a similar way for all roles and services within the State, regardless of funding source. Additionally, State agencies may look to other ACL guidance concerning COI. For example, ACL has issued regulations related to the Ombudsman program (including proposed regulation updates at § 1324 Subpart A) and guidance related to Senior Health Insurance Program (SHIP) grantees, many of whom are housed in the State agency and/or in a AAA.[139] In 45 CFR 1321.47 we propose State agencies develop specific policies and procedures on COI given the complexity of the aging network and its various roles and responsibilities. We also propose similar requirements for AAAs, including the service providers to whom they provide funds under the Act in § 1321.67.

These policies and procedures at § 1321.47 must establish mechanisms to avoid both actual and perceived COI and to identify, remove, and remedy any existing COI at organizational and individual levels, including: (1) ensuring that State 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; (3) establishing robust monitoring and oversight, to identify COI; (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 or is perceived to have a COI; (5) requiring that other agencies in which a Title III program are operated have policies in place to prohibit the employment or appointment of those 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 COI or who has an immediate family member with a COI that cannot be adequately removed or remedied; (7) ensuring that no organization that provides a Title III service has or is perceived to have a COI; and (8) establishing the actions the State agency will require a Title III program to take in order to remedy or remove such conflicts.

The policies and procedures are intended to provide a mechanism for informing relevant parties of COI responsibilities and identifying and addressing conflicts when they arise. Examples of individual COIs involving a State employee administering Title III programs include a State agency dietitian responsible for Title III programs who owns a catering company that provides meals to Title III-funded programs and a State employee responsible for monitoring AAA programs who recently sold a plot of land to an AAA.

COI policies must also address organizational conflicts. These may arise as conflicts between competing duties, programs, and services or as other conflicts identified by the Assistant Secretary. Examples of organizational COI involving State agencies include operating Title III-funded programs and a public guardianship program or the Ombudsman program and an adult protective services program within the same organization.

If an actual, perceived, or potential COI is identified, State agencies should promptly follow the established procedures they have in place to mitigate the problem. Procedures to mitigate COI could include establishing firewalls between or among 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

[135] 42 U.S.C. 3025(a)(2)(A).

[136] *Ibid.* at (b)(5)(C)(i).

[137] *Ibid.* at (b)(5)(C)(iv).

[138] 42 U.S.C. 3027(a)(7)(B).

[139] See, *e.g.,* ACL guidance to SHIP grantees, many of which housed in the State agency and/or area agency. Admin. for Cmty. Living, Conflict of Interest: Identification, Remedy, and Removal (2020).

solutions that preserve the integrity of the mission of the Act. We welcome feedback on comprehensive, successful COI policies and procedures at State agency, AAA, and service provider levels, as well as if there are recommended tools used to identify conflicts and strategies used to mitigate or remedy identified conflicts. We also seek feedback concerning any COI under Title III (excluding the Ombudsman program, which has detailed conflicts of interest expectations, as set forth in § 1324 Subpart A) that should be prohibited.

§ 1321.53 State Agency Title III and Title VI Coordination Responsibilities

Proposed § 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),[140] 307(a)(21)(A),[141] 614(a)(11),[142] and 624(a)(3)[143] of the Act. We received inquiries and feedback from grantees and other stakeholders 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 propose to clarify that coordination is required under the Act and that all entities are responsible for coordination, including State agencies, AAAs, and service providers, and that State agencies must have specific policies and procedures to guide coordination efforts within the State.

Subpart C—Area Agency Responsibilities

§ 1321.59 Area Agency Policies and Procedures

Section 306[144] of the Act sets forth the responsibilities of AAAs regarding programs operated under the Act. Section 306,[145] in conjunction with other language throughout the Title III of the Act, establishes the AAA's role with relation to the State and service providers. However, we have received inquiries and feedback from AAAs and others that indicates a lack of clarity as to, for example, the scope of State versus AAA responsibility.

Proposed § 1321.59 States that AAAs shall develop policies and procedures governing all aspects of programs operated under the Act, in compliance with State 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 propose to incorporate the provision currently set forth at § 1321.25 (*Restriction of delegation of authority to other agencies*) within this new provision.

§ 1321.67 Conflicts of Interest Policies and Procedures for Area Agencies on Aging

Section 307(a)(7)(B)[146] of the Act sets forth prohibitions against COI in AAAs. Our proposals at § 1321.67, specific to the responsibilities of AAAs, are one of several provisions related to COI in this proposed rule, including a general definition at 45 CFR 1321.3 and requirements for State agencies at 45 CFR 1321.47. The landscape of activities undertaken by AAAs since the Act was first passed and our regulations issued has broadened significantly beyond traditional OAA services. With our proposed regulations, we seek to provide AAAs and service providers clarity and specificity such that they can confidently engage in business activities that may generate conflicts while remaining in compliance with the law, carrying out the objectives of the Act in the interest of the older people they serve.

45 CFR 1321.3 describes organizational and individual conflicts of interest. For example, an individual conflict may arise if an AAA director is involved in an award of a new subcontract to a service provider that employs the director's spouse. In this case, his private interest would be in direct conflict with his official responsibilities. Similar examples are an AAA board member who is also the executive director of a service provider to whom the AAA grants funds under the Act or a case manager funded under the Act who also works part-time as an intake coordinator at a local skilled nursing facility.

Examples of an organizational COI may be if a AAA has a contract with an integrated health care system and the AAA provides direct services to the clients that receive services in that health care system. Here, the AAA's financial interest in its contract with the health system is in conflict with its responsibility to serve OAA clients equitably and without preferential treatment. Other examples of organizational COI include a AAA who is asked to join an advocacy effort regarding poor services by a particular organization with whom the AAA is under negotiation to enter into a contract or commercial relationship or a service provider of options counseling under the Act who expects its options counselors to divide their time to take on case management responsibilities supporting a contract or commercial relationship with a specific managed care organization. The proposed language in this section requires COI policies and procedures for AAAs and complements the language proposed at § 1321.47 for State agencies. These policies and procedures must establish mechanisms to avoid both actual and perceived COI and to identify, remove, and remedy any existing COI at organizational and individual levels.

In other words, we propose that AAAs have policies and procedures to identify and prevent 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.

COI policies address individual conflicts on the part of the AAA, employees, and agents of the AAA who have responsibilities relating to Title III programs, including governing boards, advisory councils, and staff. The conflicts can be actual, perceived, or potential. The policies and procedures provide a mechanism for informing relevant parties of COI responsibilities and identifying and addressing conflicts when they arise. For example, an AAA may institute a policy that staff disclose relevant financial interests prior to assuming a position of oversight or authority over specific programs, functions, or commercial relationships.

COI policies must also address organizational conflicts. These may arise as conflicts between competing duties, programs, and services or as other conflicts identified by the Assistant Secretary. For example, a AAA should maintain a policy that it will not enter into an agreement to provide legal assistance services under Title III of the Act with an entity that serves as the public guardian because the legal assistance provider is required under the Act to represent older people ''in defense of guardianship,'' including revocation of existing guardianships. Defense of guardianship involves representing the person over whom guardianship is sought in the proceeding against them. We welcome feedback regarding if operating a guardianship program or accepting a

[140] 42 U.S.C. 3026(a)(11)(B).
[141] 42 U.S.C. 3027(a)(21)(A).
[142] 42 U.S.C. 3057e(a)(11).
[143] 42 U.S.C. 3057j(a)(3).
[144] 42 U.S.C. 3026.
[145] *Ibid.*
[146] 42 U.S.C. 3027(a)(7)(B).

guardianship appointment of an older person should be a prohibited conflict for AAAs, since the Act requires AAAs to advocate for the rights of older people, including in guardianship arrangements. Our proposed rules require policies and procedures addressing both these scenarios, which may represent actual potential or perceived conflicts.

If an actual, perceived, or potential COI is identified, AAAs should promptly follow the procedures they and State agencies have in place to mitigate the problem. Whether the potential COI is actual or perceived, it is essential that the AAA pursue solutions that preserve the integrity of the mission of the Act.

§ 1321.69 Area Agency on Aging Title III and Title VI Coordination Responsibilities

Consistent with proposed § 1321.53 (State agency Title III and Title VI coordination responsibilities), proposed § 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),[147] 307(a)(21)(A),[148] 614(a)(11),[149] and 624(a)(3) [150] of the Act. We propose to clarify that coordination is required under the Act and that all entities are responsible for coordination, including State agencies, AAAs, and service providers. The proposed section complements the language proposed at § 1321.53 for State agencies, and includes specific considerations for AAAs, such as opportunities to serve on AAA advisory councils, workgroups, and boards and opportunities to receive notice of Title III and other funding opportunities.

Subpart D—Service Requirements

§ 1321.77 Purpose of Services—Person- and Family-Centered, Trauma Informed

New proposed § 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 [151] 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.

§ 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.

Proposed § 1321.81 clarifies eligibility requirements under the Act and explains that States, 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.

§ 1321.85 Supportive Services

Proposed § 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 intrastate funding formula or funds distribution plan, as articulated in the State plan.

§ 1321.87 Nutrition Services

Proposed § 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 counseling, and other nutrition services. Based on experiences during the COVID pandemic and numerous requests for flexibility in provision of meals, we propose that meals provided under Title III 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 propose to 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 propose to specify that nutrition education, nutrition counseling, and other nutrition services may be provided with funds under Title III C–1 or –2 of the Act. As required by section 331(1),[152] we propose to set forth requirements that State and/or AAA policies shall determine the frequency of meals in areas where five days or more days a week of service is not feasible. This proposed provision clarifies that funds must be distributed through an approved intrastate funding formula or funds distribution plan, as articulated in the State plan.

Finally, this proposed provision sets forth requirements for Nutrition Services Incentive Program allocations. Nutrition Services Incentive Program allocations are based on the number of meals reported by the State agency which meet certain requirements, as specified. States may choose to receive their allocation grants as cash, commodities, or a combination thereof. Nutrition Services Incentive Program funds may only be used to purchase domestically-produced foods (definition included as proposed 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 Nutrition Services Incentive Program.

§ 1321.89 Evidence-Based Disease Prevention and Health Promotion Services

Proposed § 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 intrastate funding formula or funds distribution plan, as articulated in the State plan.

§ 1321.91 Family Caregiver Support Services

During the 2000 reauthorization of the Act, Congress added Title III, Part E to set forth allowable expenses for family caregiver support services. Proposed § 1321.91 clarifies the family caregiver support services available under the Act and eligibility requirements for respite care and supplemental services, as set

[147] 42 U.S.C. 3026(a)(11)(B).
[148] 42 U.S.C. 3027(a)(21)(A).
[149] 42 U.S.C. 3057e(a)(11).
[150] 42 U.S.C. 3057j(a)(3).
[151] 42 U.S.C. 3001.
[152] 42 U.S.C. 3030e(1).

forth in section 373(c)(1)(B).[153] It also clarifies allowable use of funds and that those funds must be distributed through an approved intrastate funding formula or funds distribution plan, as articulated in the State plan.

§ 1321.95 Service Provider Title III and Title VI Coordination Responsibilities

Consistent with proposed § 1321.53 (State agency Title III and Title VI coordination responsibilities) and proposed § 1321.69 (AAA Title III and Title VI coordination responsibilities), proposed § 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),[154] 307(a)(21)(A),[155] 614(a)(11),[156] and 624(a)(3)[157] of the Act. We propose to clarify that coordination is required under the Act and that all entities are responsible for coordination, including State agencies, AAAs, and service providers. The proposed section complements the language proposed at § 1321.53 for State agencies and § 1321.69 for AAAs, and includes those requirements specific to service providers.

Subpart E—Emergency and Disaster Requirements

Based on stakeholder input and our experience, particularly during the COVID–19 pandemic, we propose adding 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 current Subpart E (*Hearing Procedures for State Agencies*) is no longer necessary since we propose that the provisions in Subpart E be redesignated and covered in proposed Subpart B (*State Agency Responsibilities*).

Although the current 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, 42 U.S.C. 5121–5207, this MDD triggers certain disaster relief authority under section 310[158] of the Act. The COVID–19 pandemic 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 pandemic, 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.

Throughout the COVID–19 pandemic, we received inquiries and feedback that demonstrated a need for clarity on available flexibilities in an emergency. RFI respondents also provided substantial feedback regarding current 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 current regulatory guidance does 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 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 pandemic, 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 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 C–2 funds which are allocated to home-delivered meals 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 III C–2 and without any special authorization by ACL during an emergency. Those flexibilities have been incorporated where applicable in the proposed 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)[159] 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.

We also recognize that during an event which results in a MDD, such as the COVID–19 pandemic, 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 pandemic, we propose 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 propose to allow in this section, we are compelled to propose 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. We welcome comment on this new proposed section, including on the sufficiency of guidance provided and potential alternative approaches to achieve the goal of providing services to older adults during emergencies and disasters.

§ 1321.97 Coordination With State, Tribal and Local Emergency Management

Proposed § 1321.97 states that State agencies and AAAs must establish emergency plans, per sections 307(a)(28)[160] and 306(a)(17)[161] of the Act, respectively, and this proposed section specifies requirements under the

[153] 42 U.S.C. 3030s–1(c)(1)(B).
[154] 42 U.S.C. 3026(a)(11)(B).
[155] 42 U.S.C. 3027(a)(21)(A).
[156] 42 U.S.C. 3057e(a)(11).
[157] 42 U.S.C. 3057j(a)(3).
[158] 42 U.S.C. 3030.
[159] 42 U.S.C. 3030(c).
[160] 42 U.S.C. 3027(a)(28).
[161] 42 U.S.C. 3026(a)(17).

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 propose to 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).

§ 1321.99 Setting Aside Funds To Address Disasters

Proposed § 1321.99 describes the parameters under which States may set aside and use funds during a MDD, per section 310 [162] of the Act.

This section also clarifies that State agencies may specify that they are setting aside Title III funds for disaster relief in their intrastate funding formula 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 planning and service area covered by a specific MDD where Title III services are impacted, as well as requirements with respect to the awarding of such funds. We considered other alternatives to this funding set-aside, such as requiring States to spend funds through their intrastate funding formula for emergency and disaster relief rather than allowing for set asides to address these situations. We seek comment on both the requirement for allowing access to emergency or disaster funding and the method by which States can plan for and award those funds.

§ 1321.101 Flexibilities Under a Major Disaster Declaration

Proposed § 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, we propose to allow State agencies up to 90 days after the expiration of a MDD to obligate funds for disaster relief services.

We also recognize that during an event which results in a MDD, such as the COVID–19 pandemic, 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 pandemic, we propose additional options to be available to State agencies to expedite expenditures of Title III funds while a MDD is in effect, 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 planning and service area covered under a MDD to be used for direct service provision without having to allocate the funds through the intrastate funding formula. We selected a cap of five percent as State agencies are allowed under section 308(b)(2) [163] 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 pandemic, 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 we propose to 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 asking that various flexibilities allowed during the COVID–19 pandemic 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) [164] 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 major disaster declaration 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 PHE for COVID–19.

§ 1321.103 Title III and Title VI Coordination for Emergency Preparedness

Proposed § 1321.53 (State agency Title III and Title VI coordination responsibilities), proposed § 1321.69 (AAA Title III and Title VI coordination responsibilities), and proposed § 1321.95 (service requirements 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),[165] 307(a)(21)(A),[166] 614(a)(11),[167] and 624(a)(3).[168] Proposed § 1321.103 clarifies that Title III and Title VI coordination should extend to emergency preparedness planning and response.

§ 1321.105 Modification During Major Disaster Declaration or Public Health Emergency

Proposed § 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 declaration or public health emergency as declared by the U.S. Secretary for Health and Human Services.

C. Deleted Provisions

We propose deleting 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 propose deleting § 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 propose deleting § 1321.75, which describes State 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

[162] 42 U.S.C. 3030.

[163] 42 U.S.C. 3028(b)(2).

[164] 42 U.S.C. 3030(c).

[165] 42 U.S.C. 3026(a)(11)(B).

[166] 42 U.S.C. 3027(a)(21)(A).

[167] 42 U.S.C. 3057e(a)(11).

[168] 42 U.S.C. 3057j(a)(3).

longer necessary, since these responsibilities are addressed by other policies and procedures at the State and local levels.

V. Grants to Indian Tribes for Support and Nutrition Services

A. Provisions Revised To Reflect Statutory Changes and/or for Clarity

Subpart A—Introduction

§ 1322.1 Basis and Purpose of This Part

Proposed § 1322.1 sets forth the requirements of Title VI of the Act to provide grants to Indian Tribes and Native Hawaiian grantees. We propose consolidating 45 CFR 1322 and 45 CFR 1323 into 45 CFR 1322 and subsequently retitling this section as ''Grants to Indian Tribes and Native Hawaiian Grantees for Supportive, Nutrition, and Caregiver Services.'' We propose revising 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 propose to add language to incorporate Native Hawaiians and Native Hawaiian grantees. We also propose to clarify that terms not otherwise defined will have meanings ascribed to them in the Act.

§ 1322.3 Definitions

We propose to update the definitions of significant terms in § 1322.3 to reflect current statutory terminology and operating practice and to provide clarity. We propose to 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 stakeholders.

We propose to 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 propose to retain and make minor revisions to the terms: ''Acquiring,'' ''Altering or renovating,'' ''Constructing,'' ''Department,'' ''Means test,'' ''Service area,'' ''Service provider,'' and ''Tribal organization.'' We propose to retain with no revisions the terms: ''Budgeting period,'' ''Indian reservation,'' ''Indian tribe,'' ''Older Indians,'' and ''Project period.''

Subpart B—Application

§ 1322.5 Application Requirements

Section 1322.19 of the existing regulation (*Application requirements*) is redesignated here as § 1322.5. We propose minor revisions to align the provision with updates to proposed definitions and statutory terminology and requirements resulting from reauthorizations—such as adding family caregivers as a service population per the 2000 reauthorization of the Act and correcting the title of the Assistant Secretary for Aging—and regulatory references. We also propose minor language revisions for clarity.

To clarify important application components, we propose to specify that application submissions must include program objectives; 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; documentation of supportive and nutrition services capability; assurances including that the eligible organizations shall establish and follow policies and procedures as proposed in § 1322.13, complete a needs assessment to include older Native Americans and if applying for funds under Title VI Part C, family caregivers, align with data collection and reporting requirements, and complete program evaluation; a tribal resolution; and signature by a principal official.

§ 1322.7 Application Approval

Section 1322.21 of the existing regulation (*Application approval*) is redesignated here as § 1322.7. We propose minor revisions to align the provision with updates to correct the title of the Assistant Secretary for Aging. We also propose to clarify that no less than annual performance and fiscal reporting is required.

§ 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. We propose to transfer hearings from the Commissioner (now Assistant Secretary for Aging) to the Departmental Appeals Board (DAB). This proposal brings redesignated § 1322.9 into alignment with current § 1336.35 which delegates appeals to the DAB, as well as our proposed regulations on hearing procedures in for Title III of the Act.

The HHS DAB provides impartial, independent review of disputed decisions under more than 60 statutory provisions. We believe this proposed change will streamline administrative functions while preserving due process protections, and it furthers the objectives of the Act.

Subpart C—Service Requirements

§ 1322.13 Policies and Procedures

Sections 1322.9 (*Contributions*), 1322.11 (*Prohibition against supplantation*), and 1322.17 (*Access to information*) of the existing regulation are combined and redesignated here as § 1322.13 (*Policies and procedures*). For clarity and ease of reference, we propose to combine the areas for which a Tribal organization or Hawaiian Native grantee must have established policies and procedures in this provision.

Changes are also proposed to specify the many programmatic and fiscal requirements of which a Tribal organization or Hawaiian Native grantee should have established policies and procedures. The first area relates to identifying an individual to serve as the Title VI director, which is proposed to be defined in § 1322.3 as 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. A second proposed requirement regards data collection and reporting. Sections 614(a)(3) and 624(a)(4) of the Act require the collection of data and periodic submission of reports to ACL regarding a Tribal organization's or Hawaiian Native grantee's activities, respectively. ACL has implemented a national reporting system and reporting requirements that must be used by all Tribal organizations or Hawaiian Native grantees to ensure timely and consistent reporting. Proposed § 1322.13(b) sets forth the Tribal organization's or Hawaiian Native grantee's responsibility to have policies and procedures to ensure that its data collection and reporting align with ACL's requirements.

Proposed § 1322.13(c)(1) describes policies and procedures that must be in

place with respect to the direct provision of services, to ensure that services will meet requirements of the Act. In response to requests for technical assistance and feedback from listening sessions, this proposed section addresses comments that requested clarity on the policies and procedures that Tribal organizations and Hawaiian Native grantees must have, including setting requirements for client eligibility, assessment, and person-centered planning, where appropriate; access to information (as proposed to be combined from current § 1322.17) to include working with area agencies on aging and other Title III and VII-funded programs and 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.

Various fiscal requirements apply to the funding awarded under the Act. Over the years, we have found that some Tribal organizations or Hawaiian Native grantees may be unaware of certain requirements and/or may not understand their obligations under these requirements. We propose to add § 1322.13(c)(2) in order to provide guidance as to the following fiscal requirements relevant to the Act with respect to which the Tribal organization or Hawaiian Native grantee must have established policies and procedures: voluntary contributions (as proposed to be combined from current § 1322.9); buildings and equipment; and supplantation (as proposed to be combined from current § 1322.11).

We have received questions regarding use of Title VI funds for costs related to buildings and equipment, such as maintenance and repair. However, the Act provides limited guidance regarding this proposed use of funding for these purposes. We propose to add § 1322.13(c)(2)(ii) to provide such guidance to ensure that the funding will be 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 part. In addition, sections 614(a)(10) and 624(a)(10) of the Act provide that fiscal control and fund accounting procedures be adopted to assure proper disbursement of, and accounting for, Federal funds. To assist a Tribal organization or Hawaiian Native grantee in meeting their obligations, we propose to include a reference to 2 CFR 200 and that construction or acquisition of multipurpose senior centers are to be repaid to the Federal Government in certain circumstances. To ensure that third parties will be on notice of such requirement, we propose to include in this paragraph a requirement that a Notice of Federal Interest be filed. We welcome comment on this proposed section, including on the sufficiency of guidance provided and potential alternative approaches to achieve the goal of providing services to older Native Americans and family caregivers.

§ 1322.15 Confidentiality and Disclosure of Information

Section 1322.17 of the existing regulation (*Confidentiality and disclosure of information*) is redesignated here as § 1322.15. We propose minor revisions to align the provision with updates to proposed definitions and consolidation of § 1323 regarding applicability to a Hawaiian Native grantee. We also propose to 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. We further propose that the policies and procedures must follow the National Institutes for Standards Cybersecurity and Privacy Frameworks and other applicable Federal laws, including the Health Insurance and Portability and Accountability Act (HIPAA). The Tribal organization of Hawaiian Native grantee 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 (PHI).

§ 1322.25 Supportive Services

Section 1322.13 of the existing regulation (*Supportive services*) is redesignated here as § 1322.25. Proposed § 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, as set forth in section 601. Supportive services under Title III of the Act include in-home supportive services, access services, and legal services. We propose to clarify allowable use of funds, including for acquiring, altering or renovating, and constructing multipurpose senior centers.

We also propose to clarify that inappropriate duplication of services be avoided for participants receiving service under both Part A or B and Part C and to include minor language revisions for clarity and consistency with proposed definitions.

§ 1322.27 Nutrition Services

Section 1322.15 of the existing regulation (*Nutrition services*) is redesignated here as § 1322.27. Proposed § 1322.27 clarifies the 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, as set forth in section 601. As set forth in section 614(a)(8), nutrition services are 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. Based on experiences during the COVID–19 pandemic and numerous requests for flexibility in provision of meals, we propose to clarify that home-delivered meals may be provided via home delivery, pick-up, carry-out, or drive-through; 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 propose to 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 propose minor clarifications for consistency.

Finally, this proposed provision sets forth requirements for Nutrition Services Incentive Program allocations. Nutrition Services Incentive Program allocations are 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. Nutrition Services Incentive Program funds may only be used to purchase domestically-produced foods (definition included as proposed in § 1322.3) 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 Nutrition Services Incentive Program.

B. New Provisions Added To Clarify Responsibilities and Requirements Under Grants to Indian Tribes and Native Hawaiian Grantees for Supportive, Nutrition, and Caregiver Services

We propose the following provisions to provide guidance in response to inquiries and feedback received from grantees and other stakeholders and changes in the provision of services, and to clarify requirements under the Act. We welcome comment on these proposed changes.

Subpart C—Service Requirements

§ 1322.11 Purpose of Services Allotments Under Title VI

Proposed § 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.

§ 1322.17 Purpose of Services—Person- and Family-Centered, Trauma Informed

Proposed § 1322.17 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. Recognizing and respecting the deep family and community connections of Native Americans that may be contrasted with more individualized approaches in non-Native American communities, we especially seek feedback regarding other terminology to use in expressing intended approaches to serving older Native Americans and family caregivers.

§ 1322.19 Responsibilities of Service Providers

Proposed § 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 adult protective services requirements, as appropriate; arranging for weather-related and other emergencies; assisting participants to benefit from other programs; and coordinating with other appropriate services.

§ 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.

Proposed § 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.

§ 1322.23 Client and Service Priority

We 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. 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.

Proposed § 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 propose to list the priorities for serving family caregivers as set forth in the section 631(b) of the Act, pursuant to the 2000 reauthorization of the Act.

§ 1322.29 Family Caregiver Support Services

During the 2000 reauthorization of the Act, Congress added Title VI, Part C to set forth allowable expenses for family caregiver support services. Proposed § 1322.29 clarifies the family caregiver support services available under the Act and eligibility requirements for respite care and supplemental services, as set forth in section 631. It also clarifies allowable use of funds and that this program is intended to serve unpaid family caregivers.

§ 1322.31 Title VI and Title III Coordination

Consistent with proposed § 1321.53 (State agency Title III and Title VI coordination responsibilities), proposed § 1321.69 (area agency Title III and Title VI coordination responsibilities), and proposed § 1321.95 (service requirements for Title III and Title VI coordination), proposed § 1322.31 outlines expectations for coordinating activities and delivery of services under Title VI and Title III, as articulated in the Act sections 306(a)(11)(B), 307(a)(21(A), 614(a)(11), and 624(a)(3). We propose to clarify that coordination is required under the Act and that all entities are responsible for coordination, including a Tribal organization and a Hawaiian Native grantee. The proposed section complements the language proposed at § 1321.53 for State agencies, § 1321.69 for area agencies, and § 1321.95 for service providers under Title III of the Act.

Subpart D—Emergency & Disaster Requirements

The COVID–19 pandemic highlighted the importance of Tribal organizations' and the Hawaiian Native grantees' efforts 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 they may uniquely affect older Native Americans and family caregivers.

If a State or Indian Tribe receives a major disaster declaration (MDD) by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207, this MDD triggers certain disaster relief

authority under section 310 of the Act. The COVID–19 pandemic for example, demonstrated the devastating impact of a PHE on the target population of services under the Act. During the COVID–19 PHE, all States and some Indian Tribes 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 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 PHE, we received inquiries and feedback that demonstrated a need for clarity on available flexibilities in an emergency. RFI respondents also provided substantial feedback regarding current 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 current regulatory guidance does 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 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 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 preparedness plans at all levels.

Based on stakeholder input and our experience, particularly during the PHE, we propose adding Subpart D—Emergency and Disaster Requirements (§§ 1322.33–1322.39) 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 proposed 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, 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.

We welcome comment on this new proposed section, including on the sufficiency of guidance provided and potential alternative approaches to achieve the goal of providing services to older Native Americans and family caregivers during emergencies and disasters.

§ 1322.33 Coordination With Tribal, State, and Local Emergency Management

Proposed § 1322.33 states that Tribal organizations and Hawaiian Native grantees must establish emergency plans, and this proposed 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 propose to 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).

§ 1322.35 Flexibilities Under a Major Disaster Declaration

Proposed § 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, we propose to allow 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 asking that various flexibilities allowed during the COVID–19 pandemic 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, 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.

§ 1322.37 Title VI and Title III Coordination for Emergency Preparedness

Proposed § 1321.57 (State agency Title III and Title VI coordination responsibilities), proposed § 1321.69 (area agency Title III and Title VI coordination responsibilities), and proposed § 1321.95 (service requirements 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), 307(a)(21(A), 614(a)(11), and 624(a)(3). Proposed § 1322.37 clarifies that Title VI and Title III coordination should extend to emergency preparedness planning and response.

§ 1322.39 Modification During Major Disaster Declaration or Public Health Emergency

Proposed § 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 major disaster declaration or public health emergency.

C. Deleted Provisions

§ 1322.5 Applicability of Other Regulations

We propose deleting § 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.

VI. Grants for Supportive and Nutritional Services to Older Hawaiian Natives

A. Deleted Provisions

We propose deleting § 1323, which is specific to Title VI, Part B, which

applies to one Hawaiian Native grantee. We propose to include requirements specific to Title VI, Part B in the proposed § 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.

VII. 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 seven 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, through our technical assistance and RFI processes, ACL has found that clarification is needed in certain aspects of the regulation. For example, there is a lack of clarity as to the responsibilities, and the authority, of the State Long-Term Care Ombudsman (Ombudsman), as well as of the Ombudsman program. Clarification also is needed as to duties owed to residents and confidentiality requirements with respect to a resident's identity and records, and corrections are needed to COI.

§ 1324.1 Definitions

We propose to add a new definition for ''Official duties'' to § 1324.1 for consistency with the Title III regulation, which also contains this defined term. In both the Title III regulation and this regulation, this term is used to define the duties of representatives of the Office Long-Term Care Ombudsman Program. As currently defined at § 1324.1, representatives of the Office of the State Long-Term Care Ombudsman (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 being included to help to clarify the role of representatives of the Office because in the course of providing technical assistance over the last several years, it has come to our attention that this role can be misunderstood by third parties who deal with the program. In addition, minor changes for clarity are proposed to the definition of ''*Resident representative*.''

§ 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 propose minor changes to § 1324.11(a) and to the introductory clause of (b), as well as to (e), (e)(1)(i), (e)(1)(v); (e)(4)(i), (ii) and (iii); (e)(5), (e)(6) and (e)(8)(ii), to clarify the purpose of the section. Other proposed 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. Currently, § 1324.11 does 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 propose to 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 records and they have no legal representative who can communicate consent for them. We propose to add the requirement for policies and procedures as § 1324.11(e)(2)(iv)(C) and to 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 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. 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 propose to 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. To provide clarity, we propose to add language to § 1324.11(e)(3)(v) to require State agencies to have policies and procedures in place to prohibit mandatory reporting of abuse, neglect, and exploitation by the Ombudsman program. 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. Section 712 also provides that 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. 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.

ACL received input with respect to these obligations of the Ombudsman in response to the RFI, and we have been made aware of instances where State government agencies have attempted to involve themselves in these functions of the Office (*e.g.,* by requiring prior approval of positions of the Office with

respect to governmental laws, regulations, or policies). Such interference is prohibited under section 712 of the Act, and we propose to add language to the introductory portion of § 1324.11(e)(8) to clarify this prohibition. Specifically, we propose to 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.''

§ 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. 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 propose to clarify § 1324.13 to provide that the Ombudsman has the authority to lead and manage the Office. Specifically, we propose to 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. Current regulatory § 1324(c)(2) provides that each Ombudsman must ''. . . establish procedures for training for certification and continuing education of the representatives of the Office, based on model standards established by the Director of the Office of Long-Term Care Ombudsman Programs within the Administration for Community Living as described in section 201(d) of the Act . . .'' Since the regulation was initially adopted, ACL has issued sub-regulatory training standards for representatives of the Office. Accordingly, we propose to update § 1324.13(c)(2) to require such procedures to be consistent with (as well as based on) 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 by changing the regulation to read, ''[. . .] 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 within the Administration for Community Living as described in section 201(d) of the Act and 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 limitations on disclosure of such records and on the disclosure of the identity of residents. Section 712 also requires that representatives receive adequate training with respect to program requirements. 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. We propose to add language to § 1324.13(c)(2(iii) and (d) to 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 and received RFI comments on this topic. In response, we propose to 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 provides for protection and advocacy agencies' 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.[169] Consistent with our authority to interpret these two statutes, we have taken a thoughtful and deliberative approach to resolving any potential conflicts in interpretation of them. To that end, we considered comments received in response to the development of the Ombudsman program regulation (45 CFR 1324). In addition, since the enactment of the Final Rule for the Ombudsman program, representatives of ACL's Administration on Aging and Administration on Disabilities have engaged in diligent efforts to work together toward addressing this potential conflict including, but not limited to, outreach to the National Ombudsman Resource Center (NORC) and the National Disability Rights Network (NDRN) in order 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 individual States as issues arise in order to assist protection and advocacy agencies and Ombudsman programs to come to an agreement on how to handle these questions.

For example, as follow-up to a report by NORC, NDRN, and the National Association of State Ombudsman Programs, NORC and NDRN co-branded a toolkit on collaboration between Ombudsman programs and protection and advocacy agencies.[170] We encourage such collaboration, and we welcome comment regarding best practices in such collaboration, as well as if any more specific protocols are recommended.

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. The information required to be included in this annual report is in addition to the data reporting that is required by ACL to be submitted annually through the national data reporting system known as the National Ombudsman Reporting System. We have found that some Ombudsman programs do not

[169] 42 U.S.C. 15043.

[170] The National Consumer Voice, Long-Term Care Ombudsman Programs and Protection & Advocacy Agencies Collaboration Toolkit, *https://ltcombudsman.org/omb_support/pm/collaboration/ltcop-protection-and-advocacy-agencies-collaboration-toolkit* (last visited Jan. 18, 2023).

understand that the annual report required by section 712 differs from the annual National Ombudsman Reporting System reporting. We propose to add language at the start of § 1324.13(g) to clarify the distinction between these two reports.

The Ombudsman program's effectiveness in advocacy relies on relationships with other entities that can assist residents. Section 712 of the Act contemplates that the Ombudsman program will coordinate services with legal assistance providers and others, as appropriate, and requires the Ombudsman program to enter into memoranda of understanding with legal assistance providers. The current regulation lacks clarity regarding memoranda of understanding that are required. Accordingly, we propose to revise § 1324.13(h)(i) to require the adoption of memoranda of understanding with legal assistance programs provided under section 306(a)(2)(C) of the Act. The proposed language would minimally require such memoranda of understanding to address referral processes and strategies to be used when the Ombudsman program and a legal assistance program are both providing services to a resident.

Further, we propose to require memoranda of understanding with facility and long-term care provider licensing and certification programs to address communication protocols and 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 proposing this requirement is set forth in § 1324.13(h)(1)(ii).

Consistent with the rule as promulgated in 2015, we also propose to clarify that memoranda of understanding are recommended with other organizations, programs and systems as set forth in § 1324.13(h)(2). We invite comments regarding other organizations that may be considered for inclusion, such as Centers for Independent Living. Elements of § 1324.13(h) have been re-numbered in connection with these changes. We also propose minor changes to § 1324.13(a)(7)(viii), and (h) for clarity.

§ 1324.15 State Agency Responsibilities Related to the Ombudsman Program

Section 712 [171] of the Act sets forth State agency responsibilities for the Ombudsman program. 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. We propose 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 provision for attorney-client privilege is modified 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. Proposed § 1324.15(k) provides direction to assist State agencies with specific components of fiscal management and codifies several best practices that we have observed. Specifically, we propose that the State agency shall notify the Ombudsman of all sources of funds for the program and requirements for those funds, and that the State agency 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 prior to distribution of funds. In addition, the proposed section requires the Ombudsman to determine that program budgets and expenditures of the 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(k) is re-numbered accordingly.

We also propose to replace the word ''of'' with ''for'' in the last sentence of § 1324.15(e) in order to correct a typographical error relating to reasonable requests ''for'' reports by the State agency as it conducts its monitoring responsibilities.

[171] 42 U.S.C. 3058g.

§ 1324.19 Duties of the Representatives of the Office

This section provides direction as to 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 proposed to § 1324.19(b)(2)(ii) and (5) for clarity.

§ 1324.21 Conflicts of Interest

It is crucial to the credibility and effectiveness of the Ombudsman program that the Ombudsman be aware of, and address, potential and actual conflicts of interest. Accordingly, section 712(f) of the Act contains requirements related to individual and organizational conflicts of interest which were revised in the 2016 reauthorization of the Act, and § 1324.21 provides direction to Ombudsman programs in identifying and remedying these conflicts of interest. We propose several changes to the existing provision for clarity and consistency with the Act.

We propose to revise § 1324.21(a)(1) to be consistent with section 712(f)(2)(A)(i) of the Act. Our prior regulations held that placing the Ombudsman program in an organization responsible for licensing, surveying, or certifying long-term care facilities represents an organizational conflict of interest. We now clarify that in addition, placing the Ombudsman program in an organization that licenses, surveys, or certifies long-term care services represents an organizational conflict of interest, more accurately reflecting section 712(f)(2)(A)(i).

We propose to insert a new § 1324.21(a)(6) stating that placement of a program in an organization that provides long-term care services and supports under a Medicaid waiver or a Medicaid State plan amendment creates an organizational conflict of interest, consistent with section 712(f)(2)(A)(iii) of the Act.

We propose to change the following phrase in current § 1324.21(a)(10): ''Conducts preadmission screening for long-term care facility placements'' to ''Conducts preadmission screening for long-term care facility admissions'' in order to reflect person-centered language.

We also propose to clarify the following in current § 1324.21(a): that placement of the Office, or requiring that an Ombudsman or representative of the Office perform conflicting activities, in an organization that provides long-term care coordination or case management services in settings that

include long-term care facilities creates an organizational conflict of interest, consistent with section 712(f)(2)(A)(iv) of the Act, by revising current § 1324.21(a)(6) and re-numbering it as § 1324.21(a)(7); that to place the Ombudsman program in an organization that sets reimbursement rates for long-term care services creates an organizational conflict of interest, consistent with section 712(f)(2)(A)(v) of the Act, by inserting a new § 1324.21(a)(9); and that to place the program in an organization that is responsible for eligibility determinations for the Medicaid program carried out under title XIX of the Social Security Act creates an organizational conflict of interest, consistent with section 712(f)(2)(A)(vii) of the Act, by inserting a new § 1324.21(a)(11). Subsequent subsections within § 1324.21(a) have been re-numbered to reflect the addition of this new language.

We propose minor changes to § 1324.21(b)(3) for clarity. We propose to delete the last sentence of § 1324.21(b)(5), which provides that the ''State agency shall not enter into such contract or other arrangement with an agency or organization which is responsible for licensing or certifying long-term care facilities in the State or is an association (or affiliate of such an association) of long-term care facilities;'' this requirement is set forth in § 1324.21(b)(3) and is unnecessary to repeat here.

We propose to clarify the following in § 1324.21(c): that direct involvement in the licensing, or certification of a provider of long-term care services, in addition to long-term care facilities, creates an individual conflict of interest, consistent with section 712(f)(1)(C)(i) of the Act, by revising current § 1324.21(c)(2)(i); that ownership, operational, or investment interest (represented by equity, debt, or other financial relationship) in an existing or proposed long-term care service, in addition to a long-term care facility, creates an individual conflict of interest, consistent with section 712(f)(1)(C)(ii) of the Act, by revising current § 1324.21(c)(2)(ii); that employment of an individual by, or participation in the management of, an organization related to a long-term care facility creates an individual conflict of interest, consistent with section 712(f)(1)(C)(iii) of the Act, by revising current § 1324.21(c)(2)(iii); that management responsibility for, or operating under the supervision of an individual with management responsibility for, adult protective services creates an individual conflict of interest, consistent with section 712(f)(1)(C)(v) of the Act, by inserting a new § 1324.21(c)(2)(ix); and that 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) creates an individual conflict of interest, consistent with section 712(f)(1)(C)(vi) of the Act, by inserting a new § 1324.21(c)(2)(x).

B. New Provisions Added To Clarify Responsibilities and Requirements Under Vulnerable Elder Rights Protection Activities

Subpart B—Programs for Prevention of Elder Abuse, Neglect, and Exploitation

§ 1324.201 Purpose of Services Allotments Under Title VII—Chapter 3. [New]

The purpose of Title VII, Chapter 3 of the Act is to set forth requirements that State agencies must meet with respect to the development and enhancement of programs to address elder abuse, neglect, and exploitation. We propose to include a new § 1324.201 in the regulation in order to clarify this purpose. The proposed language also clarifies that the Federal funds awarded to the State agency under this Chapter are provided to assist with carrying out this purpose, and that a condition to the receipt of these funds is that State agencies must comply with all applicable provisions of the Act, including those of section 721(c), (d), (e), as well as with applicable guidance set forth by the Assistant Secretary for Aging.

Subpart C—State Legal Assistance Development Program [New]

§ 1324.301 Definitions

Proposed § 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 propose to add a new regulation under Title VII, § 1321.303 to implement § 731 [172] of the Act regarding the position of Legal Assistance Developer. The proposed regulation is intended to provide clear guidance on the purpose, role, and responsibilities of the Legal Assistance Developer as described in the Act. It is the responsibility of the State agency to designate the Legal Assistance Developer and describe the office and its duties and activities in the State plan. The proposed regulation sets forth what the Legal Assistance Developer may do in accordance with their statutory appointment and the provisions of the Act, including training and technical assistance to legal assistance providers and coordination with the Ombudsman program. Additionally, the proposed rule includes conflict of interest prohibitions. ACL recognizes that Legal Assistance Developers often ''wear many hats.'' We are proposing that the Legal Assistance Developer should not undertake responsibilities other than or in addition to those the Act expressly prescribes for Legal Assistance Developers if these other activities might compromise the performance of duties as Legal Assistance Developer or the duties in other assignments. Accordingly, the Legal Assistance Developer should not undertake to be the director of Adult Protective Services, legal counsel to the Ombudsman program, or counsel or a party to administrative appeals related to long-term care settings, for example. Conflicts of interest may arise, for example, if the Legal Assistance Developer also serves as the administrator of a public guardianship program; hearing officer in Medicaid appeals related to Medicaid waiver programs, Medicaid state plan long-term services and supports, and/or nursing home eligibility; or serves as the Ombudsman.

The State must provide advice, training, and technical assistance support for the provision of legal assistance. It is the role of the Legal Assistance Developer to oversee the advice, training, and technical assistance with regard to all activities of legal assistance. The role should be broader than aligning with the Ombudsman program functions in Title VII of the Act and encompass all legal assistance and representation for all priority areas described in the Act. In fulfilling these obligations, the Legal Assistance Developer should make maximal use of the resource center established pursuant to section 420 [173] of the Act.

VIII. Required Regulatory Analyses

A. Regulatory Impact Analysis (Executive Orders 12866 and 13563)

Executive Orders 13563 and 12866 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

[172] 42 U.S.C. 3058j.

[173] 42 U.S.C. 3032i.

(including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Information and Regulatory Affairs reviewed and determined that this proposed rule is a significant regulatory action as defined by Executive Order 12866 Section 3(f).

1. Summary of Costs and Transfers

This analysis describes costs and transfers under this proposed 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 subgrantees (area agencies on aging and service providers under Title III and where applicable, Title VII). Specifically, we quantify costs associated with grantees and subgrantees 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 proposed rule would result in one-time costs of approximately $14.9 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. We request comments on our estimates of the impacts of this proposed rule, including the impacts that are not quantified in this analysis.

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 States 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 on aging, 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–B, such as screening for traumatic brain injury and the negative effects of social isolation; clarifying that a purpose of the Title III–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 to include community outreach and education and 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 current 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 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 proposed changes to 45 CFR parts 1321, 1322, and 1324 would modernize the OAA regulations to bring them into conformity with reauthorizations of the OAA that were enacted prior to the 2020 reauthorization and would 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 propose to better align regulation with statute, we propose modifications to regulatory text that would modernize our rules to provide greater flexibility to State agencies and area agencies and to reflect ongoing stakeholder feedback and responses to our RFI in areas where our current regulations do not address the evolving needs of Title III, VI, and VII grantees and the older adults and family caregivers they serve. For example, we propose to modernize our nutrition rules 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 pandemic. The COVID–19 pandemic brought to light limitations in our current nutrition regulations, which we have sought to address in proposed § 1321.87 to allow for ''grab and go'' meals where a participant would be able to collect their meal from a congregate site and return to the community off-site to enjoy it. Our proposal is a direct response to stakeholder feedback, including as gathered from the RFI, and appropriately reflects the evolving needs of both grantees and OAA participants.

Another example of a proposed modification to regulatory text that would modernize our rules is the new proposed definition of ''greatest economic need.'' Focusing OAA services towards 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 would 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; 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; and clarifying that reducing malnutrition is a purpose of the OAA Title III–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.[174] For those agencies that have not been reaching out to LGBTQI+ communities, we believe any additional cost to conduct outreach to this population would be de minimis, as they already have processes in place to reach out to underserved populations. The data collection cost likewise would 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 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'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 would be de minimis, and we request comments on our analysis of such costs to a State agency.

We do not associate any costs to State agencies, area agencies or Title VI grantees with respect to the clarification that a purpose of the Title III–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 subgrantees.

ii. Proposed Rule

a. Revising Policies and Procedures

This analysis anticipates that the proposed rule would result in one-time costs to State agencies, area agencies, service providers, and Title VI grantees to revise policies and procedures. The obligations of State agencies and area agencies 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, area agencies separately from Title VI grantees. We also address service providers separately, as we anticipate that the scope of the review needed for service providers would be narrower than that needed for State agencies and area agencies.

In addition to changes to the existing regulations, we propose to 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 & Disaster Requirements; 45 CFR part 1322 (Title VI): Service Requirements, Emergency & Disaster Requirements; and 45 CFR part 1324 (Title VII): Programs for Prevention of Elder Abuse, Neglect, and Exploitation and Legal Assistance Developer. However, substantially all of these proposed new provisions would update the OAA regulations to bring them into conformity with reauthorizations of the OAA that were enacted prior to the 2020 reauthorization and would 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, area agencies, 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, area agencies, 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 Area Agencies

In clarifying requirements for State agency and area agency policies and procedures under the OAA, ACL anticipates that all 56 State agencies and 615 area agencies (671 aggregate State and area agencies) would revise their policies and procedures under the proposed rule, with half of these State or area agencies requiring fewer revisions. We estimate that State or area agencies with more extensive revisions would spend forty-five (45) total hours on revisions per agency. Of these, forty (40) hours in the aggregate would 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), at a cost of $48.07 per hour after adjusting for non-wage benefits and indirect costs, while an average of five (5) hours would be spent by executive staff equivalent to a general and operations manager (BLS Occupation code 11–1021), at a cost of $120.32 per hour after adjusting for non-wage benefits and indirect costs. For State or area agencies with less extensive revisions, we assume that twenty-five (25) total hours would be spent on revisions per agency. Of these, twenty (20) hours would be spent by one or more mid-level manager(s), and five (5) hours would be spent by executive staff.

We monetize the time that would be spent by State agencies and area agencies on revising policies and procedures by estimating a total cost per entity of $2,524.40 or $1,563.00, depending on the extent of the revisions. For the approximately 336 State or area agencies with more extensive revisions, we estimate a cost of approximately $848,198.40. For the 335 State or area agencies with less extensive revisions, we estimate a cost of approximately $523,605.00. We estimate the total cost associated with revisions with respect to the proposed rule for State agencies and area agencies of $1,371,803.40.

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 would review their existing policies and procedures to confirm that they are in compliance with the rule and would 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 would be narrower than that needed for State agencies and

[174] For example, in its plan on aging that was effective as of October 1, 2018, the CA State agency noted a focus on developing strategies to better serve LGBTQI+ populations; the OH 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 NY 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.

area agencies and would 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, area agencies 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 would spend seven (7) total hours on revisions per agency. Of these, five (5) hours in the aggregate would 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), at a cost of $48.07 per hour after adjusting for non-wage benefits and indirect costs, 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), at a cost of $120.32 per hour after adjusting for non-wage benefits and indirect costs.

We monetize the time spent by service providers on revising policies and procedures by estimating a total cost per entity of $480.99. We estimate the total cost associated with revisions with respect to the proposed rule for 17,438 service providers of $8,387,503.60.

Title VI Grantees

This analysis anticipates that the proposed rule also would 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 282 Title VI grantees would revise their policies and procedures under the proposed rule, with one-third of these Title VI grantees requiring fewer revisions. We estimate that Title VI grantees with more extensive revisions would spend thirty (30) total hours on revisions per agency. All of these 30 hours would be spent by a mid-level manager equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43–1011), at a cost of $48.07 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 would be spent by a mid-level manager equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43–1011), at a cost of $48.07 per hour after adjusting for non-wage benefits and the indirect costs.

We monetize the time spent by Title VI grantees on revising policies and procedures by estimating a total cost per entity of $1,442.10 or $721.05, depending on the extent of the revisions. For the approximately 188 Title VI grantees with more extensive revisions, we estimate a cost of approximately $271,114.80. For the 94 Title VI grantees with less extensive revisions, we estimate a cost of approximately $67,778.70. We estimate the total cost associated with revisions of policies and procedures for Title VI grantees with respect to the proposed rule of $338,893.50.

The above estimates of time and number of State agencies, area agencies and Title VI grantees that would revise their policies under the regulation are approximate estimates based on ACL's extensive experience working with the agencies, including providing technical assistance, and feedback and inquiries that we have received from States, area agencies, and Title VI grantees. Due to variation in the types and sizes of State agencies, area agencies, and Title VI grantees, the above estimates of time and number of entities that would revise their policies under the regulation is difficult to calculate precisely. We seek comment on the accuracy of the estimates provided above.

b. Training

ACL estimates that State agencies, area agencies, service providers and Title VI grantees would incur one-time costs with respect to training or re-training employees under the proposed revised rule. 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. We also address service providers separately, as we anticipate that the training needed for service providers would be less extensive than that needed for State agencies and area agencies.

State Agencies and Area Agencies

Costs to prepare and conduct trainings of their own staff. Consistent with our estimates relating to the number of agencies that would require extensive revision of their policies, we estimate that 50 percent of the State agencies and area agencies program management staff would require more extensive staff training regarding the rule. Based on our experience working with State agencies and area agencies, we estimate that, for State and area agencies 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) would spend three (3) total hours to prepare the training, and five (5) hours to provide the training, at a cost of $48.07 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) would spend two (2) total hours to prepare the training, and two (2) hours to provide the training, at a cost of $48.07 per hour after adjusting for non-wage benefits and indirect costs.

We monetize the time spent by State agencies and area agencies to prepare and conduct trainings for their own employees by estimating a total cost per entity of $384.56 or $192.28, depending on the extent of the training needed. For the approximately 336 State or area agencies with more extensive needed training, we estimate a cost of approximately $129,212.16. For the 335 State or area agencies with less extensive training needs, we estimate a cost of approximately $64,413.80. We estimate the total cost associated with the preparation and conduct of trainings with respect to the proposed rule for State agencies and area agencies of $193,625.96.

Costs to receive trainings by their own staff. As noted above, we estimate that 50 percent of the State agencies and area agencies program management staff would require more extensive staff training regarding the rule. Based on our experience working with State agencies and area agencies, we estimate that State and area agencies with more extensive trainings would spend five (5) total hours on trainings per agency, and that those with less extensive trainings would 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), would receive training at a cost of $48.00 per hour per employee after adjusting for non-wage benefits and indirect costs, and that one (1) employee per agency, equivalent to a business operations specialist (BLC Occupation code 13–1199), would receive at a cost of $49.53 per hour after adjusting for non-wage benefits and indirect costs.

We monetize the time spent in the receipt of trainings by estimating a total cost per entity of $1,447.65 or $579.06, depending on the extent of the trainings. For the approximately 336 State or area agencies with more extensive trainings, we estimate a cost of approximately

$486,410.40. For the 335 State or area agencies with less extensive trainings, we estimate a cost of approximately $193,985.10. We estimate the total cost associated with receipt of training by employees with respect to revisions to policies and procedures under the proposed rule of $680,395.50.

Costs to conduct trainings of area agencies by State agencies. We estimate that each of the forty-seven (47) State agencies that have area agencies would conduct one (1) training for their area agencies. 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), would spend three (3) total hours to conduct the training, at a cost per employee of $48.07 per hour after adjusting for non-wage benefits and indirect costs. As the State agencies already would have created trainings for their own employees, we do not associate any costs with the creation of trainings for the area agencies. We monetize the time spent by the 47 State agencies to train area agencies by estimating a cost per agency of $288.42. We estimate the total cost to the State agencies to train area agencies to be $13,555.74.

We estimate that each of the 615 area agencies would arrange for two (2) area agency employees, each equivalent to a first-line supervisor (U.S. Bureau of Labor Statistics (BLS) Occupation code 43–1011), to attend the three (3) hour trainings conducted by the State agency, at a cost per employee of $48.07 per hour after adjusting for non-wage benefits and indirect costs. We monetize the time spent by the 615 area agencies to attend the State agency trainings by estimating a cost per agency of $288.42. We estimate the total cost associated to the area agencies to receive training from the State agencies to be $177,378.30. We estimate the total costs associated with the training by State agencies of area agencies to be $190,934.04.

Service Providers

Cost to conduct trainings. We estimate that the 615 area agencies, as well as the 9 State agencies in single planning and service area states that do not have area agencies, would provide training to their service providers with respect to revisions to policies and procedures under the proposed rule. We estimate that two (2) area agency 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), would spend two (2) total hours to conduct one (1) training, at a cost of $48.07 per hour after adjusting for non-wage benefits and indirect costs. As the State agencies and area agencies already would 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 area agencies and the 9 State agencies to train service providers by estimating a cost per agency of $192.28. We estimate the total cost associated with the conduct of trainings of service providers to be $119,982.72.

Cost to receive training. We estimate that all 17,438 service providers would receive training regarding revised policies and procedures in connection with the proposed rule. We estimate that two (2) employees per agency, equivalent to social and community service managers (BLS Occupation code 11–9151), would receive two (2) hours of training at a cost per employee of $48.00 per hour after adjusting for non-wage benefits and indirect costs.

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 $192.00. We estimate the total cost associated with receipt of training with respect to the proposed rule for 17,438 service providers of $3,348,096.00.

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 would require extensive revision of their policies, we estimate that two thirds of the Title VI grantees' program management staff would 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) would spend three (3) total hours to prepare the training, and five (5) hours to provide the training, at a cost of $48.07 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) would spend two (2) total hours to prepare the training, and two (2) hours to provide the training, at a cost of $48.07 per hour after adjusting for non-wage benefits and indirect costs.

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 $384.56 or $192.28, depending on the extent of the training needed. For the approximately 188 Title VI grantees with more extensive needed training, we estimate a cost of approximately $72,297.28. For the 94 Title VI grantees with less extensive training needs, we estimate a cost of approximately $18,074.32. We estimate the total cost associated with the preparation and conduct of trainings with respect to the proposed rule for Title VI grantees of $90,371.60.

Cost to receive trainings by their own staff. As noted above, we estimate that two thirds of the Title VI grantees' program management staff would 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 would spend five (5) total hours on the receipt of training per agency, and that those with less extensive trainings would 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), would receive training at a cost per employee of $48.00 per hour after adjusting for non-wage benefits and indirect costs, and that one (1) employee per agency, equivalent to a business operations specialist (BLC Occupation code 13–1199), would receive training at a cost of $49.53 per hour after adjusting for non-wage benefits and indirect costs.

We monetize the time spent on receipt of training by estimating a total cost per entity of $967.65 or $387.06, depending on the extent of the training. For the approximately 188 Title VI grantees agencies with more extensive trainings, we estimate a cost of approximately $181,918.20. For the 94 Title VI grantees with less extensive trainings, we estimate a cost of approximately $36,383.64. We estimate the total cost associated with receipt of training of employees with respect to revisions to policies and procedures under the proposed rule of $218,301.84.

The above estimates of the time needed by State agencies, area agencies and Title VI grantees for training of employees with respect to the updated 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. Due to variation in the types

and sizes of State agencies, area agencies, and Title VI grantees, the above estimates of time needed for training and the number of employees to be trained with respect to the updated rule is difficult to calculate precisely. We seek comment on the estimates provided above.

c. Making State Plan Documentation Available

Section 305(a)(2) of the OAA, 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 proposed 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 are in compliance with the requirements to make such documentation accessible in a public place. It is common practice for State agencies post the documents on their public websites.[175] For those that do not already post the documents on their websites, we estimate that it would 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 would 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 would cost approximately $37.50. Today, documents typically are shared electronically, rather than via print copies, and we estimate that each State agency would receive few requests for print copies of their State plans. In addition, all States have established laws that allow access to public records.[176] Therefore, we also believe this cost would be minimal and do not quantify it.

d. State Plan Amendments and Disaster Flexibilities

Based on stakeholder input and our experience, particularly during the COVID–19 pandemic, we propose adding 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 would provide for flexibilities to be available to Title VI grantees during certain emergencies and would require Title VI grantees to report separately on expenditures of funds when exercising such flexibilities. ACL estimates that some State agencies, area agencies and Title VI grantees would incur costs to comply with the proposed 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.

State Agencies and Area Agencies

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 propose to allow in this section, we are compelled to propose 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 would 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 would provide for flexibilities to be available to Title VI grantees during certain emergencies and would 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 Proposed Rule

The table below sets forth the total estimated cost of the proposed rule:

Item of cost	State agencies and area agencies ($)	Service providers ($)	Title VI grantees ($)
2020 OAA Reauthorization	0.00	0.00	0.00
Revise Policies and Procedures	1,371,803.40	8,387,503.60	338,893.50
Prepare/Conduct Training for Own Staff	193,625.96	N/A	90,371.60
Receipt of Training for Own Staff	680,395.50	3,348,096	218,301.84
SUA Training of Area Agencies	190,934.04	N/A	N/A
SUA/Area Agency Training of Service Providers	119,982.72	N/A	N/A
Available Documentation	.....	.....	.....
State Plan Amendments for Disaster Flexibilities	.....	.....	.....
Total	2,556,741.62	11,735,599.60	647,566.94

[175] For example, the State agencies from AL, AZ, CA, FL, GA, IL, MA, MT, ND, NY, and OH, in addition to others, post their plans on aging on their websites.

[176] National Association of Attorneys General (n.d.). *Public Records.* Retrieved April 18, 2023 from *https://www.naag.org/issues/civil-law/public-records/;* FOIAdvocates (n.d.). *State Public Records Laws.* Retrieved April 18, 2023 from *http://www.foiadvocates.com/records.html.* 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.*

As the table above indicates, we estimate quantified costs attributable to the proposed rule of $2.56 million for State agencies and area agencies (at an average cost of $3,635 per State agency in states that have area agencies, $3,539 per State agency in states with no area agencies, and $3,827 per area agency), $11.7 million for service providers (at an average cost of $673 per service provider), and $0.6 million for Title VI grantees (at an average cost of $2,296 per Title VI grantee). Accordingly, the costs attributable to the proposed rule, in the aggregate amount are estimated at $14,939,908.20.

2. Discussion of Benefits

The benefits from this proposed rule are difficult to quantify. We anticipate that the rule would provide clarity of administration for State agencies, area agencies and Title VI grantees with respect to aspects of the OAA that were enacted under previous reauthorizations. This clarity likely would 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 proposed modifications to regulatory text that would modernize our rules to provide greater flexibility to State agencies and AAAs, as well as to reflect ongoing stakeholder feedback and responses to our RFI in areas where our current regulations do not address the evolving needs of Title III, VI, and VII grantees and the older adults and family caregivers they serve. Our proposal to allow for ''grab and go'' meals, where a participant would 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 stakeholder feedback, 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 would lead to better nutritional health for a new group of older adults that does not currently participate in the program.

Another example of a proposed modification to regulatory text that would modernize our rules is the new proposed definition of ''greatest economic need,'' which would allow State agencies and area agencies 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 area agencies 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 would allow State agencies and area agencies to make these determinations.

The proposed flexibilities to be afforded to State agencies and Title VI grantees in certain emergency and disaster situations would 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 proposed Rule are not quantifiable, given the variation in the types and sizes of State agencies, area agencies, and Title VI grantees, as well as the variation in conditions and situations at the State and local level throughout the U.S. We invite comment as to other benefits of this proposed rule.

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 proposed rule will not have a significant economic impact on a substantial number of small entities. ACL estimates the costs that would result from the proposed rule to be $3,635 per State agency in states that have area agencies, $3,539 per State agency in states with no area agencies, $3,827 per area agency, $673 per service provider, and $2,296 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 [177] 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 proposes to certify that this NPRM, if finalized, would 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 prohibits an agency from publishing any rule that has Federalism implications if the rule either, imposes substantial direct compliance costs on State and local governments and is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule does not have Federalism impact as defined in the Executive Order.

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 with Title VI grantees and Indian Tribes. A Tribal consultation meeting took place at the National Title VI Conference April 12, 2023. ACL will continue to solicit input from affected Federally recognized Indian Tribes as we develop these updated regulations. ACL will conduct a Tribal consultation meeting on Thursday June 22, 2023 from 2:00 p.m. to 4:00 p.m. eastern time. Additional details will be made available at *https://olderindians.acl.gov/events/.*

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. 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

[177] Average weekly hours worked information per U.S. Bureau Labor of Labor's *Labor Productivity and Cost Measures—Major Sectors nonfarm business, business, nonfinancial corporate, and manufacturing—February 2, 2023,* retrieved February 16, 2023 from *https://www.bls.gov/productivity/tables/home.htm.*

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 $100 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 rule and would welcome any comment from the public in this regard.

G. Paperwork Reduction Act (PRA)

The proposed 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 stakeholders.

ACL will submit a PRA request to the Office of Management and Budget 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 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 adjusted hourly wage, $110.82 adjusted for non-wage benefits and indirect costs, and 512 hours of a 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 proposed 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.

At final stage of rulemaking ACL intends to 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, and 1324

Area agencies on aging, Elder rights, Family caregivers, Grant programs to States, Tribal organizations and a Native Hawaiian grantee, Native American elders, Native Hawaiian programs, Older adults, Indian Tribes and Tribal organizations.

For the reasons discussed in the preamble, ACL proposes to revise 45 CFR chapter XIII to read as follows:

■ 1. Revise part 1321 to read as follows:

PART 1321—GRANTS TO STATE AND COMMUNITY PROGRAMS ON AGING

Sec.

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. 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 States, territories, area agencies on aging, and local service providers under Title III of the Older Americans Act, as amended (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 or greatest social need, with particular attention to low-income minority 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;

(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 local service providers to provide direct services, or

(ii) Local service providers, in single planning and service area states, to provide direct services.

(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 (42 U.S.C. 3026) and 307 (42 U.S.C. 3027) of the Act, means services which may facilitate connection to or receipt of other direct services, including transportation, outreach, information and assistance, 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 commercial relationships.

Best available data, as used in section 305(a)(2)(C) (42 U.S.C. 3025(a)(2)) of the Act 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.

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: (a) One or more conflicts between the private interests and the official responsibilities of a person in a position of trust; (b) 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/or (c) Other conflicts of interest as identified in guidance as set forth by the Assistant Secretary for Aging and/or by State agency policies.

Cost sharing, as used in section 315(a) (42 U.S.C. 3030c–2(a)) of the Act, 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 (the United States for purposes of this definition), 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.

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 line 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) Minority religious affiliation;

(4) Sexual orientation, gender identity, or sex characteristics;

(5) HIV status;

(6) Chronic conditions;

(7) Housing instability, food insecurity, lack of transportation, or utility assistance needs;

(8) Interpersonal safety concerns;

(9) Rural location or other cultural, social, or geographical isolation, including isolation caused by racial or ethnic status, that

(i) Restricts the ability of an individual to perform normal daily tasks; or

(ii) Threatens the capacity of the individual to live independently;

(10) Other needs as further defined by State and area plans based on local and individual factors; and

(11) As specified in guidance as set forth by the Assistant Secretary for Aging.

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 and home health aides;

(2) Visiting and telephone or virtual reassurance;

(3) Chore maintenance;

(4) In-home 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 individuals and that is not available under another program.

Local sources, as used in the Act and local public sources, as used in section 309(b)(1) (42 U.S.C. 3029(b)(1)) of the Act, 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.

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.

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 (Pub. L. 92–203; 85 Stat. 688)) 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 States and eligible Tribal organizations 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 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) (42 U.S.C. 3027(a)(4)) of the Act 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 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 commercial relationships or private pay programs.

Program income, as defined in 2 CFR 200.80 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 or 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 200.407, and 35 U.S.C. 200–212 (which applies to inventions made under Federal awards).

Reservation, as used in section 305(b)(2) (42 U.S.C. 3025(b)(2)) of the Act 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 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.

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 § 1321.7.

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 non-coerced donations of money or other personal resources 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 the lead on all aging issues on behalf of all older persons and family caregivers in the State. The State agency shall proactively carry out a wide range of functions, including advocacy, planning, coordination, interagency 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 persons 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, or shall 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 State 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 a State ombudsman program which will perform the functions of section 307(a)(9) 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'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) (42 U.S.C. 3025(a)(2)(A)) and 306(a) (42 U.S.C. 3026(a)) of the Act, 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 200 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 § 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 (Supportive services), § 1321.87 (Nutrition services), § 1321.89 (Evidence-based disease prevention and health promotion services), § 1321.91 (Family caregiver support services), and § 1321.93 (Legal assistance), 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 § 1321.9(c)(2)(x); 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 and of Nutrition Services Incentive Program funds as set forth in § 1321.49 or § 1321.51 shall be maintained by the State agency where:

(A) Funds must be promptly disbursed; and

(B) As set forth in 2 CFR 200.353, prior written approval is hereby granted for a pass-through entity to provide subawards based on fixed amounts up to the simplified acquisition threshold, provided that the subawards meet the requirements for fixed amount awards in § 75.201.

(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)), 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 § 1321.9(c)(2)(B)(x)(b)(1).

(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 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 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, area agency on aging, and Territory 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 (⅓) of the 15 percent match must be met from State resources, and the remaining two thirds (⅔) 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.

(*1*) 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) (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 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) (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) (42 U.S.C. 3028(b)(5)(A)); and

(*3*) 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) (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 in aggregate; and

(F) 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:

(*1*) 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 (i) 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 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) (42 U.S.C. 3024(d)(1)(A)) and 308 (42 U.S.C. 3028) of the Act 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 for State plan administration which the State 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 minimum adequate proportion that will be 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) *Funding 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 not less than the amount expended by the State agency under Title III and Title VII of the Act for the Ombudsman program in fiscal year 2019, as required by the Act;

(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 for fiscal year 2000, 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 Stage 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 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 would like 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 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 line. 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 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 § 1321.9(c)(2)(xi)(D). 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 line is prohibited;

(*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 and in § 1321.9(xii).

(xii) *Use of Program Income.* Program income is subject to the requirements in 2 CFR 200.307 and as follows:

(A) Voluntary contributions and cost sharing payments are considered program income;

(B) Program income collected must be used to expand the service category by part of Title III of the Act, defined in § 1321.71, for which the income was originally collected;

(C) The State must use the addition alternative as set forth in 2 CFR 200.307(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;

(*ii*) Meeting financial accountability requirements; and

(*iii*) Aligning with guidance as set forth by the Assistant Secretary for Aging.

(*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 in guidance as set forth by the Assistant Secretary for Aging.

(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, 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; and

(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, as well as with all other applicable Federal laws, the grantee or subgrantee 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, 105, 107, and 109, subject to Federal grant requirements under 2 CFR 200.

(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), subject to Federal grant requirements under 2 CFR 200.

(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. 3058(d)(a)(4)), must be used to supplement, not supplant existing Federal, State, and local funds expended to support those activities.

(xvii) *Monitoring of State and Area 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 Federal requirements and guidance as set forth by the Assistant Secretary for Aging, including regarding timeframes and amount limitations that may apply.

(3) The State plan process, including compliance with requirements as set forth in § 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 appropriate;

(2) Provide technical assistance and training to agencies, organizations, associations, or individuals representing older persons and family caregivers; and

(3) Review and comment on applications to State and Federal agencies for assistance relating to meeting the needs of older persons 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 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) States 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 stakeholder feedback,

(6) The appeals process for affected parties, and

(7) Timeframes that apply to each of the items under (c).

(d) States 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 or 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, 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 § 1321.15(d). 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 States that have responsibility for administering the programs within the interstate area, in which the agreement increases the allotment of the State(s) with lead responsibility and decreases the allotment of the State(s) 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 to request redesignation as an interstate planning and service area comprising the entire metropolitan area or Indian reservation. If the Assistant Secretary approves such an application, the Assistant Secretary shall adjust the State 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, governing the administration of the interstate planning and service area.

(c) The lead State 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 States 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 of this part, are met.

(e) If the request is approved, the Assistant Secretary for Aging, based on the agreement between the States, will increase the allocation of the State with lead responsibility for administering the programs within the interstate area and will reduce the allocation(s) of the State(s) 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–B, C, and D and in proportion to the number of individuals age 70 and over for funding provided under Title III–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(s) 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.

(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'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.

§ 1321.19 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. States 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 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 will assume area agency on aging responsibilities in the event there are no successful applicants in the State'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 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 (a), 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 of 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 to and will engage in the planning or provision of a broad range of services under the Act within such planning and service area.

(d) A State 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, 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 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 of 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. 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.

§ 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'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'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 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 will follow the guidance issued by the Assistant Secretary for Aging regarding duration and formatting of the State Plan. Unless otherwise indicated, a State 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 until it is approved.

§ 1321.27 Content of State plan.

To receive a grant under this part, a State shall have an approved State plan as prescribed in section 307 of the Act (42 U.S.C. 3026). 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.

(d) A description of how greatest economic need and greatest social need are determined and addressed by specifying:

(1) How the State defines greatest economic need and greatest social need, which shall include the following populations:

(i) Persons with physical and mental disabilities;

(ii) Persons with language barriers;

(iii) Members of religious minorities;

(iv) Lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI+) persons;

(v) Persons living with HIV or AIDS;

(vi) Persons living with chronic conditions;

(vii) Persons living with housing instability, food insecurity, lack of transportation, or utility assistance needs;

(viii) Persons with interpersonal safety concerns;

(ix) Persons who live in rural areas;

(x) Persons who experience cultural, social, or geographical isolation caused by racial or ethnic status;

(xi) Native American persons;

(xii) Persons otherwise adversely affected by persistent poverty or inequality as defined by the State that restricts the ability of an individual to perform normal daily tasks or threatens the capacity of the individual to live independently; and

(xiii) As specified in guidance as set forth by the Assistant Secretary for Aging.

(2) How the State will target services to the populations identified in § 1321.27(d)(1), including in how funds under the Act are distributed 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 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.

(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–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–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 persons 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–C–1 funds to be used as set forth in § 1321.87(a)(1)(A):

(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 stakeholders, 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 stakeholders.

(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 § 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 persons, 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 minimum time period for public review and comment on new State plans as set forth in § 1321.27 and State plans requiring approval of the Assistant Secretary for Aging as set forth in § 1321.31(a);

(d) Ensure the documents noted in (c) 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's goal, assurance, or information requirement Statement;

(3) A change in the State's intrastate funding formula or funds distribution plan for Title III funds;

(4) A request to waive State plan requirements as set forth in section 316 of the Act, 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 to reflect:

(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) A request to distribute 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;

(6) A request to use funds set aside to address disasters set forth in § 1321.99; or

(7) A request to exercise 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 before the proposed effective date of the plan or plan amendment according to guidance as set forth by the Assistant Secretary for Aging.

(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 specified in and in accordance with guidance as set forth 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 Appeals to the Departmental Appeal 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 notice and an opportunity for a hearing. Administrative reviews of State plan disapprovals, as provided for in section 307(c) and section 307(d) (42 U.S.C. 3026(d)) of the Act 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's grant upon a disapproval decision from the Departmental Appeals Board. This effective date may not be earlier than the date of the Departmental Appeal 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 may appeal the Departmental Appeal Board's decision.

A State 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 shall file the appeal within 30 days of the Departmental Appeal Board's final decision.

§ 1321.45 How the Assistant Secretary for Aging may reallot the State's withheld payments.

The Assistant Secretary for Aging may disburse funds withheld from the State 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 guidance as set forth by the Assistant Secretary for Aging. These policies and procedures must safeguard against conflicts of interest on the part of the State, 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 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; and

(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.

(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 as identified in guidance as set forth 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 as identified in guidance as set forth 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 persons, family caregivers, other appropriate agencies and organizations, and the general public, an intrastate funding formula for the allocation of funds 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 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 with particular attention to low-income minority 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 or 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 or 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 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'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.

(c) In meeting the requirement in paragraph (a) of this section, the intrastate funding formula may not allow for:

(1) The State to hold funds at the State level except as outlined in § 1321.49(b)(1)(i) above;

(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–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–B Ombudsman 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) States have the option to receive grant as cash and/or agricultural commodities; and

(4) States 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–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–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–B Ombudsman funds and disaster set-aside funds as described in § 1321.99.

(5) After deducting any State plan administration funds, Title III–B Ombudsman 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) States 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 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 determines the geographical distribution of the Title III and Nutrition Services Incentive Program funding;

(2) How the State 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) (42 U.S.C. 3026(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 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; 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.

States must have policies and procedures that explain how they will coordinate with any Title VI funded Tribal organization providing services to eligible tribal elders and family caregivers. State agencies may meet these requirements through a tribal consultation policy that includes Title VI-funded aging services and programs. Policies and procedures shall address:

(a) 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

(b) How the State's aging network, including area agencies on aging and service providers, will coordinate with Title VI programs including:

(1) Communication opportunities States will make available to Title VI programs, such as meetings, email distribution lists, and public hearings;

(2) Methods for collaboration on and sharing of program information, including coordinating with area agencies if applicable; and

(3) Processes for how Title VI programs may refer individuals who are eligible for Title III services.

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 persons 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 persons 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 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 persons 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 or greatest social need, and older persons and family caregivers in the community;

(6) Offer special help or targeted resources for the most vulnerable older persons, 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 persons 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 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 persons and family caregivers; or

(2) A separate organizational unit within a multi-purpose 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 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 guidance as set forth by the

Assistant Secretary for Aging. 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 persons, 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 the planning and service area.

(b) In carrying out this responsibility, the area agency shall:

(1) Monitor, evaluate, and, where appropriate, comment on policies, programs, hearings, levies, and community actions which affect older persons and family caregivers;

(2) Solicit comments from the public on the needs of older persons and family caregivers;

(3) Represent the interests of older persons 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 persons 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 persons and family caregivers with greatest economic need or 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 persons and family and older relative caregivers in the 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 interest of older persons and family caregivers; and

(5) Reviewing and commenting on community policies, programs and actions which affect older persons and family caregivers with the intent of assuring maximum coordination and responsiveness to older persons 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 persons, including minority individuals who are participants or who are eligible to participate in programs under this part, with efforts to include those identified as in greatest economic need or greatest social need in § 1321.65(b)(2);

(2) Representatives of older persons;

(3) Family caregivers, including 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.

§ 1321.65 Submission of an area plan and plan amendments to the State for approval.

(a) The area agency shall submit the area plan on aging and amendments to the State agency for approval following procedures specified by the State agency in the State policies prescribed by § 1321.9.

(b) State 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 following populations:

(i) Persons with physical and mental disabilities;

(ii) Persons with language barriers;

(iii) Members of religious minorities;

(iv) Lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI+) persons;

(v) Persons living with HIV or AIDS;

(vi) Persons living with chronic conditions;

(vii) Persons living with housing instability, food insecurity, lack of transportation, or utility assistance needs;

(viii) Persons with interpersonal safety concerns;

(ix) Persons who live in rural areas;

(x) Persons who experience cultural, social, or geographical isolation caused by racial or ethnic status;

(xi) Native American persons;

(xii) Persons otherwise adversely affected by persistent poverty or inequality as defined by the State agency and/or area agency on aging that restricts the ability of an individual to perform normal daily tasks or threatens the capacity of the individual to live independently; and

(xiii) As specified in guidance as set forth by the Assistant Secretary for Aging.

(3) Assessment and evaluation of unmet need, such that each area agency shall submit objectively collected and statistically valid data with evaluative conclusions concerning the unmet need for supportive services, nutrition services, evidence-based disease prevention and health promotion, family caregiver support, 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 persons, family caregivers, service providers, and the public with a focus on those on those in greatest economic need and greatest social need, including:

(i) A minimum time period for public review and comment on area plans and area plan amendments; and

(ii) Ensuring the documents noted in (i) 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) (42 U.S.C. 3027(a)(8)(A)), no supportive services, nutrition services, disease prevention and health promotion, or family caregiver 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 § 1321.65(b)(7)(i) 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–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 stakeholders, 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 stakeholders.

(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, 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 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 45 CFR 1324.21 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; and

(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.

(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 must explain how the area agency's aging network, including local service providers, will coordinate with Title VI programs. Such policies and procedures must at a minimum address:

(1) How outreach will be provided 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, such as meetings, email distribution lists, and public hearings;

(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; and

(5) How services will be provided in a culturally appropriate manner.

(b) Policies and procedures may also address:

(1) Opportunities to serve on area agency advisory councils, workgroups, and boards, and

(2) Opportunities to receive notice of Title III and other funding opportunities via the area agency.

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 categories of 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 under these categories are for the purpose of assisting the State agency and its area agencies to develop, provide, or enhance for older persons 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 101, or as otherwise allowed in the Act, State agencies on aging with multiple planning and service areas will award the funds made available under of this section to designated area agencies on aging according to the approved intrastate funding formula as set forth in § 1321.9.

(d) Single planning and service area states shall award funds by grant or contract to community services provider agencies and organizations for direct services to older persons 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 persons 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 local 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 local service provider will provide the State agency in a timely manner, with statistical and other information which the State agency requires in order to meet its planning, coordination, evaluation and reporting requirements established by the State 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, 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 persons 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 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 1324, subpart A—State Long-Term Care Ombudsman Program. State agencies must comply with confidentiality and disclosure of information provisions as directed in 45 CFR 1324, as appropriate.

(c) A State or area agency on aging may 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, codes, rules, and regulations, including the Health Insurance and Portability and Accountability Act (HIPAA), as well as guidance as the State determines, for the collection, use, and exchange of both Personal Identifiable Information (PII) and Personal Health Information (PHI) in the provision of Title III services under the Act.

§ 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.

(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 providers of services shall:

(a) Specify how the provider intends to satisfy the service needs of those identified as in greatest economic need or 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 persons 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 § 1321.9(c)(2)(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) With the consent of the older person, or, if there is one, their legal representative, 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 person, or the household of the older person, in imminent danger;

(e) Where feasible and appropriate, make arrangements for the availability of services to older persons 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 persons;

(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 or individuals of any age with Alzheimer's or related disorder;

(ii) Older relative caregivers age 55 or older 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 age 55 or older 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.

(b) States, 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 identify criteria for being given priority in the delivery of services under Title III, Parts B, C and D, in accordance with the Act and guidance as set forth by the Assistant Secretary for Aging.

(c) The State agency and/or area agency shall identify criteria for being given priority in the delivery of services under Title III, Part E, in accordance with the Act and guidance as set forth by the Assistant Secretary for Aging 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) when serving older relative caregivers, older relative caregivers of children with severe disabilities or individuals with severe disabilities shall be given priority.

§ 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 section 321(a)(6)(C) (42 U.S.C. 3030d(a)(6)(C)), section 321(a)(19) (42 U.S.C. 3030d(a)(19)), and section 321(a)(21) (42 U.S.C. 3030d(a)(21)), State and area agencies shall ensure that there is coordination and no inappropriate duplication of such services available under Title III–E.

(d) All funds provided under Title III–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 provided under Title III 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 C–1;

(ii) Meals provided as set forth in (A) shall:

(A) Not exceed 20 percent of the funds expended by the State agency under Title III C–1;

(B) Not exceed 20 percent of the funds expended by any area agency on aging under Title III C–1;

(iii) Meals provided as set forth in (i) 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 provided under Title III–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 or drive-through, or through other service as determined by the plan.

(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 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–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–C–1 or 2 which must align with the Nutrition Care Process of the Academy for Nutrition and Dietetics. Congregate and home-delivered nutrition services shall provide nutrition counseling, as appropriate, based on the needs of meal participants, and the availability of resources and of expertise of a Registered Dietitian Nutritionist.

(5) Other Nutrition Services include additional services provided under Title III–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 and/or area agency policies and procedures shall define how the availability of meals five or more days per week is determined by taking into consideration availability of resources, the community's need for nutrition services as described in the State and area plan, and whether the decision will be made by each nutrition provider or meal site within a planning and service area.

(c) All funds provided under Title III–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 (42 U.S.C. 3030g–22); 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–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. States 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 each of the services authorized under this part are available Statewide.

(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 older 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, 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 themself or others.

(d) All funds provided under Title III–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–B funds and require the expenditure of at least that sum by each area agency in States with multiple planning and service areas or the State agency in States with a single 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 § 1321.93(c).

(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–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, these regulations, and guidance as set forth by the Assistant Secretary for Aging 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 persons with economic or social need, including public benefits, resident rights, and alternatives to institutionalization; and

(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, housing, utilities, protective services, abuse, neglect, age discrimination, and defense of guardianship.

(i) Defense of guardianship means advice to and representation of proposed protected persons and protected persons 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, assistance removing or limiting an existing guardianship, or assistance to preserve or restore an individual's rights or autonomy. A legal assistance provider(s) shall not represent a petitioner for imposition of a guardianship except 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 proceedings; and

(B) Representation to promote use of least-restrictive alternatives to guardianship to preserve or restore an individual's rights and or autonomy.

(iii) Provide effective administrative and judicial advocacy in the areas of law affecting older persons with greatest economic need or greatest social need;

(iv) 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

(v) 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, 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 (c)(1)(ii)(B)(1)(ii)).

(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) (42 U.S.C. 3026(a)(4)(B)) and 306(a)(19) (42 U.S.C. 3026(a)(19)) in the Act. This includes outreach to:

(A) Older adults with greatest economic need due to low income and to those with greatest social need, including older adults of color; 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 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 and regulations promulgated contained in the Legal Services Corporation Act. 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 line, 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 cause 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 (c)(1)(ii)(B)(*1*)(*ii*) of this section).

(v) Maintain the expertise required to deliver any matters in addition to those specified in (d)(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 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.

In locations where there are Title VI programs, the area agency on aging and/or local service provider shall ensure the development and implementation of policies and procedures which minimally address:

(a) How outreach will be provided to tribal elders and family caregivers regarding services for which they may be eligible under Title III;

(b) The communication opportunities the service provider will make available to Title VI programs, such as meetings and email distribution lists;

(c) The methods for collaboration on and sharing of program information and changes;

(d) How Title VI programs may refer individuals who are eligible for Title III services; and

(e) How services will be provided in a culturally appropriate manner.

Subpart E—Emergency & 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, local emergency response agencies, relief organizations, local governments, State agencies responsible for emergency preparedness, and any other institutions that have responsibility for disaster relief service delivery;

(iii) Processes for developing and updating long-range emergency 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 preparedness plans, including the State Public Health Emergency Preparedness and Response Plan.

(3) The plan shall discuss coordination with tribal, area agency on aging, 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 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, 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 without regard to distribution through the State'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 from their Title III allocations, if specified as being allowed to be withheld for the purpose in their approved intrastate funding formula or funds distribution plan. The following apply for use of set aside funds:

(1) State agencies must submit a State plan amendment as set forth at § 1321.31(b), when the State agency awards the funds for use within all or part of a planning and service area covered by a specific major disaster declaration where Title III services are impacted. The State plan amendment must at a minimum include the specific entities receiving such funds; the amount, source, and intended use for such funds; and other such justification of the use of such funds.

(2) Set aside funds that are awarded under this provision must comply with the requirements under § 1321.101(b) through (e), and

(3) The State agency must have policies and procedures in place to award funds through the intrastate funding formula or funds distribution plan 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, the State 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) 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.

(c) 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 or Title VII of the Act but must track the source of all expenditures.

(d) 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.

(e) 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.

(f) A State agency must submit a State plan amendment as set forth in § 1321.31(b). The State plan amendment must at a minimum include the specific entities receiving such funds; the amount, source, and intended use for such funds; and other such justification of the use of such funds to make obligations as follows:

(1) To allow 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) For the State agency to allocate portions of State plan administration, up to a maximum of five percent of the Title III grant award, to 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) For the State agency's use in making direct expenditures and/or acting to procure items on a Statewide level up to five percent or as determined by the Assistant Secretary for Aging during a major disaster declaration, if the State agency adheres to the following:

(i) 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;

(ii) The State agency consults with area agencies on aging prior to exercising the flexibility;

(iii) The State agency uses such set aside funding 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

(iv) The State agency ensures reporting of any clients, units, and services provided through such expenditures.

§ 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 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 in place for how they will communicate and coordinate with Title VI programs regarding emergency 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 GRANTEES FOR SUPPORTIVE, NUTRITION, AND CAREGIVER SERVICES

Sec.

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 elders on Indian reservations and of older Native Hawaiians. 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, 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, 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, and case management services.

Acquiring, as used in this part, means obtaining ownership of an existing facility in fee simple.

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 applicable legal requirements, 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.

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 Alaskan Native regions established, pursuant to the Alaska Native Claims Settlement Act (84 Stat. 688).

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 (85 Stat. 688) 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: (a) homemaker and home health aides; (b) visiting and telephone or virtual reassurance; (c) chore maintenance; (d) in-home respite care for families, including adult day care as a respite service for families; and (e) minor modification of homes that is necessary to facilitate the independence and health of older Native Americans.

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.

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.

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 (Pub. L. 92–203; 85 Stat. 688) 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.

Nutrition Services Incentive Program, as used in the Act, means grant funding to States, 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 an Hawaiian Native.

Older relative caregiver, as used in section 631 of the Act, 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;

(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 200.2 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 or 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 (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 any entity that is awarded a subgrant or contract from a Tribal organization or Native Hawaiian grantee to provide 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 of the Act (42 U.S.C. 3030c-2), means non-coerced donations of money or other personal resources 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; and

(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 1321 and Title VII of the Act as set forth in 45 CFR 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), 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 disapproves of an application, the Assistant Secretary 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 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. The decision will be issued within 30 days of the closing of the record and d will be promptly mailed to the eligible organization. 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 that 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 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 his or her contribution;

(3) Establish appropriate procedures to safeguard and account for all contributions;

(4) Use all services contributions to expand comprehensive and coordinated services systems supported under this part, while using nutrition services contributions only to expand services as provided under the Act.

(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 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 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, if there is one, of his or her 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 outline 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 and Portability and Accountability Act (HIPAA), 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 (PHI) 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 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, 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 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; and

(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.

§ 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 age 55 or older 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 age 55 or older 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 other guidance as set forth by the Assistant Secretary for Aging. 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 guidance as set forth by the Assistant Secretary for Aging.

(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 guidance as set forth by the Assistant Secretary for Aging to include:

(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 with severe disabilities or individuals 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 § 1321.71 of this chapter and legal services providers shall comply fully with the requirements in § 1321.71(c) through (p) 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 on Aging. Nutrition services include congregate meals, home-delivered meals, nutrition education, nutrition counseling, and other nutrition services.

(1) Congregate Meals are meals provided by a qualified nutrition direct service provider to eligible individuals and consumed while congregating virtually, in-person, or in community off-site.

(2) Home-Delivered Meals are meals provided by a qualified nutrition direct service provider to eligible individuals and consumed where they currently reside. 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 Nutrition Care Process of the Academy for 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; 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 Tribal organization or Hawaiian Native grantee under Title VI of the Act must have policies and procedures that outline how they will coordinate with any State agency and any applicable area agency on aging providing 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) (42 U.S.C. 3057e(a)(11)) and 624(a)(3) (42 U.S.C. 3057e(a)(3)) of the Act, respectively. A Tribal organization or Hawaiian Native grantee may meet these requirements by participating in tribal consultation with States. Policies and procedures shall address:

(a) How 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

(b) How the Tribal organization or Hawaiian Native grantee will coordinate with Title III and VII programs including:

(1) Communication opportunities a Tribal organization or Hawaiian Native grantee will make available to Title III and VII programs, such as meetings, email distribution lists, and presentations,

(2) Methods for collaboration on and sharing of program information and changes,

(3) Processes for how Title VI programs may refer individuals who are eligible for Title III services;

(4) Processes for providing feedback on the State plan on aging and any area plans on aging providing Title III and VII funded services within the Tribal organization's or Hawaiian Native grantee's approved service area.

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 preparedness, and any other institutions that have responsibility for disaster relief service delivery;

(c) Processes for developing and updating long-range emergency 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, 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) 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.

(c) 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.

(d) 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.

(e) 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 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 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.

■ 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.

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 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 (42 U.S.C. 3058f) and 712 (42 U.S.C. 3058g) of the Act, 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, 45 CFR 1324, subpart A, and/or State law and carried out under the auspices and general direction of the State Long-Term Care Ombudsman.

Representatives of the Office of the State Long-Term Care Ombudsman, as used in sections 711 (42 U.S.C. 3058f) and 712 (42 U.S.C. 3058g) of the Act, 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 his or her 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 to the resident's medical, social, or other personal information; management of financial matters; or receipt of notifications;

(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 to the resident's medical, social or other personal information; management of financial matters; or receipt notifications;

(3) Legal representative, as used in section 712 of the Act (42 U.S.C. 3058g); or

(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 (42 U.S.C. 3058f) and 712 (42 U.S.C. 3058g) of the Act, 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 (42 U.S.C. 3058f) and 712 (42 U.S.C. 3058g) of the Act, 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 persons 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, he or she 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. 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 and with 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 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 assure prompt response by the Office and/or local Ombudsman entities to complaints, prioritizing abuse, neglect, exploitation, and time-sensitive complaints and that consider the severity of the risk to the resident, the imminence of the threat of 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.

(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; 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, 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 reporting abuse, neglect, or exploitation to adult protective services or any other entity, long-term care facility, or other concerned person;

(vi) Exclusion of the Ombudsman and representatives of the Office from abuse reporting requirements, 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

(vii) 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 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 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, regarding:

(i) Disclosure of information maintained by the Ombudsman program within the limitations set forth in section 712(d) of the Act (42 U.S.C. 3058g(d));

(ii) Recommendations to changes in Federal, State and local laws, regulations, and other governmental policies and actions pertaining to the health, safety, welfare, and rights of residents; and

(iii) Provision of 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.

§ 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; and

(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; and

(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; and

(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 cause:

(i) Retaliation against residents, complainants, or witnesses,

(ii) Undermining of the working relationships between the Ombudsman program, facilities, or other agencies; or

(iii) Undermining of 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 paragraph (e) of this section;

(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 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 as otherwise required by the Assistant Secretary.

(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, 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; and

(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.

(i) *Other activities.* The Ombudsman shall carry out such other activities as the Assistant Secretary determines to be appropriate.

§ 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.

(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; and

(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.

(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 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 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 his or her 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 Ombudsman 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 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 amendment under section 1905(a) or subsection (i), (j), or (k) of section 1915 of the Social Security Act;

(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;

(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 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 the 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 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; and

(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.

(x) Serves 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 participating in the management of a long-term care facility within the previous twelve months.

(iv) Receives, or has the right to receive, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangemen 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 participating 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. 3058g(c–e)) and guidance as set forth by the Assistant Secretary for Aging.

Subpart C—State Legal Assistance Development Program

§ 1324.301 Definitions.

(a) Definitions as set forth in § 1321.3 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) 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(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 Ombudsmen 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 agreements, and similar instruments or approaches to be connected to resources and education to manage their finances 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) 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 and as set forth in § 1321.27.

(c) 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 a 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.

Dated: June 12, 2023.

Xavier Becerra,

Secretary, Department of Health and Human Services.

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