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August 15, 2023

Alison Barkoff  
Acting Assistant Secretary for Aging and Administrator  
Administration for Community Living  
Department of Health and Human Services  
Attention: ACL-AA17-P  
330 C St. SW  
Washington, DC 20201

Submitted electronically via: [www.regulations.gov](http://www.regulations.gov)

RE: RIN Number 0985-AA17

Dear Acting Assistant Secretary Barkoff:

On behalf of Advancing States, I am writing to you in response to the [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](#) (proposed rule).

Advancing States is a nonpartisan association of state government agencies that represents the nation's 56 state and territorial agencies on aging and disabilities and long-term services and supports directors. We work to support visionary state leadership, the advancement of state systems innovation, and the development of national policies that support home and community-based services (HCBS) for older adults and persons with disabilities. Our members administer services and supports for older adults and people with disabilities, including overseeing Older Americans Act (OAA) programs and services in every state. Together with our members, we work to design, improve, and sustain state systems delivering long-term services and supports (LTSS) for people who are older or have a disability and their caregivers.

Enacted in 1965, the OAA stands as a testament to the nation's commitment to the well-being of older adults, providing a comprehensive framework for services that empower older individuals to age with dignity and independence. By offering crucial programs such as nutrition assistance, caregiver support, health promotion, and community engagement initiatives, the Older Americans Act not only addresses the practical needs of older adults but also champions their social inclusion and mental health. While annual appropriations allocated for the OAA remain relatively small in the scope of the broader LTSS system, the OAA draws down other resources such as state and local dollars and provides the foundation for the Aging Services Network. In a time of demographic shifts toward an aging population, it is imperative that state aging agencies, tribal organizations, area

agencies on aging (AAAs), and local service providers have the necessary structure and guidance to continue to improve and expand OAA programs into the future.

ADvancing States strongly supports the Administration for Community Living's (ACL) proposal to update the OAA regulations, the majority of which have not been updated since 1988. We understand the significant amount of time and dedication it takes to modernize an entire program's regulations, and we appreciate and commend ACL for their efforts in this regard. Once the proposed rule is finalized, we look forward to working with ACL to implement it in a thoughtful and appropriate way that accounts for the current capacity of state agencies and realities on the ground.

To successfully implement these requirements and achieve the intended outcomes for older Americans, state aging agencies will need sufficient time for planning and implementation, as well as guidance and technical assistance from ACL. We encourage ACL to consider the need for flexibility for state aging agencies to implement these requirements in a way that best fits their unique program structures and processes. We expect some states may encounter significant obstacles to implementation due to timeframes, cost, and operational burden.

#### *Implementation Timeframes, Cost Impacts, and Operational Burden*

While state aging agencies support the overarching goals and objectives of the proposed rule, they overwhelmingly voiced concerns about the level of operational and systems change required for successful implementation. Furthermore, states expressed concerns about the substantial increase in workload and costs. The bulk of changes in the proposed rule will fall to state agencies to implement and will require significant time. For example, states will have to develop or refine policies and procedures on a host of different issues addressed in the proposed rule, and the state rulemaking process is complex and often takes nine months or longer. In addition to state rulemaking, in some instances, states will also have to review area agency on aging (AAA) policies and procedures.

State aging agencies emphasized that the estimated costs to states included in the proposed rule significantly underestimate the actual costs they will incur while implementing these requirements. To successfully implement the proposed requirements, state agencies will likely need to request funding from their legislatures, which is a multi-year process, particularly in states whose legislatures meet biennially. Some state agencies will have to work with their state legislatures either for additional appropriations, requesting additional state staff or contracted support, or potentially to move or reorganize programs given the conflicts of interest (COI) provisions as currently proposed. Four states have legislatures that meet biennially, and nineteen more have biennial budget processes; for these states, budgets are likely already set for fiscal year (FY) 2025 and new budget development is likely already beginning for FY 2026 and 2027. To effectively meet the desired outcomes and intent of the proposed rule, states must undertake these projects alongside ongoing work to complete HCBS Settings Rule corrective action plans, as well as implementing requirements of other federal regulations (e.g., for state aging agencies who are also Medicaid operating agencies, the Medicaid Access rule, and the anticipated notice of proposed rulemaking for Adult Protective Services [APS]).

In addition to requesting legislative appropriations, state procurement processes are complex and time intensive. After securing funding, the process to procure vendor(s) could take a year or longer, after

which the state and their selected vendor(s) would require a readiness period before implementation begins. Reflecting on state feedback on a feasible timeline for implementing these regulations, **we recommend ACL finalize an implementation timeframe that goes into effect no sooner than four (4) years after the release of the Final Rule.**

## Part 1321 – Grants to State and Community Programs on Aging (Title III)

### Subpart A – Introduction

#### § 1321.3 Definitions

ACL proposes a number of new definitions, revisions for others, and deleting three. Generally, ADvancing States members were supportive and appreciative of ACL’s efforts to update the OAA regulations to include new definitions. In particular, we were pleased that ACL proposed new definitions for greatest economic need and greatest social need, which ADvancing States recommended in our response to ACL’s OAA regulations request for information (RFI).

**ACL Request for Comment: ACL seeks comments on whether the proposed rule sufficiently clarifies the statutory requirements for and differences between cost sharing and voluntary contributions. Additionally, ACL requests comments on whether the proposed rule clarifies the allowability of private pay programs.**

States generally reported that ACL’s new definitions for *cost sharing* and *voluntary contributions* are clear and sufficient. There was, however, some lingering confusion regarding the definition of *private pay* and its interplay with other NPRM sections. For example, one state offered that private pay and commercial relationship should be defined separately—private pay meaning an arrangement when a consumer (or their family, or even a source of insurance coverage, etc.) purchases services outright for an individual—and commercial relationship being grounded in the establishment of a contract between a AAA and other party for the delivery of services in exchange for payment.

*Area plan administration* – We appreciate ACL’s efforts to add and refine numerous OAA definitions. Regarding area plan administration, the new definition reads: “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 relationship**” [emphasis added]. Some states expressed concerns about the open-ended and broad nature of this addition. States also expressed concern that there appears to be no limit on how much could be spent on these activities and a lack of other safeguards. We recommend that ACL revise the language to clarify that this type of spending has limitations and suggest the following language: “...including **limited** development of private pay programs or other private pay programs or other commercial relationships.”

*Conflicts of interest:* The proposed definition of conflicts of interest (proposed 42 CFR §1321.3) does not appear to be at odds with the conflict of interest requirement for Medicaid 1915(c) waiver programs. The Medicaid 1915(c) definition at 42 CFR 441.301(c)(1)(vi) focuses on the person-centered planning process and relationship between the waiver case management entity and waiver services provider. We

would emphasize that AAAs providing 1915(c) waiver case management and/or waiver services must follow the Medicaid 1915(c) requirement at 42 CFR 441.301(c)(1)(vi) for the purpose of providing Medicaid waiver case management and/or waiver services, in addition to meeting the proposed definition in the OAA NPRM. **We encourage ACL to collaborate with CMS to ensure alignment in guidance to states regarding conflicts of interest; this is necessary to ensure states clearly understand federal expectations across the many programs they administer.**

**We expect states may experience challenges avoiding conflicts of interest as proposed at (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.”** AAAs often operate within larger organizations or networks. These organizational structures may create challenges to avoid conflicts of interest. For example, a AAA that operates as part of a community care hub may be responsible for making referrals to providers, where some of the providers are in the hub’s network. This structure allows for stronger coordination of services for beneficiaries and can help connect beneficiaries to services when provider networks are limited (e.g., in rural areas); however, there is increased potential for conflicts of interest between portions of the community care hub organization. **We recommend ACL provide sub-regulatory guidance to identify protections states and AAAs should implement to avoid conflicts of interest.**

*Family caregiver* – ADvancing States appreciates the inclusive and flexible definition of family caregiver included in the NPRM. This definition recognizes the broad range of caregiving experiences, is in keeping with the definition recommended by the 2022 National Strategy to Support Family Caregivers and has been received favorably by the states.

**ACL Request for Comment: ACL seeks comments as to whether their proposed definitions of greatest social need and greatest economic need are sufficient.**

*Greatest economic need* – ADvancing States members generally supported the new proposed definition of greatest economic need (GEN). While some states did propose changes or additions to the definition, we believe the flexibility afforded to states by the language “...as further defined by State and area plans...” will allow states to address those concerns.

*Greatest social need* – ADvancing States supports the need for a definition of greatest social need (GSN) but are concerned that the definition, as outlined, does not have the data sources necessary to determine whether or not a state is reaching the “targeted population”. Furthermore, our members were deeply concerned that they do not have the financial resources to target all of the newly identified groups.

Overarching concerns regarding the proposed definition include:

- ADvancing States members are concerned about collecting information from consumers that are potentially HIPAA protected, for example, HIV/AIDS, and chronic conditions status. AAAs are typically not HIPAA-covered entities, and such a change may entail increased information technology and data collection costs to ensure HIPAA compliance.
- ADvancing States members also raised concern about collecting information on religious affiliation as it is not typically addressed by their state aging network entities.

- We are also seeking more clarity about the meaning of “interpersonal safety concerns” and how that would be measured.

Additionally, as noted in our comments on section 1321.27, the proposed definition of greatest social need does not fully align with section 1321.27 Content of State Plan and section 1321.65 Submission of an area plan and plan amendments to the State for approval, in the NPRM.

If ACL finalizes the definition of GSN as proposed, **we highly encourage ACL to provide extensive technical assistance to identify sufficient data sources to target to all of the proposed populations. Additionally, ACL should consider language similar to “may include the following populations” to section 1321.27(d)(1), allowing states to choose from the proposed list of targeted groups to allow for maximal flexibility in tailoring programs and services to the state and local level. If ACL cannot demonstrate that these data sources exist, we believe the proposed populations included in 1321.3 must be reevaluated.**

*In-home supportive services* – ADvancing States supports the new proposed definition of in-home supportive services. We were especially pleased that ACL proposes to remove the arbitrary \$150 limit on home modifications that is in the current regulations. Removing this limit has been a long-time ADvancing States advocacy goal and will improve opportunities to support older adults in their homes where the vast majority want to age in place. During our analysis of the NPRM, we also noted that the definition for in-home supportive services under Title VI offers a more flexible approach for home modifications.

Title III definition: "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**"[emphasis added].

Title VI definition: “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.”

While many states supported the Title III definition as proposed, **others proposed that ACL consider more flexible language for home modifications under Title III akin to that found in Title VI.** Aligning the definition with Title VI would reduce burden on State Units on Aging (SUA), AAA or grantee staff to identify other programs or payors, which may prove challenging and time intensive. Other states raised concerns that the “not available under another program” specification would inadvertently limit the use of funds for home modifications. Further, the proposed definition may limit aging network entities from blending and braiding funding to support home modifications, which is common in some states. **We also encourage ACL to consider whether this level of detail should be reserved for a clarifying program instruction rather than regulation.**

Definitions omitted:

*Commercial relationships* – given its importance to the new § 1321.9(c)(2)(xiv), Contracts and Commercial Relationships, we were surprised that ACL did not propose a definition for commercial relationships. We were also surprised that ACL did not propose a definition for or include a reference to the term “profitmaking organization” that is used in Section 212 of the Act. We are concerned that the lack of clarity in terms of definition and usage of differing terminology than what is used in statute may cause further confusion in the field. **We suggest ACL, at a minimum, include a definition of commercial relationships**, including clarification as to whether this incorporates both profitmaking and non-profit entities. Further, we encourage ACL to closely review what is proposed in § 1321.9(c)(2)(xiv) and Section 212 of the Act to ensure alignment and consistency.

**ACL Request for Comment: In the preamble, Grants to State and Community Programs on Aging, ACL solicits input on ways ACL and State agencies can support improvements in I&A/R systems, including training and modernization of IT systems.**

ADvancing States appreciates the recognition that Information & Referral (I&R) systems face increased expectations to serve growing populations and to be responsive to emerging technologies. For the past 50 years, I&R has served a foundational purpose within the aging network, connecting individuals and caregivers to information and assistance (I&A) through caring conversations as well as addressing crisis situations. Data from ADvancing States’ recent national survey of I&R programs indicates that I&R specialists have complex roles to meet growing and challenging needs. Key issues affecting I&R programs include growing demand for services; limited community resources, especially in the areas of housing and homelessness; sustainability; and staffing.

In light of these myriad challenges, ADvancing States encourages ACL to recognize that improvements to I&R systems, and even keeping pace with current demands, require additional and sustainable funding. Addressing important priorities for I&R improvements – such as continued professional development of the workforce, staff retention, improved infrastructure for resource databases, development of community information exchanges, and opportunities to implement technology innovations – calls for funding resources, multi-system and multi-agency coordination including at the federal level, and technical assistance available to the network broadly to assist in navigating an evolving technology landscape.

In its request for input, ACL specifically identifies modernization of IT systems through closed-loop referral (CLR) systems. Technology is an important underpinning of I&R services to meet the communication needs of inquirers. I&R facilitates connection and access to services; as such, it is driven by consumer needs and supported by technology. CLR systems are an evolving technology-based approach to data needs, often on the part of healthcare entities. Other efforts such as Community Information Exchanges, Health Information Exchanges, and No Wrong Door (NWD) systems might also develop this type of functionality. This landscape is likely to continue to evolve and change in the coming years. In this regard, **ADvancing States encourages ACL to recognize that the technology is changing; best practices have not yet emerged; the interests of payers, consumers, and community providers may be not aligned; and that many I&R services are not yet part of CLR systems.** Such systems require significant investment, time, collaboration, effective governance, and evidence that I&R services and outcomes for consumers are improved.

In proposed § 1321.3 (definitions), ACL includes information and assistance with the proposed definition of “Access to services.” ADvancing States supports the inclusion of I&A within access services but notes

that person-centered options counseling (not included) also facilitates connection to or receipt of services. More broadly, the proposed rule offers a definition of Access to services but speaks little to the consumer access systems that undergird the aging network and build connections across the aging and disabilities networks – I&A systems, Aging and Disability Resource Centers, and No Wrong Door Systems. **We are concerned about these omissions given, as noted earlier, the growing demand for services, the role of effective and funded consumer access systems in helping individuals age well in their communities, and the importance of coordination at all levels of the aging network.**

## Subpart B – State Agency Responsibilities

### § 1321.9 State agency policies and procedures

#### **ACL Request for Comment: Streamlining of state policies and procedures.**

ADvancing States supports and appreciates ACL’s attempts to streamline state agency policy and procedure requirements into one combined section.

#### **ACL Request for Comment: ACL seeks comments on proposals to provide prior written approval for unrecovered indirect costs to be used as a match.**

*Non-Federal Share (“Match”).* In § 1321.9(c)(2)(ii)(C) ACL proposes to disallow the use of non-federal share (i.e., match) funds to be used to meet OAA matching requirements under Title III from “State or local public resources used to fund a program which uses a means test....” As written, this would impact a number of states that operate state-funded HCBS programs that may have cost-share or sliding scale fee requirements. We are very concerned that this proposal would limit much-needed resources from being put into the Act. Specifically, we have heard that this requirement, if implemented, would severely impact a state’s ability to meet their match for OAA services, especially for Title III-E, the National Family Caregiver Support Program (NFCSP). Some states also noted this would require them to eliminate the cost sharing and/or sliding scale fees in their state general fund programs which would ultimately allow states to serve fewer people in those programs. We do not believe it was ACL’s intent to coerce states into changing their state-run programs nor limit resources that could be used to buttress the OAA. **We strongly recommend ACL reconsider this provision of the NPRM and allow states and AAAs to use matching funds from a variety of sources, including those that are means tested.**

*Maintenance of Effort.* Section 1321.9(c)(2)(vi) describes expectations states must meet regarding OAA maintenance of effort (MOE) requirements. States appreciate the language in Section 1321.9(c)(2)(vi)(D) that reads: “(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.” **We recommend the establishment of a carve-out from the MOE for one-time state appropriations.**

*Rural Minimum Expenditures.* Section 1321.9(c)(2)(viii) describes state responsibilities for maintaining minimum expenditures for older adults in rural areas, including that states establish a process for defining rural areas within their state. While we appreciate the flexibility offered here to states, these provisions also come with some challenges. For the purposes of OAA reporting in the Older Americans Act Performance System (OAAPS), rural is defined using Rural-Urban Commuting Area (RUCA) codes. During the rollout and implementation of OAAPS we heard from some states that the way RUCA defines rural in their states was challenging. Since states are required to use OAAPS for reporting and report

expenditures in OAAPS, which defines rural using RUCA, states have identified an incongruence between the provision in Section 1321.9(c)(2)(viii)(A) that allows states to define rural areas, when they have to report in OAAPS using RUCA. **States would benefit from technical assistance from ACL on this matter specifically as well as broadly on rural issues impacting OAA programs. Additionally, we are concerned whether some states will be able to meet the requirement in Section 1321.9(c)(2)(viii)(c) to project the cost of providing such services, as the state does not themselves directly provide these services, and there are local considerations that can differ from AAA to AAA.**

**ACL Request for Comment: State’s oversight responsibility over AAA contracting. ACL also would like best practice examples.**

We appreciate ACL’s efforts to propose new language and structure for contracts and commercial relationships under §1321.9(c)(2)(xiv) of the NPRM. Advancing States members are supportive of helping AAAs expand their capacity to serve older adults and engage with new payers. The state’s oversight and support of this effort has been an area of focus for our members and one in which we provided comments on in our OAA regulations RFI response.<sup>1</sup>

The March 25, 2020, amendments to the OAA loosened the restrictions on AAA use of Title III funding to pursue and secure contracts with health care entities while also including Sec. 212 (b) (1) “agreements may not be made without prior approval of the state agency.” However, the scope was limited to oversight on contracts with “profitmaking organizations.” The NPRM outlines that states shall review (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 which significantly broadens the SUAs required oversight.

***Unfunded mandate.*** States feel strongly the regulations pertaining to contracts and commercial relationships at §1321.9(c)(2)(xiv) are an unfunded mandate. While there are some states that already review and monitor contracts that AAAs enter, without additional sustained funding to implement this oversight requirement, many states will struggle to come into compliance. This will be particularly difficult for smaller state agencies with fewer staff to help shoulder the burden of reviewing additional contracts. States will need funding for additional staff, data collection software, and new or enhanced IT systems to adequately comply with the regulation.

***Clear definitions.*** To implement the regulation effectively, states would benefit from a clear definition for both “profitmaking organization” and “commercial relationship”.

***Uncertainty about scope.*** Advancing States is seeking clarification on the scope of the required oversight.

- How are AAAs that create separate non-profits or LLCs affected by the oversight requirements? Would the state be obligated to review the contracts of the newly formed non-profits or only the original AAA?

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<sup>1</sup><http://www.advancingstates.org/sites/nasuad/files/u33914/Advancing%20States%20Letter%20on%20OAA%20Regulations%20with%20Appendix%206.6.2022.pdf>



- As more AAAs are entering into partnerships with other providers in the Community Care Hub (CCH) model, what does ACL envision as the oversight expectation for states?
- Is it the expectation that states only would have to review the contracts of the AAA if they are the lead entity for the CCH or would they need to review the contract if the AAA is a participating member of a CCH?
- States also would like clarification on whether the §1321.9(c)(2)(xiv) language would include contracts AAAs enter with other federal government agencies, such as the U.S. Department of Housing and Urban Development and the U.S. Department of Veterans Affairs.

**Clarification on approval process.** ADvancing States seeks clarification from ACL on how comprehensive the process for contract approval needs to be. SUAs have shared there are many layers, or types, of approvals needed when reviewing contracts between AAAs and the state, including program, policy, fiscal, legal, and executive approvals. In many states, the fiscal and legal reviews of contracts are conducted in separate state agencies which can slow the review process down. ADvancing States is also seeking clarification on whether or not contract amendments must also be reviewed. ADvancing States would also like clarification on what steps ACL would like the state to take if the state disagrees with a contract or a commercial relationship.

**State risk and liability.** ADvancing States members remain concerned about the lack of clarity around the state's liability and are seeking answers to the following questions: If a state reviews and approves a contract and contract provisions or performance are subsequently deficient, will the state be liable for any damages? Because the SUA reviewed and approved a contract, will the SUA become a party to the contract? If the SUA identifies issues within the contract, what is the remedy? Is the SUA financially responsible if the AAA does not have enough reserves to cover expenses as a result of their outside contracts?

**Mitigating the inherent friction oversight will cause AAAs.** To help mitigate the friction that additional oversight will cause AAAs, ADvancing States is asking ACL to consider developing a set of guiding principles, or a compliance tool such as a checklist, to assist states in their contract review process.

**Open records requirements.** States are seeking clarification on how open record laws would apply to contracts between AAAs and health care entities that often times have non-disclosure agreements. How would the open record statutes apply to the states in those instances since they are not a party to the non-disclosure agreement?

**Timeframe considerations.** States anticipate coming into compliance with these regulations may take a significant amount of time. States have shared a myriad of activities required to comply with the regulation, including recruiting and hiring qualified staff, training staff and the AAAs, developing processes, consulting with legal counsel on the development of a process, factoring in reasonable turnaround time, and considering appeals or grievances of any potential denials. States also emphasize the sheer amount of contracts AAAs enter into, such as for subcontracting under the OAA for service delivery, for other miscellaneous services provided to the AAA (e.g., website development), or for tangible supplies and equipment (e.g., vehicles, computers). States anticipate cataloguing all of those contracts (whether approved or not) will take staffing and resources. States may have to approach their state legislature for approval before moving forward with establishing new processes and policies for review and approval of contracts. Some states, especially those with smaller state aging agencies, will

need to obligate additional funds to operationalize review and approval of contracts and will likely need legislative authority.

**Technical assistance.** Advancing States requests that ACL provide technical assistance to states while they are implementing the new regulations. Providing an opportunity for states to seek clarification and ask questions will assist states with implementing the regulations as they were intended. Technical assistance would also provide a platform for ACL and states to share best practices.

**Compliance.** Advancing States members had a variety of questions relating to compliance with this new oversight responsibility including: How will states be considered “in compliance” with the new requirements for oversight over contracts? What data will states be expected to collect to be in compliance with this new requirement? How often will the data be expected to be collected? What are the consequences to SUAs that are found to be out of compliance with this new requirement? Will states be responsible for ongoing performance management for each contract reviewed? Is there any continual oversight from the state expected from ACL? Is there any financial liability to states for being out of compliance?

**ACL Request for Comment: Comment on how states review AAA contracts with private entities.**

Advancing States asked SUAs about current practices regarding AAA contract review for private entities. Many states responded they do not currently review AAA contracts with private entities, or they minimally review AAA contracts and only in certain circumstances (i.e., if the contract uses state or federal funding or creates a conflict with the agreements in place between the SUA or AAA). Some states have been waiting for additional ACL guidance before implementing new contract approval processes. A few examples of how states review AAA contracts are listed below.

- Collecting background and other information on contracts and doing an informal review. This information includes who is involved in the contract, why the AAA wants to enter into a contract with the entity, and the duration of the contract.
- Pulling a random selection of contracts as part of an annual monitoring.
- AAAs send draft contract language to the SUA program manager for review and comment.
- Contract review by state’s legal advisors.
- Requiring prior approval for AAA contracts with for-profit entities. The state reviews the for-profit entity’s ability to provide services in compliance with the OAA and consistent with the goal of the AAA as stated in the area plan. The state also checks to see if the for-profit entity is the best possible provider for that service, as opposed to a non-profit.

As the Administration works to develop an OAA Final Rule, **we encourage ACL to develop regulatory text that sets an appropriate federal regulatory floor for SUAs to meet but that remains flexible enough for SUAs with capacity or need to establish processes or standards that meet their state-specific priorities.**

**ACL Request for Comment: Comments on the use of OAA funds in buildings, alterations, or renovations, maintenance and equipment.**

In §1321.9(c)(2)(xv) of the NPRM ACL proposes new language relating to buildings, alterations, or renovations, maintenance, and equipment. In the past, Advancing States has heard from states

regarding challenges faced by aging network entities to provide funding for infrastructure investments. We encourage ACL to pursue maximum flexibility in this section to allow states to, if desired, make much-needed infrastructure investments. We are also concerned whether SUAs have the necessary information to ensure that funding used to maintain or renovate buildings is proportionate, as many buildings have multiple funding streams and also change periodically.

### § 1321.13 Designation of and designation changes to planning and service areas

Technical correction: We believe that the reference to § 1321.15(d) found in § 1321.13(e) should instead reference 1321.13(d).

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

Throughout our extensive engagement and information collection efforts with states regarding this NPRM, many have raised questions and concerns regarding whether states would be required to amend already-approved State Plans on Aging to come into compliance with the Final Rule. **We encourage ACL to only require states to update their State Plans upon renewal and after the effective date for the Final Rule.**

### § 1321.27 Content of State plan

**ACL Request for Comment: Comment on how the state plan and the area agency on aging plan should work cohesively.**

In § 1321.27(c) ACL requires State Plans on Aging to provide evidence that they are informed by, and based on, area plans. This language mirrors similar provisions found in the Act. While we understand this piece of the NPRM stems from the statute – as does a similar provision for area plans that they be coordinated with and reflect State Plan goals – in practice this has been difficult for some states to implement cohesively. For example, in many instances the state and area plan have different timelines that do not align with approaching this in the way proposed or reflected in the law. State agencies also appropriately take a statewide lens and approach to developing their State Plans, which would not be the case for area plans with a narrower focus. We believe that the correct approach would be for State Plans to be informed by area plans, not based on area plans – to help ensure equitable programming and allow for the state to set overarching goals and areas of focus. **We appreciate the inclusion of “informed by” in addition to “based on” in the NPRM language and encourage ACL to flexibly apply these provisions, allowing states and AAAs to develop processes that work best for their own unique circumstances.**

We also suggest the addition of clarifying language similar to the following in **bolded** text: “(c) Evidence that the State plan is informed by and based on area plans, **with the exception of single planning and service area states as defined by § 1321.51.**”

§ 1321.27(d) delineates requirements for the content of State Plans on Aging, including which populations must be included under greatest social and economic need. There is also similar language for area plans in section 1321.65. We are concerned, however, that the populations listed under 1321.27(d) and 1321.65 do not fully align with those included in the definition for greatest social need at 1321.3. As proposed, this inconsistency exacerbates existing challenges for state agencies to operationalize greatest social economic need for their targeting activities and, ultimately, the

development of the intrastate funding formula (IFF) that has downstream impacts for AAAs and providers as well. **We recommend ACL ensure that these provisions align to avoid confusion upon implementation.**

**If ACL cannot demonstrate that sufficient data sources exist for all populations identified in the definition of GSN, we believe the proposed populations included in 1321.3 and 1221.27(d) must be reevaluated. Additionally, we recommend that the language included in the definition of greatest social need – specifically, “Other needs as further defined by State and area plans based on local and individual factors” – be mirrored in section 1321.27(d).**

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

**ACL Request for Comment: ACL seeks input on extending the length of required time for a state plan on aging to be submitted from 45 days to 120 days in advance.**

In § 1321.33 ACL proposes to require state agencies on aging to submit a draft of their State Plan on Aging to their Regional Office at least 120 calendar days before the proposed effective date, up from the 45-day requirement in the current regulation. Advancing States appreciates the time and dedicated efforts ACL regional staff commit to providing technical assistance and reviewing State Plans and state plan amendments. While we are understanding of ACL’s challenges in reviewing State Plans in a timely manner, the policy proposed would accommodate ACL’s workforce challenges but would not necessarily reflect the shortages and capacity limitations that state agencies and other organizations across the network face. Furthermore, it would limit the state’s ability to include robust stakeholder input and feedback. Therefore, we do not believe that this policy change should only account for ACL’s workforce needs but also the networks. **State agencies were generally willing to consider an increase from the current 45-day requirement to 60 calendar days as workable. States are also seeking the inclusion of an additional provision that would require ACL to respond to state submissions within 30 calendar days in order to allow states the adequate time they need to make any changes required by ACL.**

### § 1321.47 Conflicts of interest policies and procedures for State agencies and § 1321.67 Conflicts of interest policies and procedures for area agencies

Both of these sections reinforce the importance of preventing and mitigation conflicts of interest (COI) throughout the aging network. We are concerned, however, that the NPRM asks if there is a COI when a state or AAA operates multiple programs, such as OAA Title III and APS. **We strongly push back on the assertion that a state aging agency operating both OAA programs and APS, for example, is a COI in the first place—and do not believe states should have to undergo the remediation process for organizational COIs in such circumstances.** State agencies operating multiple programs – for instance, serving as a Medicaid operating agency, overseeing APS, and serving as the SUA – does not represent a COI but in fact strengthens the ability of the agency to improve the lives of older adults and influence statewide policy.

### § 1321.49 Intrastate funding formula

We appreciate ACL’s efforts to update and clarify section 1321.49 that addresses the intrastate funding formula (IFF). The IFF represents one of the hallmarks of the OAA – state flexibility in tailoring OAA funding and programming to their specific communities. Section 1321.49 references section 1321.27(d), which includes populations that must be included in the State Plan on Aging under greatest social and economic need. Echoing earlier comments, we encourage ACL to reevaluate the language found in 1321.27(d) and the proposed definition of greatest social need to ensure consistency.

### § 1321.53 State agency Title III and Title VI coordination responsibilities

State aging agencies were generally supportive of provisions in the NPRM, including 1321.53, regarding coordination between Title III and Title VI programs. Some states expressed a need for technical assistance and coordination support from ACL to play a facilitation role when needed to bring all parties to the table successfully. Additionally, one state noted how section 1321.27(g) would require AAAs to coordinate programs and services, where applicable, with those provided to tribes under Title VI. Since Title VI funds are allocated directly to grantees and SUAs do not collect data on or monitor Title VI grantees, **additional detail on the SUA’s roles and responsibilities to ensure proper outreach and coordination would be instructive for states.**

### Subpart C – Area Agency Responsibilities

#### § 1321.55 Mission of the area agency

§ 1321.55(10) states that AAAs need to: “(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.” Some states were concerned by the implications of this provision for different types of AAAs. For example, county or other local government AAAs may have little influence over the makeup of their boards or, alternatively, the board may be comprised of local elected leaders like a county board of supervisors. **We encourage ACL to consider the diverse makeup of AAAs to ensure these provisions are able to be implemented in the field.** Specifically, we offer the following alternative language for 1321.55(10) for consideration:

Engage with ~~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.

The OAA statute prohibits means testing. The OAA also requires that OAA funds must be targeted to specific groups – such as low-income minority older adults – as well as those broadly of greatest economic need. Throughout the OAA and thus the NPRM there is implicit tension between these two competing directives. For example, in section 1321.61(c), AAAs are directed to provide “...particular attention to low-income minority individuals.” In section 1321.55, which establishes the mission of AAAs, it specifies in (3) that “...options are readily accessible to all older persons and family caregivers, no matter what their income...” Reconciling some of these issues may help provide states and AAAs with clarity for their operations.

### § 1321.57 Organization and staffing of the area agency

We understand that ACL’s intent in slightly changing the wording under 1321.57(a)(2) is to enable AAAs to reflect modern AAA organizational structures. Specifically, ACL proposes the following change:

“(2) A separate organizational unit within a multi-purpose agency which functions ~~only for purposes of serving~~ as the area agency on aging.”

States want to ensure that the proposed language change does not restrict SUAs approval authority for any changes to AAA designations and the successful completion of steps outlined in §1321.19 through 1321.23. **We request ACL clarify that the proposed change to 1321.57(a) is not intended to remove appropriate oversight of AAAs by SUAs and ACL.**

### § 1321.61 Advocacy responsibilities of the area agency

States recognize the critical advocacy role that AAAs have for older adults and their caregivers in their service areas. As ACL continues to encourage development of AAA contracting with payers outside of the OAA, we urge ACL to develop structures that support AAAs maintaining their role in objective advocacy on behalf of older Americans.

## Subpart D – Service Requirements

### § 1321.73 Policies and procedures

ADvancing States has a long history of supporting efforts to improve quality and outcome measurement for LTSS programs, including the OAA. Specifically, we operate the National Core Indicators – Aging and Disabilities (NCI-AD) initiative that is a voluntary effort by 23 state aging, Medicaid, and disability agencies to measure and track their own performance.

§ 1321.73(c) includes the following language:

“(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.”

While we are supportive of improving the measurement and quality of OAA services, in this instance we are concerned by how the word "independent" may be interpreted here. One inference that could be drawn is that there is an expectation that states bring in an outside resource to conduct quality monitoring. Many states have robust monitoring and quality measurement processes currently in place. **Additionally, given the small overall amount of funding each state receives under the OAA, we want to prevent states from being forced to spend limited dollars on, for example, contracts with outside entities for quality monitoring when they already have effective processes in place.**

This provision, though well intentioned, may represent an unfunded mandate on states and AAAs. It raises questions such as: Does ACL intend on proposing and standardizing measures that states and AAAs should be measuring against? Will this data be reported anywhere above the state, or will it be maintained at the state/local level?

We recommend ACL consider using the Research, Demonstration, and Evaluation (RDE) Center for the Aging Network to support states in developing the evidence base for OAA programs and services. While the FY2023 appropriations bill provided \$5 million for the RDE Center, it also limited the scope of the center specifically on falls prevention. We have advocated through our proposals for FY2024 appropriations for Congress to allocate additional funding to the RDE Center and ensure future funding is not limited only to falls.<sup>2</sup>

### § 1321.75 Confidentiality and disclosure of information

#### **ACL Request for Comment: Whether ACL sufficiently set forth exceptions to OAA confidentiality requirements.**

We appreciate ACL's efforts to clarify OAA confidentiality standards. Our members strongly support the protection and confidentiality of older Americans receiving OAA services. Some states have requested clarification on section 1321.75(e) that describes how state policy and procedures must explain exceptions to OAA confidentiality requirements and allow for client data to be shared with other state and local entities, community-based organizations, and health care providers and payers. States want to confirm that SUAs retain the authority to place limitations on the sharing of information as well as records created for older adults and caregivers in the delivery of OAA services. **SUAs must be empowered, when necessary and appropriate, to place restrictions on information sharing that may conflict with state or other laws or expose OAA programs to unnecessary liability.**

### § 1321.81 Client eligibility for participation and § 1321.83 Client and service priority

Our members were generally supportive of section 1321.81 and section 1321.83 provisions. We especially appreciate the flexibility for states to further define their own eligibility requirements under 1321.81(b). We also request clarity from ACL on how section 1321.83(c) and 1321.91(c), regarding prioritization for Title III-E services, align.

### § 1321.85 Supportive services

Advancing States recommends that this section be slightly amended by striking in (a), “which may include multipurpose senior centers” after “access services.” A senior center in itself is not a service and is not listed as such in the statute.

### § 1321.87 Nutrition services

Many states greatly appreciated the new flexibility in § 1321.87(a)(1)(i) that allows states and/or AAAs to use up to 20 percent of OAA Title III C1 (congregate nutrition) for the provision of “shelf-stable, pick-up, carryout, drive-through, or similar meals” –commonly referred to as grab & go meals. Grab & go meals were technically allowed before the COVID-19 pandemic but were somewhat discouraged. The popularity of this method of delivery for nutrition services grew exponentially during the pandemic. Throughout our numerous discussions and engagement with states regarding unwinding from the pandemic, grab & go meals— and their ongoing provision — have come up nearly every occasion. In addition to representing a common priority for many states, state agencies are also reflecting on feedback from their own AAA and provider networks on this issue.

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<sup>2</sup><http://www.advancingstates.org/sites/nasquad/files/u34188/Advancing%20States%20Letter%20on%20FY2024%20Appropriations%202.7.2023.pdf>

While we appreciate ACL's proposal for how to address grab & go meals in the NPRM, based on feedback from the states we have the following recommendations.

- **Remove the 20 percent limitation and allow a limit to be set on a state-by-state basis.** This change would allow maximum state flexibility to meet the specific demands of their aging networks and, most importantly, the person-centered needs of their consumers. This would also maintain the innate flexibility of this section that allows states to choose whether they would like to utilize C1 dollars to support grab & go meals or not.
- **Reduce the disproportionate burden placed on states and AAAs to exercise this flexibility in section 1321.87.** To use up to 20 percent of C1 dollars for grab & go meals, states would be required to demonstrate that meals are provided to "complement the congregate meal program" and:
  - "(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."

States and AAAs already have safeguards in place to allow for the provision of grab & go meals, including the flexibility found in § 1321.81(b)(1-9). As proposed, the requirements to use this new authority for C1 meals are onerous and may discourage uptake from states and AAAs.

- **Reduce administrative requirements for states and AAAs for the provision of grab & go meals using C1 dollars in sections 1321.27 and 1321.65.** Like section 1321.87, states and AAAs would be required to demonstrate compliance in the State Plan and area plans with a number of burdensome administrative requirements in order to use C1 for grab and go. We encourage ACL to reduce the number of requirements to only those that are necessary for ongoing program operations.

States were eager to learn whether the proposed 20 percent limit on the use of these dollars would apply before or after transfers between/within Title III programs, and we ask that ACL clarify this.

Technical correction: We believe in section 1321.87(a)(ii), the "(A) may need to be replaced by "(i)". We also suggest ACL review the wording of 1321.87(a)(1) for grammatical accuracy and consistency.

### § 1321.89 Evidence-based disease prevention and health promotion services

We appreciate ACL's inclusion of a definition for evidence-based disease prevention and health promotion services in § 1321.89. While states are supportive of evidence-based programs (EBPs) under Title III-D, some have encountered challenges in providing these services due to the at times cost-prohibitive licensing fees and also establishing economies of scale. These concerns are especially acute in some rural and frontier areas. **We recommend ACL explore opportunities for better supporting the provision of EBPs or evidence-informed programs in rural/frontier areas given the small federal appropriation for III-D.**



### § 1321.91 Family caregiver support services

In § 1321.91, ACL proposes to add regulatory text for family caregiver support services per Title III-E and Title VI-C of the 2000 reauthorization. As Title III-E and Title VI-C of the Act have lacked accompanying regulations since their addition nearly a quarter century ago, ADvancing States members welcome the proposed rule. Association members consistently report on the severity of the intersecting crises of direct care workforce shortages and caregiver burnout. ADvancing States is encouraged by ACL’s recent work in these areas, especially the development of the National Strategy, and in flexibilities and funding related to the COVID-19 public health emergency. ADvancing States will continue to advocate for policies that alleviate the national caregiving crisis.

ADvancing States members generally support the delegation to states and AAAs of defining “limited basis” for supplemental caregiver support services in § 1321.91(a)(5), and appreciate the flexibility offered within this section. Some states, however, encourage ACL to consider some revisions to the language of this section. A few states suggest ACL develop a consistent definition of the term “limited basis.” **ADvancing States encourages ACL to consider sub-regulatory guidance to provide examples of how states may approach this definition.**

In § 1321.91(b), ACL proposes requiring all five caregiver support services authorized under Title III-E and defined in §1321.91(a) be made available statewide. While a majority of ADvancing States members support the proposed language of this section, some states voiced concerns over the challenges of meeting such a requirement, including:

- Significant direct care worker shortages across regions.
- Particularly acute shortages in respite care workers.
- Difficulty of procuring providers in rural areas.
- AAAs with lower funding levels are at a disadvantage to provide all five services.
- Lack of clarity on how this section aligns with § 1321.83(c) – Client and Service Priority, which appears to give first priority to older caregivers of children with severe disabilities.

**ADvancing States encourages ACL to consider how workforce shortages intersect with regional economic realities in implementing these provisions.** Additionally, we ask ACL to provide clarification on client and service priority per § 1321.91(a) and § 1321.83(c).

### § 1321.93 Legal assistance

We appreciate ACL’s efforts and intent in inclusion of additional areas of definition, scope and discussion for legal assistance. We also applaud ACL’s focus on the rights and independence of older Americans, which is a shared priority of our members. We recognize direct client representation provides a higher level of client support than drafting wills and other documents. However, most states read the proposed language as overly prescriptive and administratively burdensome, without proper funding, and unlikely to be fulfilled given the realities of contracts and potential staffing available. Several states noted the difficulty already faced in contracting legal assistance providers in many parts of the state due to the availability of eligible entities who would be willing to accept low reimbursement rates. There is concern

that expansion of required substantive areas of representation, coupled with legal representation in judicial and appellate proceedings, will create requirements that states are unable to fulfill.

There is concern that while the NPRM focuses on several substantive areas, states may have different needs expressed by potential clients in different areas of the state. A state questioned whether it would be able to support a client in housing or eviction defense, noting the potential unintended consequence that these important issues would go unaddressed in order to meet other requirements. A state noted that, “the needs of our clients vary widely across the state. Each AAA should be able to contract with providers who have expertise in the areas of greatest need to the clients they serve.” Other states, in similar vein, shared their experience with challenges of hiring, noting there is already a shortage of skilled attorneys in rural or frontier areas. The NPRM as written may not allow law students or pro bono attorneys to take on cases, which many areas already rely on.

**ADvancing States recommends that states have flexibility in determining the requirements for contracting, and to allow for differentiation in knowledge, skills, and experience of contracted entities given the varied needs for representation across service areas.**

**ACL Request for Comment: Comment on guardianship program and how it should work with the OAA programs.**

Several states were supportive of the intent of these proposed requirements, noting the importance, value, and hope to continue current efforts in the areas of advance planning and partnerships with APS. Other states noted regulations were overreaching, and as written have the potential to disallow discretion for individualized, or person-centered, approaches. Some states cautioned against a policy that completely separates legal assistance from state guardianship programs. Guardianship programs are state-driven and the language in the final rule should allow for unique state characteristics in program design and other state-specific factors within broad federal parameters.

A handful of states asked for plain language to be used, especially throughout this section of the rule, and requested a clear definition of “defense of guardianship.”

Yet, some states noted support of the proposed rule as written, and others noted that current state law and operational practice (for example, providing defense of guardianship outside of this funding source) would make this requirement duplicative.

**ADvancing States proposes to allow states flexibility in determining the scope to which OAA programs provide defense of guardianship and allow states to be adaptable in shaping guardianship programs given the needs of the clients, and potential clients, of the service area. Also, we do not agree that a state or AAA’s role in providing OAA legal assistance presents an irremediable COI with playing a role in the state or local guardianship system, assuming the proper firewalls and COI policies are in place.**

**ACL Request for Comment: Comment on whether the proposed regulatory language is consistent with ACL’s goal of promoting self-determination and the rights of older people, legal assistance programs.**

Most states reported that § 1321.93 is overly burdensome as proposed, and they would not be able to contract with a legal assistance provider. Several states noted that while in agreement with intent of the proposed rule, current funding realities and availability of legal assistance providers would prohibit acting in compliance with the proposed rule as written. A state noted the difficulty in contracting with

competent legal assistance providers under the current rule requirements, much less expanded to provide the full scope as written. **ADvancing States recommends additional flexibility be provided to states to determine what the greatest areas of need are for potential clients, and to contract accordingly with LAPs who have expertise in areas of greatest need.**

Given current language in the Legal Services Corporation (LSC) Act (see [42 U.S.C. 2996g\(e\)](#)), and the priority areas outlined for Legal Assistance, **ADvancing States and member states ask for additional clarification and guidance be provided to reconcile prohibitions on representation and those of greatest need, as these limitations may thwart OAA intent and lead to unintended consequences.**

Further, many states voiced support for ACL’s goal of promoting self-determination and the rights of older people. Yet, the proposed rule does not define or provide guidance or definition on self-determination, or how to measure. **We request ACL provide additional clarification and guidance in this area.**

## Subpart E – Emergency & Disaster Requirements

**ACL Request for Comment: Comments on emergency disaster provisions and state flexibilities.**

### § 1321.101 Flexibilities under a major disaster declaration

In § 1321.101, ACL describes proposed Major Disaster Declaration (MDD) flexibilities pursuant to Title III of the Act. The proposed language clarifies sub-regulatory guidance granting SUAs flexibility to prioritize services, determine policies, and delegate responsibilities to AAAs who may, in turn, delegate responsibilities to local service providers. ADvancing States members are generally supportive of flexibilities proposed under section § 1321.101(a)-(d), which allow states to expedite expenditure of Title III funds during an MDD period.

§ 1321.101(e) requires SUAs to obligate funds for disaster relief services within 90 days from the expiration of an MDD period. Most states have expressed this timeframe is likely not feasible. Based on state experiences with unwinding from the COVID-19 emergency, **ADvancing States recommends ACL extend the allowable timeframe to 180 days from the expiration of an MDD period, but otherwise preserve the language of § 1321.101(e) as proposed.**

§ 1321.101(f) requires SUAs to submit a State Plan amendment per § 1321.31(b) and include “specific entities receiving such funds; the amount, source, and intended use for such funds; and other such justification of the use of such funds.” Many states have concerns with the language of § 1321.101(f) as proposed. Some states request clarification as to the submission timeframe of a State Plan amendment during an MDD per § 1321.31(b). ADvancing States members urge ACL to consider that, due to the evolving challenges and the changing needs of service recipients inherent in emergencies, states are often unlikely to be able to provide specific detail at the outset of an MDD. Additionally, states have expressed concern that this section implies a State Plan amendment is required each time a change in the amount, source, intended use, or any other justification of the use of funds is made, which could cause delay in service delivery during an MDD. **ADvancing States recommends ACL provide clarification on the content, submission timeframe, and submission frequency requirements of State plan amendments under an MDD.**

## **Part 1322 – Grants to Indian Tribes and Native Hawaiian Grantees for Supportive, Nutrition, and Caregiver Services (Title VI)**

### **Subpart A – Introduction**

#### **§ 1322.1 Basis and purpose of this part**

Since OAA Title VI funds are allocated directly to grantees and states have no role in administering them, states comments on Title VI were limited. We are supportive of ACL’s streamlining of Parts 1322 and 1323 into one, combined 1322 section.

ADvancing States recommends that ACL consider changes to § 1322.1(a), specifically the statement “...American Indian elders on Indian reservations...” We encourage a reframing of this language to instead reference American Indians elders from a federally or state recognized tribe, as not all tribal elders reside on a reservation.

### **Subpart B – Application**

#### **§ 1322.5 Application requirements**

ADvancing States recommends that in § 1322.5(d)(1) that tribal organizations be allowed to define what constitutes an older individual.

### **Subpart C – Service Requirements**

#### **§ 1322.27 Nutrition services**

ADvancing States seeks greater clarity regarding various provisions in 1322.27(a)3) and 1322.27(a)4) as to whether nutrition education and nutrition counseling is required, or an option based on assessed need by Tribal organizations or Hawaiian Native grantees.

## **Part 1324 – Allotments for Vulnerable Elder Rights Protection Activities (Title VII)**

### **Subpart A – State Long-Term Care Ombudsman program**

#### **§ 1324.13 Functions and responsibilities of the State Long-Term Care Ombudsman**

Section 1324.13(h)(1)(i) proposes to require memorandums of understanding between the ombudsman program and legal assistance providers. In states with only one or few legal assistance providers this represents a straightforward endeavor. In states with multiple or numerous legal service providers this will be a significant undertaking and likely time-consuming process for the state.

#### **§ 1324.15 State agency responsibilities related to the Ombudsman program**

Section 1324.15 proposes to add new language related to fiscal management and the ombudsman program. Specifically, in § 1324.15(k) (1), (2), and (3) ACL proposes:

- “(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...”

Our members are generally supportive of providing transparency on all funds the ombudsman program receives in section 1324.15(k)(1) as well as the ombudsman’s ability to approve allocations for local programs in section 1324.15(k)(3). States have the most questions and requests for clarification regarding 1324.15(k)(2), that reads as follows: “(2) The Ombudsman has **full authority** to determine the use of fiscal resources appropriated or otherwise available for the operation of the Office;” [emphasis added]. **A number of states reported the phrase “full authority” was overly broad and could prove challenging to implement.** Some specific state concerns included:

- A number of states requested clarification from ACL on guardrails for the proposed “full authority” language. For example, if a state fully contracts out for its LTCOP, can the contracted entity now rewrite the terms and conditions of its contract? Or if a state allocates state general fund dollars to the LTCOP with a specific purpose, can the ombudsman change how those funds are used for other priorities?
- State agencies request clarification on how the provisions in 1324.15(k) align with the state agency responsibilities for ensuring fiscal compliance and monitoring of the program. For example, § 1324.15(c) states that:

“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.”

The above section implies that the state agency retains some authority over Title III and VII funds related to the ombudsman program.

- ADvancing States suggests that 1324.15(k)(2) should be clarified to state that the ombudsman program has full authority over funds appropriated for Title VII, Subpart A—State Long-Term Care Ombudsman program, but that the state agency retains authority over other funding streams, such as any amounts of Title III-B historically used by AAAs to support the LTCOP within maintenance of effort requirements.
- In some states, Title VII ombudsman funding is the only money that is directly appropriated to the LTCOP and at the local level AAAs determine what other funding will be used for the LTCOP.

### § 1324.21 Conflicts of interest

Our members support the amelioration or elimination of conflicts of interest regarding OAA services. Since the ombudsman program is the only OAA program that has received rulemaking since 1988, coming into compliance with an OAA Final Rule will likely be supported by this fact. Section 1324.21(a) addresses organizational conflicts of interest. Many states reorganized or created new firewalls for their ombudsman programs following the issuance of the Ombudsman Final Rule in 2015-16 and the COI provisions contained therein. The current list of organizational COIs is extensive and now includes many different activities related to the Medicaid program, including:

- Providing LTSS under any Medicaid waiver or State Plan authority,
- Providing case management services,
- Responsibility for eligibility determinations for Medicaid or other public benefits.

While some states will likely have to reevaluate the placement of their state long-term care ombudsman program, and others may have to report COIs and establish firewalls to ameliorate them, we are more concerned for the impacts these COI may have on AAAs—many of whom serve as providers or provide case management under the Medicaid program. Again, while our members support the mitigation of COI from OAA programs, we question why some of the organizational COIs are included in the list in the first place. We also welcome national dialogue over whether further separating the ombudsman program out from other programs in the LTSS system enhances the efficacy and impact of this important program.

## Subpart C – State Legal Assistance Development Program

### § 1324.303 Legal Assistance Developer

ACL’s efforts in establishing a new regulatory framework for the Legal Assistance Developer (LAD) under Title VII are appreciated by states and underscore the value of this work. Yet, several states felt the newly drafted proposed requirements may be unduly burdensome in scope, given limitations in staffing availability at the state level. As written, the proposed rule would require several states to change their operations and staffing because of limitations on shared positions as required in the proposed rules. **We recommend ACL reconsider its proposals that would stringently prohibit “dual hatting” the LAD position with other state-designated responsibilities to allow states to structure this position based on their states capacity and needs.**

States are concerned about § 1324.303(c) that stipulates: “(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.” While ADvancing States agrees that state agencies largely support the intent of the proposed LAD regulations, we are concerned that, given the limited funding available under Title VII, the support described for the very expansive roles and responsibility of the LAD articulated in § 1324.303(a) may become cost-prohibitive for some states. **We recommend ACL provide areas and activities of focus, while allowing states flexibility in determining the required activities of LADs, and to allow for differentiation given the highest needs across state service areas.**

ACL has provided substantial efforts in mitigating risks of real or perceived COI for LADs. States overall felt that COI designations are important but may be overly burdensome as drafted. States also raised

the following questions regarding COI provisions for LADs, which may necessitate additional guidance from ACL on the intent of the COI limitations as drafted, and clarify the following areas:

- Is it a COI if a LAD participates in a state guardianship association? There may be great value in this participation for the LAD but also for the association (such as a bar association, WINGS, or other professional associations).
- Would it be a COI if the LAD is a guardian for a family member or in a personal matter? If so, we would ask ACL to reconsider this requirement as overreaching.
- In a similar vein, one state notes that a caveat “for compensation” should be considered under § 1324.303(d)(3)(vi).

## Costs to State Agencies

### ACL Request for Comment: Comments on analysis of costs to state agencies.

We appreciate ACL’s attempts to quantify the projected costs of state agencies to implement the proposed rule on page 39606 of the NPRM. State agencies generally reported that **ACL’s projections for state costs to implement the rule were below or significantly below what the states themselves projected.** Given the breadth and depth of the NPRM, and the fact that all provisions remain proposed and not final, it was challenging for states to come up with exact figures for their projected costs to implement. That said, the following comments and themes emerged:

- Most states reported the NPRM provisions would necessitate hiring of additional state staff, which entails both salary and benefits costs far and above ACL’s projections for many states.
- Some states noted ACL’s estimates do not account adequately for time and manpower changes the NPRM will entail. For example, due to the substantial time it takes for new policies and procedures to be written and approved, contracts and subcontracts will need to be revised. Some states also noted how time intensive reviewing contracts for AAAs and providers would likely be for state staff. Training for state staff, AAAs, and providers would also be extensive and require significant efforts.
- Other states also reported potential changes to IT platforms and software that can be both time consuming and expensive.
- Some states told us they will most likely need to seek outside contractor support to assist with coming into compliance with the proposed rule.

**We encourage ACL to consider these comments as it reflects on a proposed effective date for the Final Rule as well as seeking additional sources of federal funding to support states to implement it.**

## Final Thoughts

Advancing States reiterates our support and appreciation for ACL on the much-needed updating of the OAA’s regulatory framework. A modern and relevant set of federal rules will ultimately support better OAA programming and services administered by states and AAAs and delivered by providers.

Given that the preponderance of effort related to coming into compliance with the Final Rule will fall on state agencies, we hope ACL will take into special consideration our recommendation to extend the final effective date. Additionally, **we recommend ACL fund a technical assistance center to support state agencies implementing the Final Rule.** ACL funds resource centers for a host of different entities and issues but does not support one specifically for state aging agencies. ACL has also significantly altered the regional staff technical assistance role. With the forthcoming OAA Final Rule, we believe now is the time to remedy this omission in ACL's resource center funding infrastructure.

We appreciate the opportunity to provide comments on this proposed rule. We look forward to continued partnership with ACL and state and territorial agencies as we work to modernize and enhance the Older Americans Act. If you have any questions regarding this letter, please feel free to contact Adam Mosey at [amosey@advancingstates.org](mailto:amosey@advancingstates.org) or Conor Callahan at [ccallahan@advancingstates.org](mailto:ccallahan@advancingstates.org) or Rachel Neely at [rneely@advancingstates.org](mailto:rneely@advancingstates.org)

Sincerely,



Martha Roherty  
Executive Director  
ADvancing States